

Restoring the Conservation Purpose in Conservation Easements: Ensuring Effective and Equitable Land Protection Through Internal Revenue Code Section 170(h)¹

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Conservation easements are legal restrictions limiting development and are intended to preserve natural lands, historical areas, and open space. And for more than 50 years, Congress has permitted taxpayers to claim an income tax deduction when they make a charitable donation of an easement. These easements are now the primary form of environmental preservation in the United States.

But the current Internal Revenue Code provision authorizing this deduction invites donations with questionable preservation value to the public and high-profile instances of abuse. It also disproportionately favors the wealthy. Notably, most donations are not required to provide public benefit. Reform proposals and law journal articles discuss the challenges of valuing easements, but there is little discussion of how to ensure the deduction properly incentivizes quality conservation work.

This article fills that void. It examines the current law and discusses how Congress can ensure the deduction is available only to easement donations which further cohesive environmental protection goals. It proposes requiring all easement donations to provide a public benefit and to be in accordance with conservation and strategic goals developed by local governments and non-governmental organizations. It also proposes

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1. This title is inspired by articles written by Jess R. Phelps. See Jess R. Phelps, *Defining the Role of Conservation in Agricultural Conservation Easements*, 44 *ECOLOGY L.Q.* 627, 627 (2017); see also Jess R. Phelps, *Defining the Role of Agriculture in Agricultural Conservation Easements*, 45 *ECOLOGY L.Q.* 646, 647 (2019).

specific policy reforms, drawn from other sections of the Code, to achieve this goal.

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I. INTRODUCTION

Amy lives in southern Maine in between Portland and the greater Boston metropolitan area, an expanding region with much urban sprawl. She is the owner of a large farm, which contains forest, grasslands, and a stream. She inherited the property from her recently deceased parents, who were the third generation in her family to farm the land. She does not farm the land, however, and it has not been farmed in some time. Amy is torn between selling the land, as she has no productive use for it and knows she could make a lot of money from a developer, and protecting the natural landscape that is so close to her family. She hears from a local land trust about how placing a conservation easement on the property will protect the land from development and could also provide her with significant tax benefits. Amy wishes to place a conservation easement on the property. The tax benefits from donating the easement incentivize her to protect the land—providing a benefit to her and her community.

But nearby, a group of real estate attorneys and their investment bank friends have formed a limited liability company and have decided to purchase a small piece of property in a flood plain—land that will never be developed due to its flood risk and which was previously clear-cut and contaminated by a local power company. They also decide to place their property under the protection of a conservation easement—influenced not by the intent of environmental protection, but solely by their ability to claim a large tax break.

Both Amy and the profiteers will likely be able to claim a deduction for their easements. But their intent diverges greatly. This disparity, and the general inability of the tax code to address this challenge, threatens to undermine the conservation easement deduction as a whole.

These issues of developers, fraud, and other abuses never came up when Section 170(h), the provision of the federal tax code authorizing conservation easements, was enacted. Instead, the drafters envisioned a system that would incent well-meaning property owners to protect their property for the greater good. They did not envision highly dubious deductions that clearly violated the spirit of the Code, let alone major abuse. Revision is now needed.

* * *

It is often said that land is America's most valuable resource. But America's natural landscapes face endless pressure from development,

resource extraction, and other irreversible development changes.² Fortunately, Congress believes the protection of natural areas provides a significant public benefit and stimulates preservation through federal tax policy.³ The Senate Finance Committee first acknowledged the critical role of conservation easements in 1980.⁴ Recognizing this, Congress amended the Internal Revenue Code to allow a tax deduction for the charitable contribution of conservation easements: legal agreements restricting the development of property for the permanent preservation of land for habitat protection, open space and historic preservation, and public recreation.⁵

Conservation easements are a uniquely American form of property ownership⁶ and a relatively recent innovation—they did not become popular until just 40 years ago.⁷ And like many other American innovations, their use raises questions that it may benefit the wealthy at the expense of its overall policy goals. This article first describes a background on conservation easements and their unique role in environmentalism and both property and tax law.

The deduction, once estimated to cost the federal government less than \$10 million a year, now costs billions of dollars annually.⁸ The deduction is one of the largest environmental and land management programs in the federal budget.⁹ Its estimated cost in foregone revenue in

2. Clyn Smith, III, Comment, *Easements to Preserve Open Space Land*, 1 ECOLOGY L.Q. 728, 748 (1971).

3. OFFICE OF TAX ANALYSIS, U.S. DEP'T OF THE TREASURY, A REPORT TO THE CONGRESS ON THE USE OF TAX DEDUCTIONS FOR DONATIONS OF CONSERVATION EASEMENTS 4, 8 (1988) (on file with author); see also Bradford Updike & Bryan Mick, *Conservation Easements: The Federal Tax Rules and Special Considerations Applicable to Syndicated Transactions*, 49 CREIGHTON L. REV. 293, 295-96 (2016) (describing how "The United States Congress determined years ago that it was in the country's best interest to preserve land of ecological or historic importance in a manner that protects conservation values identified by Congress as being important.").

4. S. REP. NO. 96-1007, at 9 (1980).

5. I.R.C. § 170(h); 26 C.F.R. § 1.170A-14. This article calls this mechanism a conservation easement and acknowledges that there are various forms of conservation tools. This article will not focus on what are referred to as agricultural conservation easements, but it will draw on discussion of this closely related topic.

6. Jessica Owley, *Tribes as Conservation Easement Holders: Is a Partial Property Interest Better than None?*, in TRIBES, LAND, AND THE ENVIRONMENT 171, 173 (Sarah Krakoff & Ezra Rosser eds., 2012).

7. See *infra* note 74.

8. The deduction is properly viewed as an expenditure because it represents foregone revenue. Nancy A. McLaughlin, *Tax Incentives for Conservation Easement Donations*, in TAX LAW AND THE ENVIRONMENT: A MULTIDISCIPLINARY AND WORLDWIDE PERSPECTIVE 219, 219 (Roberta F. Mann & Tracey M. Roberts eds., 2018).

9. *Id.* at 223 ("Through just three Farm Bill programs, the U.S. Department of Agriculture

2016 was comparable with the entire budgets of the National Park Service, Fish and Wildlife Service, and Bureau of Land Management that year.¹⁰ The deduction is also the most favored form of charitable contribution in the Internal Revenue Code.¹¹ Conservation easement deductions now have the highest average dollar value of any class of charitable donations of property—ten and fifty times more valuable than the average donation of appreciated securities and artwork, respectively.¹²

The impact of conservation easements is enormous.¹³ Their use has also expanded at a nearly exponential clip. In 1980, only 128,000 acres of land across the United States were protected using conservation easement agreements.¹⁴ As discussed in Section II, their use increased slowly but steadily over the next two decades, before exploding in popularity at the turn of the century. From 2000 to 2006, the amount of acreage nearly doubled, from three to six million acres.¹⁵ And between 2010 and 2015, easements permanently protected nine million additional acres.¹⁶ Today, more than 27 million acres are protected under easements.¹⁷ Additional estimates suggest more than 40 million acres are protected.¹⁸

Revisions to the Internal Revenue Code are needed, however, to

spent over \$1.8 billion on conservation easement acquisitions between 2003 and 2007.”); Amy Wilson Morris & Adena R. Rissman, *Public Access to Information on Private Land Conservation: Tracking Conservation Easements*, 2009 WIS. L. REV. 1237, 1245 (2009).

10. McLaughlin, *supra* note 8, at 223.

11. STAFF OF JOINT COMM. ON TAXATION, 114TH CONG., TECHNICAL EXPLANATION OF THE PROTECTING AMERICANS FROM TAX HIKES ACT OF 2015 14-15 (Comm. Print 2015); *see also* Dominic Parker, *The Conservation Easement Conundrum*, PROP. & ENV'T RSCH. CTR. (Feb. 12, 2019), <https://www.perc.org/2019/02/12/the-conservation-easement-conundrum> (explaining how the deduction “dwarfs in value every other form of charitable giving on a per-donation basis, including art, real estate, and money.”).

12. Letter from Christopher S. Murphy, U.S. Sen., & Richard Blumenthal, U.S. Sen., to John Koskinen, Comm’r, Internal Revenue Serv. (Feb. 23, 2016), <https://partnershipforconservation.org/wp-content/uploads/2018/09/MurphyLettertoKoskinen.pdf>.

13. *See* Updike & Mick, *supra* note 3, at 293.

14. Kelly Kay, *Breaking the Bundle of Rights: Conservation Easements and the Legal Geographies of Individuating Nature*, 48 ENV’T & PLAN. A 504, 506 (2015).

15. LAND TRUST ALLIANCE, 2015 NATIONAL LAND TRUST CENSUS REPORT 6 (2016).

16. *Id.* at 3.

17. Based on 2017 figures, the most recent comprehensive figures available, provided by the National Conservation Easement Database (conservationeasement.us), accessed on April 28, 2021, a collaboration of Ducks Unlimited and The Trust for Public Land. Much thanks to Jessica Welch for her explanation of the data, and to her, Jess Skillman, Andrew DuMoulin, Mitch Hannon, and Rob McLeod for their tireless pursuit of tracking conservation easement data.

18. Richard Conniff, *Why Isn’t Publicly Funded Conservation on Public Land More Accountable?*, YALE ENVIRONMENT 360 (July 23, 2019), <https://e360.yale.edu/features/why-isnt-publicly-funded-conservation-on-private-land-more-accountable>.

prevent abuse and ensure the deduction results in effective and equitable conservation. The deduction, despite providing immense benefits to land preservation and the American environment, does not always result in quality land conservation. It is also a target for abuse and tax fraud. This article offers suggestions to ensure this important government policy results in substantial public and environmental benefit.

This article first provides an overview of current law, including a discussion of the development of the relevant Code provision and Treasury regulations. Next, it discusses challenges with the Code provision, which include a lack of clear public benefit given the amount spent on the deduction, as well as the abuse of the deduction. Both threaten to undermine the credibility of this important land conservation tool.

In response to these issues, this article suggests revisions to the Code's definition of a qualified "conservation purpose" to ensure the deduction results in effective and equitable conservation. The article then makes three recommendations to implement this change, drawing from other provisions in the Internal Revenue Code. First, it suggests implementing a registry of "conservation zones," similar to the recent Opportunity Zone program. Next, it suggests creating an oversight panel, similar to the Internal Revenue Service's Art Advisory Panel, to assess conservation purpose and public benefit for certain transactions. Finally, it recommends ways to increase public disclosure of easement deductions to increase accountability and transparency. Firmer rules and standards are necessary to ensure the deduction results in adequate public benefit and continues to serve as a driver of conservation.¹⁹

Congress should provide clearer guidance to the courts, landowners, and conservationists regarding what a proper "conservation purpose" is. As this article argues, it is unclear that the enormous amount of this tax expenditure results in adequate protection of ecologically sensitive areas. It is also clear that abuse and misuse of the deduction are rampant—and undermine the critical role of this land protection tool and the dedicated and honest conservationists who use it. Clear guidance from Congress and the Treasury will promote public confidence in conservation easements, ensure that limited federal tax dollars are spent on an effective program,

19. See Adam Looney, *Estimating the rising cost of a surprising tax shelter: the syndicated conservation easement*, BROOKINGS INSTITUTE (Dec. 20, 2017), <https://www.brookings.edu/blog/up-front/2017/12/20/estimating-the-rising-cost-of-a-surprising-tax-shelter-the-syndicated-conservation-easement>.

and ensure that easements will continue to provide significant public benefit for decades and generations to come.²⁰

II. BACKGROUND AND CURRENT LAW

A. *Conservation Easements' History and Popularity Explained*

Easements are a creature of common law.²¹ Conservation easements are legal agreements between a landowner and an organization—often public agencies or non-profits—that restrict future development activities on the property to protect its conservation value.²² They are a “revolutionary departure” from common law,²³ however, in that they are a rare exception to property law’s disfavor towards negative easements and servitudes that prevent future landowners from using their land.²⁴ As discussed in Part B.1. below, the federal government uses tax policy to promote the use of conservation easements. Put simply, conservation easements provide landowners with financial incentives—through the federal tax code—to conserve and protect land.²⁵

Conservation easements are also a uniquely American form of property law and land preservation. There is little discussion of the use of conservation easements in other countries.²⁶ And when there is, such discussion is more academic and theoretical—focusing on whether the easement would be a proper tool—rather than assessing effectiveness in a particular country. In Canada, while easements are used in a limited form, it is unclear whether they are permissible under Canadian common law.²⁷ In addition, some scholars argue that while conservation easements

20. See, e.g., Federico Cheever, *Public Good and Private Magic in the Law of Land Trusts and Conservation Easements: A Happy Present and a Troubled Future*, 73 DENV. L. REV. 1077 (1996).

21. THOMAS S. BARRETT & PUTNAM LIVERMORE, *THE CONSERVATION EASEMENT IN CALIFORNIA* 3 (1983); see also Smith, *supra* note 2, at 728 (describing conservation easements as a “novel and promising variation of an old legal tool.”).

22. ELIZABETH BYERS & KARIN MARCHETTI PONTE, *THE CONSERVATION EASEMENT HANDBOOK* 7 (2d ed. 2005).

23. Marc Campopiano, Note, *The Land Trust Alliance's New Accreditation Program*, 33 *ECOLOGY L.Q.* 897, 902 (2006).

24. Walter E. Beard, Jr., Comment, *A Proposal for Greater Accessibility to Charitable Deductions for Conservation Easement Donations*, 19 *HOUS. BUS. & TAX L.J.* 143, 145 (2019).

25. See, e.g., Connie Kertz, *Conservation Easements at the Crossroads*, 34 *REAL EST. L.J.* 139, 139-140 (2005).

26. See, e.g., Samuel Silverstone, *Open Space Preservation through Conservation Easements*, 12 *OSGOODE HALL L.J.* 105, 107 (1974) (discussing lack of conversation about conservation easements in Canada).

27. *Id.* at 110-11.

are effective in America, they may not be worthwhile tools overseas.²⁸

Easements were first used in the 1930s by the National Park Service to protect scenic views along highways, but this was not widespread or emulated by others until the 1950s and 1960s, when the Wisconsin Highway Department began to protect scenic views along highways.²⁹ The U.S. Fish and Wildlife Service then quickly followed to acquire easements to protect waterfowl habitat for migratory birds.³⁰ Organizations outside of government joined in as well. The Nature Conservancy accepted its first easement in 1961.³¹

1. *The benefits of conservation easements as a land protection tool.*

Voluntary conservation activity on private land is needed to achieve conservation on the scale needed for species or natural systems to thrive.³² Easements represent an opportunity to engage in substantial environmental protection on private land. Private parties own most of the land in the United States.³³ Accordingly, private lands comprise a significant amount of the nation's ecosystems.³⁴ For example, about 95% of all endangered plant and wildlife species are located on private lands.³⁵ In addition, the federal government owns only about 28% of the total acreage in the country.³⁶ This means that policymaking must turn to the protection of private lands. Conservation easements can be a tool in this mission.

Conservation easements are often preferable to other land protection

28. Gerald Korngold, *Globalizing Conservation Easements: Private Law Approaches for International Environmental Protection*, 28 WIS. INT'L L.J. 585, 585 (2011).

29. Richard Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . And Should It Be?*, 52 UIC JOHN MARSHALL L. REV. 677, 680 (2019); see also Brian W. Ohm, *The Purchase of Scenic Easements and Wisconsin's Great River Road*, 66 APA J. 177 (2000).

30. WILLIAM H. WHYTE, *THE LAST LANDSCAPE* 92-93 (1968).

31. Roddewig, *supra* note 29, at 681 (providing an excellent description of a wide variety of early adopted easement programs at the local, state, and federal government levels).

32. Laurie A. Wayburn, *Conservation Easements as Tools to Achieve Regulatory Environmental Goals*, 74 L. & CONTEMP. PROBS. 175, 180 (2011).

33. CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R242346, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1-2* (2017); CAROL HARDY VINCENT ET AL., CONG. RSCH. SERV., R42346, *FEDERAL LAND OWNERSHIP: OVERVIEW AND DATA 1-2* (2020); U.S. FOREST SERV., *WHO OWNS AMERICA'S TREES, WOODS, AND FORESTS? RESULTS FROM THE U.S. FOREST SERVICE 2011-2013 NATIONAL WOODLAND OWNER SURVEY 3* (2015).

34. Peter M. Morrisette, *Conservation Easements and the Public Good: Preserving the Environment on Private Lands*, 41 NAT. RES. J. 373, 374 (2001).

35. Updike & Mick, *supra* note 3, at 296.

36. VINCENT ET AL., *supra* note 33, at 1.

strategies as they are a flexible, decentralized, and typically cost-effective way to protect parcels with valuable conservation attributes.³⁷ Purchasing conservation easements is less costly than purchasing full title, as an easement is a partial interest and leaves the fee simple in private hands.³⁸ Also, protection through an easement is often accomplished much faster than an outright acquisition in fee simple—timing that can make all the difference in whether a parcel is protected or developed.³⁹ Finally, outright purchase of land is not appropriate or feasible in many cases.⁴⁰ Easements allow government agencies and non-profit organizations, which are increasingly facing fiscal pressures, to still engage in environmental protection activity.⁴¹ In addition, easements serve as a potent weapon to protect natural resources—especially as some believe the traditional regulatory programs, such as the Clean Water Act, Clean Air Act, and Endangered Species Act may have reached the limits of their effectiveness.⁴²

The availability of the easement deduction also fills a void in the many jurisdictions which lack either the land use planning tools or necessary political willpower to accomplish the goals conservation easements achieve.⁴³ For example, direct, heavy-handed government regulation, such as in the form of urban growth boundaries, mandatory development plans, or zoning requirements, may be politically unpalatable to state and local elected officials—as well as to their constituents.

Easements are thus attractive in a political climate hostile to direct government regulation.⁴⁴ This is especially the case in many Western

37. See, e.g., Zachary A. Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENV'T. L. REV. 119, 136 (2010).

38. See Comment, *Preserving Rural Land Resources: The California Westside*, 1 ECOLOGY L.Q. 330, 355-56 (1971) (“Easements present cost-saving advantages. They cost less to acquire than a fee interest, they permit the land to be used productively, and the lands involved are not completely removed from the property tax rolls because of public ownership.”).

39. Bray, *supra* note 37, at 174 (explaining how easements “are able to bring some lands under conservation more cheaply, or at least more quickly, than other conservation alternatives.”).

40. JOAN YOUNGMAN, *A GOOD TAX* 111 (2016).

41. See Morris & Rissman, *supra* note 9, at 1239-40 (“Enormous amounts of public money are being spent on conservation easements in the form of direct purchases by public agencies, public grants to nonprofit land trusts, and tax subsidies for conservation easement donations.”).

42. Kertz, *supra* note 25, at 139.

43. Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1567 (2008) (describing how conservation easements can fill a gap in land planning tools); see also Smith, *supra* note 2, at 735-38 (describing advantages to government agencies and property owners).

44. Nancy A. McLaughlin, *Increasing the Tax Incentives for Conservation Easement*

communities. Easements permit private parties to implement land use controls with limited government intervention, planning, or oversight.⁴⁵ Finally, purchasing easements shields government agencies against takings claims, which frequently occur with other environmental protection methods.⁴⁶ For these reasons, easements provide a potent tool in the modern American conservation toolbox.

The widespread use of easements does have well-founded criticism. Many have argued, for example, that easements can create “unfair distributional side effects in the present and . . . may lock future generations into inefficient and undesirable conservation commitments.”⁴⁷ Instead, tax policy should only incentivize those with valuable conservation purposes. Also, the decentralized nature of the easement results in “scattershot” conservation achieving limited goals.⁴⁸ Creating a stricter “conservation purpose” test, as discussed in Section IV.A., will address these concerns.

B. History of the Deduction

1. Legislative history.

The IRS authorized the first easement deduction in 1964 when it granted a deduction to a taxpayer who gratuitously conveyed an easement to the federal government to maintain a scenic, forested view alongside a highway.⁴⁹ The taxpayer received a deduction equal to the fair market value of the easement.⁵⁰ The following year, an IRS news release advertised the availability of deductions for donations of scenic easements

Donations – A Responsible Approach, 31 *ECOLOGY L.Q.* 1, 4 (2004).

45. YOUNGMAN, *supra* note 40, at 130; see also Adena R. Rissman, *Evaluating Conservation Effectiveness and Adaptation in Dynamic Landscapes*, 74 *L. & CONTEMP. PROBS.* 145, 150 (2011) (explaining how “[p]roperty rights are viewed as more resistant to political and economic change than other conservation tools such as regulation.”).

46. STEVE BOILARD & DANA CURRY, CAL. LEGIS. ANALYST’S OFF., CALIFORNIA’S LAND CONSERVATION EFFORTS: THE ROLE OF STATE CONSERVANCIES (2001) (discussing how “the potential for legal challenge continues to complicate these agencies’ activities.”).

47. Bray, *supra* note 37, at 136.

48. John D. Echevarria, *Skeptic’s Perspective on Voluntary Conservation Easements*, ECOSYSTEM MARKETPLACE 1 (Aug. 31, 2005), http://gelpi.org/gelpi/current_research/documents/RT_Pubs_Short_EcoMarketplace.pdf.

49. Rev. Rul. 64-205, 1964-2 C.B. 62; see also McLaughlin, *supra* note 44, at 10-11. Easements were used by government agencies throughout the 20th century, including by the federal and state governments in the 1930s and 1940s for scenic preservation. The U.S. Fish and Wildlife Service began using easements extensively to protect waterfowl breeding habits in the Dakotas and in Minnesota starting in the 1950s. See BARRETT & LIVERMORE, *supra* note 21, at 4-5.

50. Rev. Rul. 64-205, 1964-2 C.B. 62.

to government agencies.⁵¹ Next, the Tax Reform Act of 1969 revised the Code to curb perceived abuses and deny deductions for nearly all charitable contributions of partial interests.⁵² This inadvertently eliminated the deduction.⁵³

Congress subsequently moved to provide explicit statutory authority for easement deductions in the Tax Reform Act of 1976.⁵⁴ The 1976 Act authorized deductions for easements donated to a government entity or qualifying charitable group exclusively for one of the following purposes: the preservation of land areas for public outdoor recreation or education, or scenic enjoyment; the preservation of historically important land areas or structures; or the protection of natural environmental systems.⁵⁵ This formed the basis of the modern statutory framework.

Congress then moved to refine the law into its modern-day provision. First, in 1977, Congress limited the deduction to the donation of permanent easements.⁵⁶ Next, in 1980, Congress restricted the deduction only to easements donated to publicly supported charities or government agencies.⁵⁷ The 1980 Tax Treatment Extension Act also provided explicit authority for deductions for the preservation of open space.⁵⁸ The Treasury then published final regulations for the income tax deduction in early 1986.⁵⁹ Treasury officials and leading conservation attorneys worked hand in hand to draft the regulations.⁶⁰ This formed the Code provision and regulations that exist today.

The legislative framework has not changed since the 1980 congressional action and final regulations in 1986. This legislation left unnecessary vagueness, an issue that continues to fester to this day. Prior

51. McLaughlin, *supra* note 44, at 11.

52. See Tax Reform Act of 1969, Pub. L. No. 91-172, § 201, 83 Stat. 487, 549-62 (1969); see also McLaughlin, *supra* note 44, at 11.

53. I.R.C. § 170(f)(3)(A); see also McLaughlin, *supra* note 44, at 11.

54. Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520 (1976); see also McLaughlin, *supra* note 44, at 12.

55. I.R.C. § 170(f)(3)(B)(iii) (1976); McLaughlin, *supra* note 44, at 12.

56. I.R.C. § 170(f)(3)(B)(iii) (1977). The 1977 law also expanded the deduction through 1981. See Tax Reduction and Simplification Act of 1977, Pub. L. No. 95-30, § 309, 91 Stat. 126, 154 (1977).

57. See Act of Dec. 17, 1980, Pub. L. No. 96-541, § 6, 94 Stat. 3204, 3206-08 (1980); see also McLaughlin, *supra* note 44, at 50-51 (explaining that this was due to concerns that landowners were abusing the provision to donate portions of their backyards to local neighborhood foundations).

58. Act of Dec. 17, 1980, Pub. L. No. 96-541, § 6, 94 Stat. 3204, 3207 (1980).

59. 51 Fed. Reg. 1496 (Jan. 14, 1986) (to be codified at 26 C.F.R. pt. 1, 20, 25, 602).

60. Land trusts consulted extensively with Congress and Treasury in structuring § 170(h) and the Treasury regulations. McLaughlin, *supra* note 44, at 15.

to passage of the Tax Treatment Extension Act of 1980, which promulgated the current version of the conservation purposes requirement, Treasury officials expressed consternation over how the legislation did not include a “sufficiently precise” definition.⁶¹ Treasury officials worried this would result in deductions without adequate public benefit, foreshadowing present concerns.⁶² Joint Committee staff expressed a similar concern in 2005.⁶³ The IRS avoids requiring a more stringent definition of conservation purposes. In 1980, the court rejected an IRS argument that only land of “distinctive ecological significance” may qualify as a tax-exempt function of an environmental charitable organization.⁶⁴ This IRS private letter ruling, a non-precedential decision binding only on the parties involved, came before Congress and the Treasury Department promulgated the final developed regulations on the deduction.

Notable expansions to the deduction occurred in the 21st century. In 2006, Congress expanded the annual deduction from 30 to 50% of taxable income for up to 16 years, and ranchers and farmers could deduct 100% of income.⁶⁵ Congress permanently extended the deduction in 2015.⁶⁶ The Republican-led House Ways and Means Committee described the deduction as “an important way of encouraging conservation and preservation,” and argued that it should be permanently extended.⁶⁷

Easement donations also provide gift and estate tax benefits. The Tax Reform Act of 1986 allowed taxpayers to claim a charitable gift or estate tax deduction for an easement donation.⁶⁸ The Taxpayer Relief Act of 1997 expanded the estate tax incentives and allowed up to 40% of the value of land burdened by a conservation easement to be excluded from an estate for estate tax purposes.⁶⁹ Congress incrementally expanded the

61. Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 L. & CONTEMP. PROBS. 29, 31 (2011).

62. *Id.*; see also OFFICE OF TAX ANALYSIS, *supra* note 3, at 9 (on file with author).

63. Halperin, *supra* note 61, at 31.

64. See BRUCE R. HOPKINS, *THE LAW OF TAX-EXEMPT ORGANIZATIONS* 256-57 (11th ed. 2015) (citing *Dumaine Farms v. Comm’r*, 73 T.C. 650 (1980)).

65. Peter Elkind, *The Billion-Dollar Loophole*, PROPUBLICA (Dec. 20, 2017, 6:30 AM), <https://www.propublica.org/article/conservation-easements-the-billion-dollar-loophole>.

66. Consolidated Appropriations Act, 2016, Pub. L. No. 114-113, § 111, 129 Stat. 2241, 3041 (2015).

67. H.R. REP. NO. 114-17, at 6 (2015).

68. Tax Reform Act of 1986, Pub. L. No. 99-514 (1986), § 1422, 100 Stat. 2085, 2716-17 (1986).

69. Taxpayer Relief Act of 1997, Pub. L. No. 105-34 (1997), § 508, 111 Stat. 787, 857-60 (1997).

total amount of this exclusion from 1999 to 2002.⁷⁰ This was intended to provide benefits for “cash poor, land rich” property owners who may not receive much benefit from the income tax deduction.⁷¹ Together, these deductions provide powerful incentives for landowners to donate conservation easements. They also result in large tax expenditures each year.

2. *Growth of the use of the deduction over time.*

The growth of both the use of conservation easements and the land conservation movement is interwoven with the federal tax deduction.⁷² Conservation easements have “exploded” onto the landscape and now eclipse all other tools in the modern American conservation toolbox.⁷³ The use of conservation easements started taking off in the early 1980s.⁷⁴ However, their use was initially sporadic and growth was slow. In the early years after the 1980 legislation, due to the lack of clear regulations from the Treasury Department, most taxpayers sought private letter rulings, which then took over a year to receive, to ensure their deduction would not subsequently be challenged by the IRS.⁷⁵ This slowed down the pace of conservation easement use. But in the mid-1980s, following the adoption of the final Treasury regulations and explicit authorization of the easement deduction practice, the number of acres protected each year grew as landowners became more familiar with the practice.⁷⁶

70. See Economic Growth and Tax Relief Reconciliation Act of 2001, Pub. L. No. 107-16, § 551, 115 Stat. 38, 86 (2001); see also David Joulfaian, *A Quarter Century of Estate Tax Reforms*, 53 NAT'L TAX J. 343, 347 (2000).

71. McLaughlin, *supra* note 44, at 16-17.

72. Bray, *supra* note 37, at 174.

73. Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 L. & CONTEMP. PROBS. 1, 2 (2011).

74. Roddewig, *supra* note 29, at 683 (“[I]t was tax legislation enacted in 1980 that truly ushered in a national conservation easement movement.”).

75. H.R. REP. NO. 91-782 (1969) (Conf. Rep.), as reprinted in 1969 U.S.C.C.A.N. 2391, 2409; Kingsbury Browne, Jr. & Walter G. Van Dorn, *Charitable Gifts of Partial Interests in Real Property for Conservation Purposes*, 29 TAX L. 69, 75 (1975); see, e.g., I.R.S. Priv. Ltr. Rul. 85-44-036 (Aug. 1, 1985); I.R.S. Priv. Ltr. Rul. 85-18-024 (Jan. 31, 1985); I.R.S. Priv. Ltr. Rul. 84-50-065 (Sept. 13, 1984); I.R.S. Priv. Ltr. Rul. 84-49-025 (Aug. 30, 1984); I.R.S. Priv. Ltr. Rul. 84-28-037 (Apr. 6, 1984); I.R.S. Priv. Ltr. Rul. 84-28-034 (Apr. 6, 1984); I.R.S. Priv. Ltr. Rul. 84-22-064 (Feb. 28, 1984); I.R.S. Priv. Ltr. Rul. 84-20-016 (Feb. 10, 1984); I.R.S. Priv. Ltr. Rul. 84-18-032 (Jan. 23, 1984); I.R.S. Priv. Ltr. Rul. 84-10-034 (Dec. 2, 1983); I.R.S. Priv. Ltr. Rul. 83-13-123 (Dec. 30, 1982); I.R.S. Priv. Ltr. Rul. 83-02-085 (Oct. 14, 1982); I.R.S. Priv. Ltr. Rul. 82-48-069 (Aug. 30, 1982); I.R.S. Priv. Ltr. Rul. 82-47-024 (Aug. 18, 1982); I.R.S. Priv. Ltr. Rul. 82-43-125 (July 27, 1982); I.R.S. Priv. Ltr. Rul. 82-33-025 (May 18, 1982).

76. McLaughlin, *supra* note 44, at 20-21; see also Halperin, *supra* note 61, at 30.

C. Current Law and Tax Benefits

1. Current law.

The Code labels conservation easements as “qualified conservation contributions.” A qualified conservation contribution is a contribution: “(A) of a qualified real property interest, (B) to a qualified organization, [and] (C) exclusively for conservation purposes.”⁷⁷ The contribution must also be in perpetuity.⁷⁸ The donation must meet all requirements of I.R.C. § 170(h) to qualify for the deduction. These requirements are discussed in turn.

First, the deduction must be for a real property interest. A qualified interest can be a complete or partial interest, so long as it is a restriction on the use of land.⁷⁹ The Treasury regulations list two types of qualified real property interests. The first is a conservation easement, which in tax code parlance is referred to as a “perpetual conservation restriction.”⁸⁰ The second is a “qualified mineral interest”—the fee simple interest minus a mineral interest, which must be for conservation purposes. A mineral interest is a donor’s interest in subsurface minerals, oils, or gas—and the right to access such minerals.⁸¹ This article, and the bulk of easement law, focuses on perpetual conservation restrictions.

In order for a donation to be deductible, the easement must be held by a “qualified organization.”⁸² Qualified organizations are either government units or public charities.⁸³ The organization must be committed to protecting the conservation purposes of the easement.⁸⁴ These organizations serve as watchdogs against violations of the easement restriction.⁸⁵ Public charities must meet a statutory public support test.⁸⁶ Alternatively, a charity may qualify if it receives “a

77. I.R.C. § 170(h)(1)(A)-(C).

78. I.R.C. § 170(h)(5)(A); Treas. Reg. § 1.170A-14(g)(6) (as amended in 2009); Rissman, *supra* note 45, at 151 (“This emphasis on perpetuity is understandable in light of the persistent threats to conserved areas.”).

79. I.R.C. § 170(h)(2).

80. Treas. Reg. § 1.170A-14(b)(2) (as amended in 2009).

81. Treas. Reg. § 1.170A-14(b)(1)(i) (as amended in 2009).

82. I.R.C. § 170(h)(1)(B).

83. I.R.C. § 170(h)(3).

84. Treas. Reg. § 1.170A-14(c)(1) (as amended in 2009).

85. C. TIMOTHY LINDSTROM, A TAX GUIDE TO CONSERVATION EASEMENTS 29 (2008) (“Easement holders, in theory, provide the assurance that the substantial subsidy provided by the nation’s taxpayers for voluntary land conservation is a good investment.”).

86. Treas. Reg. § 1.170A-14(c)(1)(iii); *see also* LINDSTROM, *supra* note 85, at 31-32.

substantial amount” of funds from the public or exists for the sole purpose of supporting a government organization.⁸⁷ Private foundations are not “public charities” and therefore cannot hold easements.⁸⁸

More than three-fourths of the land held under easement is protected by non-profit land trust organizations.⁸⁹ “Virtually all” land trusts are organized as publicly-supported charitable organizations.⁹⁰ These organizations have credibility with and access to landowners, and knowledge of local land and community needs.⁹¹ Federal, state, and local government agencies also hold conservation easements.⁹² Many government agencies are also effectively organized as land trusts.⁹³

Next, the contribution must be “exclusively for conservation purposes.”⁹⁴ The Code defines a conservation purpose as:

- (i) [T]he preservation of land areas for outdoor recreation by, or the education of, the general public,
 - (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
 - (iii) the preservation of open space (including farmland and forest land) where such preservation is—
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,
- and will yield a significant public benefit, or
- (iv) the preservation of an historically important land area or a certified historic structure.⁹⁵

87. Treas. Reg. § 1.170A-14(c)(1)(ii); *see also* LINDSTROM, *supra* note 85, at 34.

88. LINDSTROM, *supra* note 85, at 32-33.

89. *National Land Trust Census*, LAND TRUST ALL., <https://www.landtrustalliance.org/census-map/#National> (last visited May 23, 2021).

90. McLaughlin, *supra* note 44, at 61-62.

91. *Id.* at 6.

92. *See, e.g.,* NATIONAL CONSERVATION EASEMENT DATABASE, <https://www.conservationeasement.us> (last visited Mar. 27, 2021); *see also* CONSERVATION ALMANAC, <https://www.conservation Almanac.org> (last visited Mar. 27, 2021).

93. Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673, 675 (2008).

94. I.R.C. § 170(h)(1)(C).

95. I.R.C. § 170(h)(4)(A)(i)–(iv).

The conservation purpose requirement is a tool for ensuring that only appropriate properties are eligible for participation in the conservation easement program.⁹⁶ Yet this test is incredibly vague and does too little to filter out properties. While the requirement is intended to ensure the public receive some minimum amount of benefit from the creation of the easement, this does not always occur.⁹⁷ Reforms to ensure significant public benefit occurs are discussed in the following sections.⁹⁸

2. *Current tax benefit.*

Taxpayers can receive a federal income tax deduction of up to 50% of adjusted gross income (AGI).⁹⁹ The deduction is equal to the difference in the appraised value of the property before and after it is burdened by the easement.¹⁰⁰ Qualified farmers and ranchers may deduct up to 100% of AGI.¹⁰¹ Taxpayers may carry over excess amounts in each of the 15 succeeding years following the deduction.¹⁰² This means a landowner may receive a deduction for his contribution for many years. This is an exceptionally generous charitable deduction.¹⁰³ Taxpayers may also receive federal gift and estate tax deductions, as well as benefits at the state and local levels.

It is helpful to explain these benefits through an example. We return to Amy, the landowner of the farm in the Introduction. Amy's AGI is \$150,000 per year and she expects her income to stay the same over the coming years.

She works with the local land trust to negotiate the terms of the easement, which will protect important local flora and fauna, prevent commercial development, and allow her family to continue living on a small segment of the land. She then hires a "qualified appraiser," to

96. Josh Eagle, *Notional Generosity: Explaining Charitable Donors' High Willingness to Part with Conservation Easements*, 35 HARV. ENV'T. L. REV. 47, 63 (2011).

97. *Id.* at 62.

98. *See infra* Part IV.

99. I.R.C. § 170(b)(1)(E)(i). Adjusted gross income is an individual's total gross income minus specific deductions.

100. *Schapiro v. Comm'r*, 61 T.C.M. (CCH) 2215 (1991) (holding that the fair market value of an easement is based on the "highest and best use").

101. I.R.C. § 170(b)(1)(E)(iv)(I).

102. I.R.C. § 170(b)(1)(E)(ii).

103. Until 2009, qualified conservation contributions had more favorable tax treatment than most other charitable contributions by providing larger write-offs and a longer carryforward of deductions into future years. *See* Sam Young, *Conversations: William T. Hutton*, 126 TAX NOTES 578, 581 (2010). After the 2015 Protecting Americans from Tax Hikes Act, this is again the case.

conduct a “qualified appraisal.”¹⁰⁴ The appraiser first looks at the fair market value of the property—the value it would fetch in an arms’ length transaction—without the easement. Next, the appraiser determines the value of the land with the easement on it. The appraiser would consider factors such as sales for similar properties under easement, other properties both developed and undeveloped, and the terms of the easement. With these factors in mind, the following hypothetical figures illustrate the tax benefits.

The appraiser values the fair market value of Amy’s farm at \$4 million. But with the easement on the land, the value of the property drops to \$3 million. This is a 25% drop in the value.

The value of the easement is most often determined using the “before and after” method, comparing the two appraisals.¹⁰⁵ This is the value of the charitable deduction. So here, the value of the charitable deduction is \$1 million. The appraiser must first look to see if there is a substantial record of comparable sales of similar easements. The before and after method is an inexact science.¹⁰⁶

This will provide Amy with a large federal income tax benefit. She will need to claim her benefit over a number of years. In the first year, she can claim a \$75,000 deduction. However, she can “carry forward” the deduction for up to 15 years—meaning that she can continue claiming the deduction in the years to come until she reaches her \$1 million value. Amy could then claim \$75,000 for each of the next 12 years, and then claim \$25,000 in the 14th year, to receive the benefit of her full \$1 million easement value. If, in the alternative, Amy were a farmer, her income tax benefits would be even greater. Finally, the value of her property for estate tax purposes would be reduced substantially.

A basic tax law primer is useful. A deduction is a reduction of the amount of a taxpayer’s income that is subject to tax. So if a taxpayer has \$150,000 in income, but receives a deduction of \$75,000, then she is only taxed on \$75,000 of her income. This provides substantial benefits. The dollar value is based on the amount saved by not having to pay taxes on the amount that is deducted. So if this deduction of Amy’s would be subject to a 25% tax rate, then the value of her deduction is \$18,750 per year. These are immense benefits.

104. Treas. Reg. § 1.170A-13(c)(2)-(3), (5).

105. Nancy A. McLaughlin, *Conservation Easements and the Valuation Conundrum*, 19 FLA. TAX REV. 225, 227 (2016); see *Schapiro v. Comm’r*, 61 T.C.M. (CCH) 2215 (1991).

106. McLaughlin, *supra* note 105, at 227.

D. *Size of the Expenditure*

The size of the easement deduction tax expenditure has increased over the years. In 1980, the federal government believed it would forego \$5 million in income tax revenue each year due to the deduction.¹⁰⁷ From 2008 to 2012, the deduction cost taxpayers more than \$1.6 billion.¹⁰⁸ In 2016, the most recent year for which official information is available from the Treasury, the expenditure totaled \$4.2 billion dollars.¹⁰⁹ More recent data, based on combing SEC filings and other data sets, suggest that the amount claimed is even higher.¹¹⁰

The size of the expenditure has steadily increased most years since 2011, with a dip in 2015.¹¹¹ Syndicates generated nearly \$27 billion in charitable contributions between 2010 and 2017.¹¹² This shows no signs of slowing down absent enforcement actions by the IRS or changes to the Code. The Joint Committee on Taxation staff does not list the 170(h) deduction in its annual tax expenditure table, stating that quantification is not available.¹¹³ Instead, all tax expenditures, but especially expenditures of this large nature, ought to be scrutinized to ensure they continue to provide benefits.

III. ISSUES WITH THE CURRENT PROVISION

A. *Does the Deduction Actually Provide Conservation Value?*

The deduction undoubtedly results in the protection of important natural and culturally significant areas. Conservation easements helped facilitate the purchase and protection of iconic California areas such as Hearst Castle, Santa Cruz Island, and much of Pfeiffer-Big Sur State Park.¹¹⁴ However, it is unclear if the deduction effectively fosters and

107. Stephen J. Small, *An Obscure Tax Code Provision Takes Private Land Conservation into the Twenty-First Century*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE 55, 56 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

108. Conniff, *supra* note 18.

109. MOLLY F. SHERLOCK, CONG. RSCH. SERV., IN11141, CHARITABLE CONSERVATION CONTRIBUTIONS: POTENTIAL FOR ABUSE? 2 (2019).

110. BROOKINGS, HOW WE CALCULATED THE REVENUE COST OF SYNDICATED CONSERVATION EASEMENTS 2 (2017).

111. SHERLOCK, *supra* note 109, at 2.

112. S. COMM. ON FIN., 116TH CONG., SYNDICATED CONSERVATION-EASEMENT TRANSACTIONS 2 (Comm. Print 2020).

113. STAFF OF JOINT COMM. ON TAX'N, 115TH CONG., ESTIMATES OF FEDERAL TAX EXPENDITURES FOR FISCAL YEARS 2018-2022 (JCX-81-18), at 17 (2018).

114. Young, *supra* note 103, at 580; BARRETT & LIVERMORE, *supra* note 21, at 5.

incentivizes high-quality conservation on a larger scale.

Empirical research suggests the deduction may not be fully achieving its purpose. The value of the deduction may not match the substantial tax break received by wealthy property owners.¹¹⁵ Adam Looney described the deduction as “depriving the government of billions of dollars of revenue and in some cases doing little to advance environmental protection.”¹¹⁶ Looney also concluded donations are often concentrated in transactions “unrelated to conservation benefits.”¹¹⁷ For example, more than one-third of deductions nationwide between 2010 and 2012 occurred in Georgia, a state with 1.5% of conserved land.¹¹⁸ Similarly, donations are clustered in high-cost areas such as Martha’s Vineyard, Massachusetts or Westchester, New York.¹¹⁹ This concentration suggests environmental protection gives way to tax planning strategies for the wealthy.

This uncertainty also elicits unease from leading tax policy scholars. For example, Professor Daniel Halperin expresses concern over how “the revenue loss from the charitable deduction for easement donations might well be far more than the public benefit provided.”¹²⁰ Admittedly, it is difficult to discern the dollar value of the public benefit. This is why this article later calls for more data to be provided by donors and recipient organizations so that this can be studied and analyzed further. Adam Looney of the Brookings Institution makes a similar point and argues that the tax expenditure may not flow to the preservation of properties with a high conservation value.¹²¹ Professor Nancy McLaughlin has expressed similar concern in her many law review articles on the topic.¹²²

This uncertainty places a stain on the dedicated work of hardworking conservation organizations and genuinely motivated landowners

115. Elliott G. Wolf, Note, *Simultaneously Waste and Wasted Opportunity: The Inequality of Federal Tax Incentives for Conservation Easement Donations*, 31 STAN. ENV’T L.J. 315, 316 (2012) (“[T]he current scheme fails to maximize the marginal conservation accomplished per dollar of foregone tax revenue because of ample empirical evidence that the wealthy do not value conservation less than others.”).

116. ADAM LOONEY, TAX POL’Y CTR., CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 1 (2017).

117. *Id.*

118. *Id.* at 2.

119. *Id.*

120. Halperin, *supra* note 61, at 32.

121. LOONEY, *supra* note 116, at 2.

122. See generally McLaughlin, *supra* note 105; Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV’T L. REV. 421 (2005); McLaughlin, *supra* note 44.

nationwide.¹²³ Local land trusts play an important role. They often know the local properties and can sense what would be a valuable property to protect. They also are well-connected: they employ or know lawyers who can draft easements and negotiate donations; they know appraisers who understand land conservation; they know, most importantly, the local community of landowners and have spent decades building trust, credibility, and expertise.

These organizations also are long-term players in a local community. Many, if not most, have been around for decades. If, like most do, they hold easements, they are also responsible for maintaining and upholding the property in perpetuity. These groups are key pieces of the fabric of a local community. These groups are also actively opposed to the current abusive schemes.¹²⁴

This deduction also further exacerbates how the federal tax code favors wealthy, predominantly white taxpayers. Evidence suggests current deductions overwhelmingly flow to wealthy landowners; mirroring the tax code as a whole.¹²⁵ For example, a Black Family Land Trust review of state income tax conservation easement tax credits in Virginia found black landowners received only 1% of total easement value there.¹²⁶ The deduction provides much greater benefits to wealthy taxpayers than it does to those of moderate or limited means.¹²⁷ Also, easement deductions are more regressive than the deduction for charitable contributions of cash.¹²⁸ The literature, scholarship, and data on these points is scarce. The tax code does little collection of data based on race

123. See Updike & Mick, *supra* note 3, at 35 (speculating that easements will begin to see more traction as an investment opportunity for high income people); see also Peter J. Reilly, *Tax Planning for the High Salary Pauper*, FORBES (Nov. 23, 2019 6:11 PM), <https://www.forbes.com/sites/peterjreilly/2019/11/23/tax-planning-for-the-high-salary-pauper/?sh=1fe372376b79>.

124. See, e.g., Michele S. Byers, *Stop Fraudulent Land Conservation Schemes!*, N. J. CONSERVATION FOUND. (Dec. 3, 2020), <https://www.njconservation.org/stop-fraudulent-land-conservation-schemes/>.

125. Roddewig, *supra* note 29, at 678 (“Should we continue to, in effect, subsidize their conservation activities through federal and state tax incentives that primarily benefit wealthy landowners?”). See generally DOROTHY A. BROWN, *THE WHITENESS OF WEALTH* (2021).

126. James A. Bacon, *Environmental Racism and Conservation Easements*, BACON’S REBELLION (Nov. 17, 2018), <https://www.baconsrebellion.com/wp/environmental-racism-and-conservation-easements/>.

127. See Wolf, *supra* note 115, at 320-23 (describing a pair of hypothetical cases to show how the deduction benefits wealthy landowners much more than “cash-poor” landowners); Parker, *supra* note 11 (“Individuals with higher adjusted gross incomes effectively pay a lower after-tax ‘price’ to donate conservation easements.”).

128. Wolf, *supra* note 115, at 323.

and ethnicity¹²⁹—a practice that may change under a Biden Administration.

In addition, it is unclear if the provision actually encourages landowners to engage in conservation and preservation activities. With regard to conservation easements, “it may not be the best use of public funds to give property tax breaks to landowners who simply maintain their land just as they otherwise would.”¹³⁰ A key tenet of tax policy is that a tax break should encourage behavior that would not have occurred absent government intervention, rather than simply subsidizing or rewarding what taxpayers would have done anyway.¹³¹ This concern has existed for decades. The Treasury Department expressed concern in both 1979 and 1987 over how landowners with no desire to sell or develop their land give up very little by donating an easement.¹³²

Recent research supports this concern. One study concluded many easement donors do not place high value on the development rights for which they are receiving a deduction or would engage in conservation without an incentive.¹³³ Similarly, Professor Nancy McLaughlin, a leading expert on easement law, argues the deduction is most effective at stimulating donations from wealthy landowners who do not intend to either develop their land or use it in a manner inconsistent with conservation priorities.¹³⁴ Professor Dominic Parker reaches a similar conclusion: his research suggests easements may reward landowners for actions they would take regardless of the incentive and these donations

129. Francine J. Lipman et al., *U.S. Tax Systems Need Anti-Racist Restructuring*, 168 TAX NOTES FED. 855 (2020); see also Dorothy A. Brown, *How the U.S. Tax Code Privileges White Families*, THE ATLANTIC (Mar. 23, 2021), <https://www.theatlantic.com/ideas/archive/2021/03/us-tax-code-race-marriage-penalty/618339/>.

130. Woods Bowman, Joseph Cordes & Lori Metcalf, *Preferential Tax Treatment of Property Used for Social Purposes: Fiscal Impacts and Public Policy Implications*, in EROSION OF THE PROPERTY TAX BASE 269, 290 (Nancy Y. Augustine et al. eds., 2009).

131. *Id.*

132. See *Minor Tax Bills: Hearings Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 96th Cong. 174 (1980) (“[F]or a taxpayer who does not have the present intention to sell or develop the property, the gift of, for example, a conservation easement, while perhaps diminishing the value of the property, does not do so until a later date; in particular, it may have no material impact on the continuing enjoyment of the property by the donor of the easement.”); see also OFFICE OF TAX ANALYSIS, *supra* note 3, at 8-9 (“[I]t is possible that no such stimulation is taking place – all of the conservation easement donations that are made would be made even in the absence of deductibility – so that the only impact of allowing the tax deduction is foregone tax revenue.”).

133. Eagle, *supra* note 96, at 78.

134. McLaughlin, *supra* note 44, at 9.

may not provide long-term conservation value.¹³⁵ While the public may benefit from the land protection, it is unclear if it is worth the cost.

This tax policy concern is exemplified by high-profile instances of deductions with questionable conservation value. For instance, newspaper headlines highlight examples of taxpayers receiving deductions for donating conservation easements on properties such as golf courses. These contributions “fuel[] concerns that some donations of easements have benefitted donors more than they have furthered conservation causes.”¹³⁶ For example, President Donald J. Trump received a \$39 million deduction for an easement placed on his Bedminster, New Jersey golf course, as well as a separate deduction for a driving range in California.¹³⁷ President Trump has received more than \$100 million in total for similar deductions.¹³⁸ Former National Football League superstar Warren Sapp has also been caught up in litigation over an easement’s true value.¹³⁹ These are among the most high-profile instances of deductions with dubious conservation value, but similar examples arise annually all across the country. The Treasury Department announced its intention to eliminate the deduction for golf courses in its 2015 Revenue Proposal, but this proposal was never implemented during the Trump Administration.¹⁴⁰

These high-profile examples reflect a larger trend. A “relatively small

135. Parker, *supra* note 11.

136. LOONEY, *supra* note 116, at 4. The Wall Street Journal has reported extensively on deductions for easements, including easement deductions for golf courses. See Richard Rubin, *Donald Trump’s Donations Put Him in Line for Conservation Tax Breaks*, WALL ST. J. (Mar. 10, 2016, 10:41 PM), <https://www.wsj.com/articles/donald-trumps-land-donations-put-him-in-line-for-conservation-tax-breaks-1457656717>; see also Richard Rubin, *Donald Trump Got a Big Break on 2005 Taxes*, WALL ST. J. (Mar. 17, 2016, 5:25 PM), <https://www.wsj.com/articles/donald-trump-got-a-big-break-on-2005-taxes-1458249902>; Richard Rubin, *When a Conservation Tax Break Protects Backyards and Golf Courses*, WALL ST. J. (June 1, 2017, 9:41 AM), <https://www.wsj.com/articles/BL-REB-37528>; Richard Rubin, *IRS Scrutinizes Land-Donation Syndicates Yielding Big Tax Breaks*, WALL ST. J. (Dec. 29, 2016, 11:58 AM), <https://www.wsj.com/articles/irs-scrutinizes-land-donation-syndicates-yielding-big-tax-breaks-1483030736>; Richard Rubin, *IRS Tees Off on Golf Courses’ Green Tax Claims*, WALL ST. J. (Jan. 4, 2016, 8:56 PM), <https://www.wsj.com/articles/irs-tees-off-on-golf-courses-green-tax-claims-1451959008>.

137. Elkind, *supra* note 65.

138. *Id.* A deduction claimed by Donald J. Trump is also the subject of an inquiry by the New York State Attorney General. See Andrea Muse, *New York AG Seeks Documents on Trump Org’s Easement Deductions*, 168 TAX NOTES FED. 1711 (2020).

139. Kristen A. Parillo, *NFL Star Scores Easement Win in Tax Court*, 169 TAX NOTES FED. 1392 (2020).

140. U.S. DEP’T OF THE TREASURY, GENERAL EXPLANATIONS OF THE ADMINISTRATION’S FISCAL YEAR 2017 REVENUE PROPOSALS 214-15 (2016).

number of taxpayers, transactions, and donee organizations reap a large share of the total tax benefit.”¹⁴¹ These most often involve lands that are unlikely to ever be developed and are motivated primarily by financial gain that will not require donors to give up much, if anything at all.¹⁴²

Roughly 10% of acreage conserved claimed nearly 70% of all tax benefits; and 2% of transactions accounted for 43% of all deductions.¹⁴³ Adam Looney found that about 25 organizations, of more than 1,700 nationwide, received about half of all donations.¹⁴⁴ Put another way, less than 2% of eligible organizations receive more than half of the benefit. Many of these are small organizations, not large, nationally recognized organizations such as The Nature Conservancy which operate across the country with budgets the size of large corporations.¹⁴⁵ Clay County, Georgia, for example—a county with a shrinking population and with many thousands of acres unlikely to be vulnerable from development—is the location for a disproportionate amount of claimed deductions.¹⁴⁶ Many of these groups are not even touted local land trusts known for their ability to deliver conservation at low overhead and administrative costs. And while organizations do not need to be the size of The Nature Conservancy to engage in quality conservation activities, data suggests some recipient organizations are not cut out—or even equipped—to handle the work. While concerning, these transactions are completely legal. They suggest the Code permits deductions that do not result in a public benefit.

B. Tax Fraud and Tax Shelters

The deduction also elicits illegal tax avoidance strategies. Attempts to use the easement deduction to create tax shelters—legal strategies to reduce the amount of income tax owed—have persisted for decades. For example, in 2004, the IRS issued regulations to crack down on “conservation buyer transactions,” where charities purchased property of sometimes dubious conservation value, labeled the parcel a conservation easement, resold the property subject to the easement for a lower price,

141. LOONEY, *supra* note 116, at 2.

142. Haisten Willis, *Wealthy Investors Seem to be Exploiting Land-conservation Tax Breaks, and the Senate is Taking Notice*, WASH. POST (Oct. 23, 2020), <https://www.washingtonpost.com/business/2020/10/23/land-conservation-tax-break-deals/>.

143. LOONEY, *supra* note 116, at 2.

144. *Id.* at 2.

145. *Id.* at 2-3.

146. Tamar Hallerman, *Congressional Panel Targets ‘Abusive’ Tax Shelters Popular in Ga.*, ATLANTA NEWS NOW (Sept. 2, 2020), <https://www.ajc.com/news/congressional-panel-targets-abusive-tax-shelters-popular-in-ga/36FITW233BAUPNCA6LNHSU6XEQ/>.

and collected a substantial charitable contribution from the buyer.¹⁴⁷ This practice ended after an IRS investigation, as well as reporting by the Washington Post.¹⁴⁸

A new scenario is currently popular. These are essentially “tax shelters masquerading as conservation easement transactions.”¹⁴⁹ In these schemes, known as syndicated easements, owners gather investors and hire a private appraiser who gives the property a highly inflated appraised value.¹⁵⁰ Syndicated partnership investors, on average, claimed \$9 in deductions for each dollar they put in.¹⁵¹ This scheme claimed \$6.8 billion in 2017.¹⁵² The scheme continued to grow in popularity throughout the 2010s. The number of syndicated easement transactions increased heavily in 2020, with no sign of stopping, despite increased IRS scrutiny.¹⁵³

Tax shelters of any kind are hard to understand. This helps them avoid public scrutiny and widespread publicity.¹⁵⁴ Here is how the syndicate fraud scheme works. First, a promoter, a businessperson coordinating the process to make a profit, purchases a relatively worthless parcel of land; property with a low fair market value that is likely also devoid of conservation value. Next, the promoter “syndicates,” or transfers, the land

147. Robert J. Wells, *Tax Shelters and the Law of Unintended Consequences*, 104 TAX NOTES 5, 6 (2004); see also Press Release, Internal Revenue Serv., Treasury and IRS Issue Notice Regarding Improper Deductions for Conservation Easement Donations (June 30, 2004).

148. Joe Stephens and David B. Ottaway, *Senators Question Conservancy's Practices*, WASH. POST (June 8, 2005), <https://www.washingtonpost.com/archive/politics/2005/06/08/senators-question-conservancys-practices/69eb4bba-f576-4e72-9f4c-d1eb3914c876/>; see Joe Stephens and David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss*, WASH. POST (May 6, 2003), <https://www.washingtonpost.com/archive/politics/2003/05/06/nonprofit-sells-scenic-acreage-to-allies-at-a-loss/905ef074-56ad-4034-8690-d2d8910d8e4b/>; see also Joe Stephens and David Ottaway, *Nature Conservancy Suspends Land Sales*, WASH. POST (May 13, 2003), <https://www.washingtonpost.com/archive/politics/2003/05/13/nature-conservancy-suspends-land-sales/ccd75a02-7f0b-4f31-8209-85640b4b42eb/>.

149. Elkind, *supra* note 65 (“While the vast majority of conservation easement transactions involve private landowners, a cottage sub-industry evolved within the financial services market over the past decade that involves companies that syndicate real estate investment opportunities to retail investors that utilize conservation as a possible program investment purpose.”); See Updike & Mick, *supra* note 3, at 297.

150. Elkind, *supra* note 65.

151. *Id.*

152. See Letter from Charles P. Rettig, Comm’r, Internal Revenue Serv., to Sen. Charles Grassley, Chairman, U.S. Sen. Comm. on Fin. (Feb. 12, 2020), [https://www.finance.senate.gov/imo/media/doc/2020-02-12%20IRS%20to%20Grassley,%20Wyden%20\(Syndicated%20Conservation%20Easement%20Transactions\).pdf](https://www.finance.senate.gov/imo/media/doc/2020-02-12%20IRS%20to%20Grassley,%20Wyden%20(Syndicated%20Conservation%20Easement%20Transactions).pdf).

153. Alexis Gravely, *Conservation Easement Deals Increase Despite IRS Notice*, 168 TAX NOTES FED. 2514 (2020).

154. SEN. CHARLES E. GRASSLEY & SEN. RON WYDEN, 116TH CONG., SYNDICATED CONSERVATION EASEMENT TRANSACTIONS 5 (Comm. Print 2020).

to his investor through a partnership, a legal entity. The promoter then finds a developer, who has no intention of actually developing on the property, to prepare an investment and development plan for the property. Then, the promoter turns to an appraiser, who is also likely in on the scheme, to provide a greatly inflated valuation. With this information in hand, the promoter is then ready to turn a quick profit. The promoter finds a land trust or other qualified recipient, also likely in on the game, to donate the easement to. The promoter then claims a massive deduction—equal to the difference between the sham fair market value based on the sham development and the value of the property with the easement attached—and passes this on to the partnership of investors. In a partnership, the income tax flows down, or “passes through,” from the legal partnership entity to the individual partners. So the promoter’s investors would be able to claim these deductions on their individual income tax returns. In this scheme, tax cheats win, and the greater public loses.

A 2020 Senate Finance Committee report shed light on this process. The Senate Finance Committee subpoenaed a number of these groups. It found emails showing promoters taking orders from their clients on how much of an easement deduction they would like to purchase through the sham transaction. The Committee described how these promoters and their investors held no interest in land investment or environmental protection and just wanted to buy tax deductions.¹⁵⁵

These transactions are the subject of U.S. Senate and federal prosecutor inquiry. The Department of Justice first filed a lawsuit, a test case of sorts, over a high-profile syndicate in 2018.¹⁵⁶ In November 2019, the IRS announced it would broadly pursue civil and criminal cases against syndicated easement promoters, tax preparers, and appraisers.¹⁵⁷

155. *Id.* at 6.

156. Allyson Versprille, *IRS Probing Promoters of Tax-Dodging Land Conservation Deals*, BLOOMBERG TAX (Oct. 22, 2019), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X7SMAANK000000?bna_news_filter=daily-tax-report#jcite; see also Press Release, Dept. of Justice, Justice Department Sues to Shut Down Promoters of Conservation Easement Tax Scheme Operating out of Georgia, (Dec. 19, 2018), <https://www.justice.gov/opa/pr/justice-department-sues-shut-down-promoters-conservation-easement-tax-scheme-operating-out>.

157. Richard Rubin, *IRS Pursues Criminal Cases on Land-Tax Donation Deals*, WALL ST. J. (Nov. 12, 2019), <https://www.wsj.com/articles/irs-pursues-criminal-cases-on-land-tax-donation-deals-11573599354>; Press Release, Internal Revenue Serv., IRS Increases Enforcement Action on Syndicated Conservation Easements (Nov. 12, 2019), <https://www.irs.gov/newsroom/irs-increases-enforcement-action-on-syndicated-conservation-easements>; see also Dylan Moroses, *Several IRS Divisions Probing Conservation Easement Abuse*, LAW360 (Nov. 12, 2019), <https://www.law360.com/tax-authority/articles/1219136/several-irs-divisions-probing>.

Observers note the IRS is pursuing a “scorched-earth” litigation and prosecution strategy, as the number of cases filed continues to grow and represents just the tip of the iceberg.¹⁵⁸ The Senate is currently investigating these deals, as well as considering possible legislation in response.¹⁵⁹ In August 2020, the Senate Finance Committee, following a lengthy investigation and many subpoenas, issued a damning report criticizing the scheme.¹⁶⁰ And in December 2020, a group of schemers pled guilty for the first time in a case brought by the IRS and the Department of Justice.¹⁶¹ The IRS is currently offering settlements to cases docketed in federal court and expects more guilty pleas throughout 2021.¹⁶²

This abuse of the deduction illustrates the need for a larger, legislative reform. The IRS’ current approach of selectively targeting bad actors in lawsuits may not create a large enough deterrent and rankles practitioners.¹⁶³ For example, the IRS found “no notable decrease” in the use of syndicated easement practices more than two years after labeling the practice as a “listed transaction,” the IRS’ equivalent of the Federal Bureau of Investigation’s “Most Wanted” list.¹⁶⁴ This scheme is likely to

conservation-easement-abuse.

158. Lee A. Sheppard, *Clamping Down on Conservation Easements*, 168 TAX NOTES FED. 1753 (2020); Kristen A. Parillo, *Tax Court’s Conservation Easement Caseload Grows*, 169 TAX NOTES FED. 348 (2020); Kristen A. Parillo, *Deluge of Tax Court Easement Petitions Continue*, 169 TAX NOTES FED. 687 (2020).

159. Kaustuv Basu, *Grassley, Wyden Want Better Answers in Land Deals Probe*, BLOOMBERG TAX (Nov. 5, 2019), https://www.bloomberglaw.com/product/tax/bloombergtaxnews/pharma-and-life-sciences/X863JF30000000?bna_news_filter=pharma-and-life-sciences#jcite; see also Kaustuv Basu, *Grassley, Wyden Issue Subpoenas in Land Deals Investigation*, BLOOMBERG TAX (Sept. 16, 2019), <https://www.bloomberglaw.com/product/tax/bloombergtaxnews/daily-tax-report/X1NGTCQS000000>; Alexis Gravely, *Grassley Backs Updated Bill to Curb Abusive Easement Deals*, 169 TAX NOTES FED. 160 (Oct. 5, 2020).

160. Press Release, U.S. Senate Comm. on Fin., Finance Committee Releases Report on Syndicated Conservation-Easement Transactions (Aug. 25, 2020), <https://www.finance.senate.gov/chairmans-news/finance-committee-releases-report-on-syndicated-conservation-easement-transactions>.

161. Press Release, Dept. of Justice, Atlanta Tax Professionals Plead Guilty to Promoting Syndicated Conservation Easement Tax Scheme Involving More than \$1.2 Billion in Fraudulent Charitable Deductions (Dec. 21, 2020), <https://www.justice.gov/opa/pr/atlanta-tax-professionals-plead-guilty-promoting-syndicated-conservation-easement-tax-scheme>.

162. See Kristin A. Parillo, *IRS Reaches First Settlement of Syndicated Easement Case*, 168 TAX NOTES FED. 1921 (2020).

163. *Id.*; Kristen A. Parillo, *Conservation Easement Suit May Not Deter Bad Actors*, 162 TAX NOTES 689 (2019); see also Daniel S. Rosen, *The IRS’s Faulty Approach to Conservation Easement Donation Valuations*, 163 TAX NOTES FED. 2007 (2019).

164. See Rettig, *supra* note 152.

continue due to limited IRS resources for enforcement.¹⁶⁵ The Joint Committee on Taxation also recently estimated a reform bill intended to curb this specific type of abusive transaction would only produce temporary results and would result in additional loopholes for investors to exploit.¹⁶⁶

Revisions to the tax code are needed to stop these high-profile abuses.¹⁶⁷ This abusive activity undermines the integrity of the provision, putting its future at risk and endangering the dedicated efforts of environmentalists and those who are honestly incentivized to place land under conservation easement protection.¹⁶⁸ Reform is needed to preserve the integrity of this deduction to ensure it continues to be a tool available for decades to come.¹⁶⁹

IV. A POLICY REFORM: REVISING THE “CONSERVATION PURPOSES” REQUIREMENT

This article does not address ways of directly handling over-valuation abuse, as this is discussed extensively in the literature.¹⁷⁰ The most effective way to address both this larger tax policy concern and widespread abuse is to require a more stringent and more definite “conservation purpose” for a charitable contribution to be eligible for the deduction.

165. Steve Dubb, *Conservation Easement Scam Proves Resilient Despite IRS Pressure*, NONPROFIT Q. (Jan. 6, 2020), <https://nonprofitquarterly.org/conservation-easement-scam-proves-resilient-despite-irs-pressure/>.

166. Kristen A. Parillo & Fred Stokeld, *Anti-Easement Bill Would Produce Temporary Results, JCT Says*, 164 TAX NOTES FED. 615 (2019); see also Fred Stokeld, *JCT Says Quashing Abusive Easement Breaks Would Raise \$6.6 Billion*, 164 TAX NOTES FED. 424 (2019); Richard Rubin, *Fiscal Debates: Senate Proposal Would Curb Land Conservation Deals – Temporarily*, WALL ST. J. (July 12, 2019), <https://www.wsj.com/articles/fiscal-debates-senate-proposal-would-curb-land-conservation-dealstemporarily-11562937027>.

167. Steven J. Small, *A Modest Legislative Proposal to Shut Down Specific Tax Shelters*, 141 TAX NOTES 1085 (2016).

168. Jay Starkman, *Conservation Easements: The 21st-Century Abusive Tax Shelter*, 82 EXEMPT ORG. TAX REV. 57, 59 (2018).

169. See, e.g., Nicholas Carson, Note, *Easier Easements: A New Path for Conservation Easement Deduction Valuation*, 109 NW. U. L. REV. 739, 753-760 (2015) (describing the many methods of easement valuations and their challenges).

170. See, e.g., McLaughlin, *supra* note 105, at 266 (providing a listing of conservation easement valuation dispute cases in the courts, largely before syndicated easement transaction cases were filed in the courts).

A. *Rewriting the Conservation Purposes Requirement*

1. *Current (lack of) case law.*

Very few cases address the “conservation purposes” requirement directly. Two influential cases from the first decade of the 21st century are the two main pieces of case law in this body of law. The author conducted a survey of case law and found only two subsequent cases that directly address the issue.

The first case, while influential, is not directly on point. In *Turner*, the Tax Court provided a clear example of an easement that did not satisfy the conservation purposes requirement.¹⁷¹ James Turner purchased property in Virginia to develop into single-family homes.¹⁷² However, half of the property was located in a recognized 100-year floodplain and could not be developed.¹⁷³ After his efforts to sell the property failed, Turner donated the floodplain portion of the property and claimed a federal income tax deduction.¹⁷⁴ The IRS challenged the deduction, and the Tax Court agreed. The Tax Court explained that the “conservation purpose” requirement was not met because the land could not have been developed.¹⁷⁵

The second case, *Glass*, is likely a reason the IRS is less likely to challenge a deduction on conservation purposes grounds. In *Glass*, a husband and wife (the Glasses) donated small portions of a ten-acre parcel located on the shores of Lake Michigan to a reputable local land trust.¹⁷⁶ The Glasses claimed a federal charitable tax deduction that the IRS subsequently challenged—arguing the easement did not meet the conservation purposes test because it did not protect habitat.¹⁷⁷ The Glasses contended the property protected eagle habitat, even though eagles did not live on the property and the land made up only a very small and fragmented piece of habitat. The Sixth Circuit ultimately sided with the Glasses.¹⁷⁸ It concluded the Tax Court did not err when giving “habitat” its plain meaning—creating a very low threshold for what type

171. See *Turner v. Comm’r*, 126 T.C. 299, 313-14 (2006).

172. *Id.* at 301-03.

173. *Id.* at 305.

174. *Id.* at 306-09.

175. *Id.* at 313.

176. *Glass v. Comm’r*, 471 F.3d 698, 702 (6th Cir. 2006), *aff’g* 124 T.C. 258 (2005).

177. *Id.* at 699.

178. *Id.* at 713.

of land qualifies as habitat.¹⁷⁹ This lower standard for habitat will likely hinder later efforts to rein in future deductions.

Since *Glass*, only two published cases have addressed this issue directly. While each case reached different results, it appears clear that only the most blatant and abusive deduction is likely to fail the conservation purposes test, and that the Tax Court will almost certainly try to reach its decision on grounds other than the conservation purposes test.

In the first case, *Irby*, the taxpayer donated an easement on ranchland in Western Colorado, along with some cash consideration, to a local land trust. The cash consideration was financed by federal, state, and local dollars from programs intended to advance land preservation. The court summarily concluded the conservation purposes test was met, in part because the relevant publicly funded agencies—the federal Natural Resources Conservation Service, Great Outdoors Colorado (a fund established by the Colorado Constitution), and the local county agency funded by taxpayer dollars—all determined the parcel met their conservation criteria.¹⁸⁰ This case shows that if the Tax Court does decide to engage with the conservation purposes requirement, a strong showing of support from conservation-based agencies will result in a favorable finding.

In the second case, *Atkinson*, the Tax Court concluded that a taxpayer's easement donation and claimed deduction did not satisfy the conservation purposes requirement. This case provided a bright line as to what would not satisfy the test.

Unlike in *Glass* or *Irby*, in which the easement under question did contain some natural lands, the land in question here was a private golf course that used heavy amounts of pesticides and chemicals.¹⁸¹ Quite simply, the land was not in its original state or even in an undeveloped state. Further, the easement clearly was not intended to protect habitat, as the easement allowed the removal of native and non-native trees, digging and dredging land to develop the golf course, and engaging in limited construction activities.¹⁸² This case also likely turned in part on the taxpayer's failure to offer evidence showing that the land was for the preservation of open space—which shifted the burden of proof to the

179. *Id.*

180. *Irby v. Comm'r*, 139 T.C. 371, 382-84 (T.C. 2012).

181. *Atkinson v. Comm'r*, 110 T.C.M. (CCH) 550, at *2 (T.C. 2015).

182. *Id.* at *8.

taxpayer.¹⁸³ The court's decision turned on incredibly fact-intensive analysis. For example, it noted there was no management plan to ensure native trees were maintained in their natural state.¹⁸⁴ The Tax Court noted that this was a developed golf course—unlike the “mostly undisturbed land” in *Glass*.¹⁸⁵

Countless other cases have raised the conservation purpose issue in briefing but have not been decided on these grounds.¹⁸⁶ The courts tend to make their decisions on other grounds such as valuation issues or the perpetuity requirement to avoid engaging with a fact-based intensive analysis of the conservation purpose issue. In addition, the IRS has often dropped their challenges on this ground to focus on other aspects.¹⁸⁷ It is likely that the IRS recognizes it faces an uphill battle to win on a conservation purposes challenge after *Glass*.

2. Legislative and executive intent.

The legislative history suggests Congress intended the deduction only to be available when an easement provided “public benefits above and beyond any potential gain to the owner.”¹⁸⁸ But the significant public benefit provision in the regulations, originally only for open space easements, has been identified and criticized as unclear and vague ever since the regulations were proposed in the early 1980s.¹⁸⁹

The legislative history of the deduction also reflects the continuing efforts of Congress and the IRS to ensure that deductibility is limited to easements that provide significant public benefit and that the potential for abuse is kept to a minimum.¹⁹⁰ Case law also supports a strengthened public benefit requirement. In 2006, the Tax Court, in the seminal *Turner*

183. *Id.* at *9.

184. *Id.* at *26-29.

185. *Id.* at *34.

186. See, e.g., *Pine Mountain Pres. v. Comm'r*, 978 F.3d 1200, 1212 (11th Cir. 2020), *aff'g in part*

151 T.C. No. 247 (T.C. 2018); *Butler v. Comm'r*, 103 T.C.M. (CCH) 1359, at *1, *24 (T.C. 2012); *Mitchell v. Comm'r*, 138 T.C. 324, 336-40 (T.C. 2012); *Comm'r v. Simmons*, 646 F.3d 6, 8-11 (D.C. Cir. 2011) (focusing on the perpetuity requirement); *PBBM-Rose Hill, Ltd. v. Comm'r*, 900 F.3d 193, 204-05 (5th Cir. 2018); *R.R. Holdings, L.L.C. v. Comm'r*, 119 T.C.M. (CCH) 1136, at *17 (T.C. 2020); *Hoffman Props. II, LP v. Comm'r*, 956 F.3d 832, 835 (6th Cir. 2020); *Oakbrook Land Holdings, LLC v. Comm'r*, 119 T.C.M. (CCH) 1352, at *17-18 (T.C. 2020).

187. See *Kiva Dunes Conservation, LLC v. Comm'r*, 97 T.C.M. (CCH) 1818 (T.C. 2009).

188. OFFICE OF TAX ANALYSIS, *supra* note 3, at 8.

189. *Select Comments – Proposed Regulations Under Section 170(h)*, 17 CONSERVATION TAX PROGRAM 17-19, 23-30 (1983).

190. OFFICE OF TAX ANALYSIS, *supra* note 3, at 4, 8.

case, explained that Congress intended to limit the deduction only to easements that created a substantial public benefit and provided enhanced benefit to the public.¹⁹¹

In addition to the legislature, presidential administrations from both parties have expressed interest in reforming the conservation purposes requirement—although neither has done more than make one-off mentions at tax law symposiums or in early drafts of budget documents. First, at a 2004 panel, Bush Administration IRS officials mentioned that reforming and clarifying the conservation purposes requirement would strengthen the integrity of the easement deduction.¹⁹² The officials did not pursue this in detail. Years later, the Obama Administration’s Treasury Department made a one-sentence suggestion to this effect in its 2016 and 2017 Greenbooks—annual initial explanations of an administration’s revenue proposal—but the Treasury did not explore it further.¹⁹³ It is unclear why this fell to the wayside. Perhaps, other budget priorities took precedent. Regardless, reforming the conservation purposes requirement has received support, even if not pursued in detail, from across the political aisle.

3. Proposal.

Congress should tighten the “conservation purposes” requirement of section 170(h). As previously discussed, the crucial “conservation purposes” requirement in section 170(h) is vague and largely undefined by Congress and the Treasury. The lack of focus on the conservation purposes test increases the negative externalities associated with both conservation easements and the deduction. Congress has left the statutory scheme essentially untouched since the legislation was enacted in 1980.¹⁹⁴ It is time to revisit the “conservation purposes” test.

As a reminder, the Code defines a conservation purpose as:

191. *Turner v. Comm’r*, 126 T.C. 299, 317 (T.C. 2006) (citing S. Rep. 96-1007, *supra* note 4, at 9-10) (“[T]he committee believes that provisions allowing deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures the committee bill would restrict the qualifying contributions where there is no assurance that the public benefit, if any, furthered by the contribution would be substantial enough to justify the allowance of a deduction.”).

192. J. Christine Harris, *Conservation Easement Donations Still a Priority, Government Officials Say*, 108 TAX NOTES 1522 (2005).

193. U.S. DEP’T OF THE TREASURY, *supra* note 140, at 215; see also Matthew R. Madara, *Treasury Seeking to Fix Conservation Easement Deduction*, 146 TAX NOTES 1213 (2015).

194. See, e.g., Jenny L. Johnson Ware, *New Executive Orders Shift Conservation Easement Battleground*, 165 TAX NOTES FED. 785 (2019).

- (i) [T]he preservation of land areas for outdoor recreation by, or the education of, the general public,
 - (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
 - (iii) the preservation of open space (including farmland and forest land) where such preservation is—
 - (I) for the scenic enjoyment of the general public, or
 - (II) pursuant to a clearly delineated Federal, State, or local governmental conservation policy,
- and will yield a significant public benefit, or
- (iv) the preservation of an historically important land area or a certified historic structure.¹⁹⁵

As the statute describes, only the preservation of open space not for scenic enjoyment is required to be aligned with a government conservation policy. Also, preservation of open space is the sole category with an explicit requirement “to yield a significant public benefit.” Congress should apply the government policy alignment and significant public benefit standards to all conservation purposes. Section 170(h)(4) should be rewritten as follows:

(4) CONSERVATION PURPOSE DEFINED:

(A): IN GENERAL—For purposes of this subsection, the term “conservation purpose” means—

- “(i) the preservation of land areas for outdoor recreation by, or the education of, the general public,
- (ii) the protection of a relatively natural habitat of fish, wildlife, or plants, or similar ecosystem,
- (iii) the preservation of open space (including farmland, forest land, and land for the scenic enjoyment of the general public), or
- (iv) the preservation of an historically important land area or a certified historic structure”

(B): DENIAL OF DEDUCTION IN CERTAIN CASES—

no deduction shall be allowed for a qualified contribution unless such preservation

195. I.R.C. §§ 170(h)(4)(A)(i)-(iv).

(i) is pursuant to a clearly delineated Federal, State, or local governmental conservation policy, and

(ii) will yield a significant public benefit.

(C) IN GENERAL—

The Secretary may promulgate regulations to implement standards to further this subsection (h)(4)(B).

This change will provide multiple benefits. First, it will further Congress' goal of encouraging a "valuable diversity of conservation accomplishments."¹⁹⁶ This will also side-step other measurements of possible conservation value, which are hard to quantify and model.¹⁹⁷ Admittedly, it is hard to place a dollar value on a piece of ecologically sensitive property by comparing it to neighboring properties. Comparison may be impossible if the habitat or natural qualities are unique and not replicated elsewhere. Finally, this proposal will also "encourage the development of conservation standards and conservation decisions at a more local level," a stated preference of those who want to reform the deduction.¹⁹⁸

This idea has been briefly mentioned by leading experts. Adam Looney of the Brookings Institution, a former Treasury official, makes a similar recommendation, but offers few details.¹⁹⁹ Conversely, an American Bar Association task force opposed the change, arguing it is overly restrictive and would reduce the number of donations.²⁰⁰ This article builds on these ideas.

It is unclear why exactly this idea has not been implemented. This requirement would likely reduce the availability of the deduction. This could make it difficult to find support in Congress, let alone a congressional champion to advocate strongly for the change. In addition, conservation organizations themselves may be opposed to the change. These groups frequently receive a profit in the form of a charitable

196. W. William Weeks et al., *ABA RPTE Conservation Easement Task Force Report: Recommendations regarding Conservation Easements and Federal Tax Law*, 53 REAL PROP. TR. & EST. L.J. 245, 245, 342 (2018).

197. See Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. ENV'T L. 1, 7 (2012) (arguing two alternative definitions of conservation value: "one based on a percentage of the fair market value of the entire property interest, and another based on a percentage of the donor's cost-basis in the property").

198. *Id.*

199. ADAM LOONEY, CHARITABLE CONTRIBUTIONS OF CONSERVATION EASEMENTS 7-8 (2017).

200. Weeks et al., *supra* note 196, at 245, 341.

donation of a portion of the deduction value in exchange for their substantial role in facilitating transactions. These fees are often a large portion of these organizations' annual budgets.

Nevertheless, this change will ensure the tax expenditure adequately results in public benefit and that tax dollars are spent on effective conservation.

B. Specific Policies to Implement this Change: Suggestions for Treasury Regulations

This article now suggests three proposals to implement this change. All three are drawn from programs in other parts of the Code. First, Congress should amend the Code and Treasury regulations to create a "Conservation Zone" program. This will identify geographic areas eligible for the deduction. Easement donations occurring within one of these geographic areas will receive a presumption of a valid conservation purpose from the IRS. The program will somewhat be modeled after the development of Opportunity Zones. Second, the IRS should create an easement advisory board, similar to the Art Advisory Panel for charitable contributions of artwork, to review easements for conservation value. The board could review donations of particularly large value or dubious purpose. Finally, the public disclosure requirements for both easement donors and holders should be strengthened. This will provide the data and transparency necessary to help ensure donations and claimed deductions result in public benefit. These changes could be implemented through Treasury regulations and are discussed in turn.

1. Creating "conservation zones": ensuring land preservation is pursuant to clearly delineated policy.

a. Overview.

In addition to requiring that deductions be pursuant to a government policy, Congress should create an *explicit* federal policy that provides clearer guidance. The Treasury regulations currently state that a "clearly delineated policy" need not be "a certification program that identifies particular lots or small parcels of individually owned property."²⁰¹ As a result, some government policies are currently quite vague.²⁰²

Congress should direct the Treasury, in consultation with other expert federal agencies, to create a registry of "conservation zones," similar to

201. Treas. Reg. § 1.170A-14(d)(4)(iii) (2020).

202. Halperin, *supra* note 61, at 42.

the recently promulgated Opportunity Zone program. The Treasury would also consult and work with state and local governments. Properties that fall within a conservation zone would be deemed “pursuant to a federal policy” and would receive a presumption of eligibility for the deduction. This would effectively create a safe harbor: any parcel falling within a zone would be deemed to meet the conservation purposes requirement. Areas outside of the zone would need to provide further justification and evidence to support their conservation purpose.

Objective standards, while a change from current policy, can provide clear guidance and also reflect the many different, valuable American landscapes. When developing the regulations in the 1980s, the Treasury declined to create more objective standards, as the “tremendous diversity” of lands in the country made a standard, nationwide policy impossible.²⁰³ Officials believed “creating an objective permissible development standard that reasonably could be applied to open space easements nationwide was impossible” in the 1980s.²⁰⁴ For example, different standards may apply in Western states and smaller New England states. The protection of parcels of few acres may be common and valuable in New England, but such a use would not be permitted or desirable in Western states.²⁰⁵ Instead, the Treasury chose to delegate much of the easement selection process to the organizations accepting donations of easements.²⁰⁶ This decentralized system results in scattered conservation and favors the needs of the landowner and organization receiving the easement rather than the American public and taxpayers.

This conservation zone system, where the federal government sets baseline standards and allows states to set more detailed criteria, can avoid this issue. It also will likely be politically palatable. By leaving much of the selection process up to state and local government and ensuring the federal government only has a limited role in selection, this change will recognize the intent of the 1980s regulations.

This reform could increase the ability of a greater number of landowners to engage in conservation work. A state could designate urban areas as part of its conservation zones, creating the opportunity for increased preservation in densely populated areas. Take, for example, landowners in urban areas who want to donate urban parcels to preserve a city’s tree canopy in order to purify air and reduce the urban heat

203. McLaughlin, *supra* note 44, at 52.

204. *Id.* at 53.

205. STEPHEN J. SMALL, *FEDERAL TAX LAW OF CONSERVATION EASEMENTS* 6-9 (1986).

206. McLaughlin, *supra* note 44, at 52.

effect.²⁰⁷ These individuals may be disincentivized by the limited tax benefits available to them without clear direction from a program such as the conservation zone system. A clear signal that their activity would be permitted by the IRS would provide a strong incentive for them to participate in conservation activities.

In addition, this reform would limit the likelihood of taxpayers claiming deductions for properties such as golf courses. Conservation zone criteria could severely restrict or prohibit unnatural areas such as golf courses from eligibility.

b. *Precedent for geographic restrictions for easement deductions.*

Precedent exists for imposing geographic restrictions for the tax treatment of easements. As originally enacted, the estate tax exclusion under section 2031(c) was available only with respect to land located in or within twenty-five miles of a metropolitan statistical area, national park, or wilderness area, or within ten miles of an urban national forest.²⁰⁸ This restriction stayed in place for many years.²⁰⁹ It was intended to ensure the deduction went only to the preservation of ecologically significant land or lands at risk due to urban sprawl and development.²¹⁰

Explicit geographic restrictions currently exist for deductions for the contribution of easements protecting historic areas. The Code only permits deductions for historic structures listed in the National Register or located in a certified historic district.²¹¹ A deduction for the donation of an easement protecting a certified historic structure is allowed only for buildings, structures, or land areas listed in the National Register or located in a registered historic district.²¹² All certified historic structures cannot be eligible for deduction until the Secretary of the Interior certifies to the Secretary of the Treasury that the property is of historic significance to the district. Historic districts, created in the National Historic Preservation Act of 1966, “coordinate and support public and private efforts to identify, evaluate, and protect America’s historic and

207. See Hazel Trice Edney, *Georgia’s Environmental Progress Hangs in the Balance amid Senate Inquiry*, ATLANTA VOICE (Aug. 15, 2019), <https://www.theatlantavoice.com/articles/georgias-environmental-progress-hangs-in-the-balance-amid-senate-inquiry>; see also Ramsey Nix, *Saving the City in the Forest*, ATLANTA MAG. (Sept. 23, 2018), <https://www.atlantamagazine.com/news-culture-articles/saving-the-city>.

208. McLaughlin, *supra* note 44, at 17; see also I.R.C. § 2031(c)(8)(A)(i) (1997).

209. McLaughlin, *supra* note 44, at 17; I.R.C. § 2031(c)(8)(A)(i) (1997).

210. LINDSTROM, *supra* note 85, at 214-15.

211. I.R.C. §§ 170(h)(4)(C)(i)-(ii).

212. I.R.C. § 170(h).

archeological resources.”²¹³ This policy for historic preservation easements could be illustrative in developing a geographic-based conservation easement system.

Finally, the states have also permitted geographic restrictions in their easement credit programs. For example, in 1975, a Suffolk County, New York program authorized certain geographic benchmarks when it allowed deductions for the protection of parcels adjacent to or contiguous with previously preserved properties.²¹⁴ Other states have used geographic restrictions as well.

c. Comparison to opportunity zones.

Opportunity Zones are designated through a combination of federal and state action. Investors receive tax benefits, in the form of deferral and partial exclusion of tax, by investing in a Qualified Opportunity Fund, which then invests in areas designated as Qualified Opportunity Zones.²¹⁵

While the federal government set initial standards, state governments ultimately made Opportunity Zone selections. A census tract is eligible for designation as a Qualified Opportunity Zone if it satisfies the New Market Tax Credit Program’s definition of a “low-income community.”²¹⁶ The Treasury Department determined that more than 41,000 census tracts were eligible for designation as a Qualified Opportunity Zone.²¹⁷

Code section 1400Z-1 permits the governor of each state to nominate a limited number of eligible census tracts to be Qualified Opportunity Zones.²¹⁸ Governors could nominate up to 25% of eligible tracts.²¹⁹ Up to 5% of nominated tracts could be contiguous to low-income tracts, provided the median family income of the tract does not exceed 125% of the median family income of the neighboring tract.²²⁰ A total of 8,762

213. *National Register of Historic Places*, NAT’L PARK SERV. (Aug. 15, 2019), <https://www.nps.gov/subjects/nationalregister/index.htm>.

214. Roddewig, *supra* note 29, at 681; *see also* RICHARD J. RODDEWIG & CHERYL A. INGHAM, TRANSFERABLE DEVELOPMENT RIGHTS PROGRAMS: PLANNING ADVISORY SERVICE REPORT NUMBER 401, at 6-8 (1987).

215. STAFF OF JOINT COMM. ON TAXATION, 116TH CONG., QUALIFIED OPPORTUNITY ZONES: AN OVERVIEW (2019), *available at* <https://www.jct.gov/publications.html?func=startdown&id=5201>.

216. I.R.C. § 1400Z-1(c)(1).

217. Rev. Proc. 2018-16, 2018-9 I.R.B. 383 (2018).

218. I.R.C. § 1400Z-1; *see also* Rev. Pro. 2018-16.

219. I.R.C. § 1400Z-1(d)(1); *see also* Rev. Pro 2018-16.

220. I.R.C. § 1400Z-1(e).

tracts were designated in total.²²¹ Only 2.6% of all designated tracts were contiguous.²²² The legislation did not create a way to modify or propose new tracts for inclusion as areas evolve over time.²²³

This tool is undoubtedly imprecise. Some designated areas clearly do not satisfy the spirit of the legislation. For example, in Minnesota, the Mall of America and the booming district surrounding it, located in a wealthy Minneapolis suburb, is one of the state's 128 designated zones.²²⁴ Also, early beneficiaries of the tax incentive include billionaires and wealth financiers, including those close to the administration that promulgated the rules.²²⁵ Finally, the program has been criticized for using outdated census data, resulting in areas no longer considered low-income being designated.²²⁶ However, it may serve as a useful model for environmental conservation. Unlike the built environment and urban areas, the characteristics of natural land are less likely to change rapidly or be subject to complex human forces such as redevelopment and gentrification. With the exception of phenomena such as natural disasters, changes to the natural environment are likely to occur at slower rates than in the built environment.

d. *Mechanics of designating conservation zones.*

A similar selection system of granting eligibility to defined geographic areas could be used in the conservation easement context. While census tracts would be impractical, expert government agencies can rely on a wide variety of resources to establish baseline eligibility metrics, and then delegate the selection of state-specific geographic areas to governors or other state executives.

First, federal agencies can use geographic information software (GIS) and large landscape datasets to identify general regions, biological attributes, or other criteria that warrant protection. GIS is a proven and effective tool to identify and plan for the protection of ecologically

221. BRETT THEODOS ET AL., DID STATES MAXIMIZE THEIR OPPORTUNITY ZONE SELECTIONS? 2 (2018).

222. *Id.*

223. *Id.*

224. Eric Roper, *Tax break for poor areas boosts Mall of America District*, MINNEAPOLIS STAR TRIB., (Jan. 7, 2019), <https://www.startribune.com/tax-break-for-poor-areas-boosts-mall-of-america-district/503952002/>.

225. See Jesse Drucker & Eric Lipton, *How a Trump Tax Break to Help Poor Communities Became a Windfall for the Rich*, N.Y. TIMES (Aug. 31, 2019), <https://www.nytimes.com/2019/08/31/business/tax-opportunity-zones.html>.

226. Stephanie Cumings, *Wyden and Dems Launch Multi-Pronged Crackdown on O-Zones*, 165 TAX NOTES FED. 1023 (2019).

sensitive land, and to balance competing priorities of species, human needs, and local economies.²²⁷ GIS has transformed land use and protected area planning and assessment and should be applied to easement planning.²²⁸

Readily available data sets developed by expert government agencies such as the Department of Agriculture's National Agricultural Statistics Survey Cropland Data Layer and the United States Geological Survey's National Landcover Database can provide objective measurements and criteria.²²⁹ Also, the Fish and Wildlife Service is uniquely suited for this analytical responsibility given its role in reviewing habitat conservation plans under the Endangered Species Act.²³⁰ These programs provide credibility, decades of expertise, and relationships with local partners and landowners—as well as formidable levels of funding.

Implementing agencies can also look to criteria established by competitive matching grant programs such as the Forest Service's Forest Legacy Program, which conserves forest lands to protect water quality, habitat, outdoor recreation, and other benefits.²³¹ The program has protected more than 2.8 million acres of land since 1990.²³² It uses a combination of objective and subjective criteria.²³³

Federal agencies could then look to state governments to add in criteria on a state-by-state basis, or punt decision making entirely to the states, to ensure the program best fits state needs. For example, federal agencies could incorporate state natural heritage programs to help

227. See, e.g., DIANE L. SZAFONI ET AL., ILL. NAT. HIST. SURV., DEVELOPMENT OF A NATURAL AREAS INTEGRITY AND RESTORABILITY INDEX AND APPLICATION TO LANDS OF THE CHICAGO REGION 3 (2011), https://www.inhs.illinois.edu/files/8113/4021/9464/Landscapes_of_Ecological_Integrity_Final_Report-Part1.pdf (explaining use of these two data sets in Illinois).

228. See Adena R. Rissman et al., *Private Organizations, Public Data: Land Trust Choices about Mapping Conservation Easements*, 89 LAND USE POL'Y 104221, 104221 (2019); see also Morris & Rissman, *supra* note 8, at 1270 (noting "GIS and online user-friendly applications like Google Earth create new possibilities" for easement oversight).

229. See, e.g., SZAFONI ET AL., *supra* note 227, at 3.

230. See, e.g., Jessica Owley, *Keeping Track of Conservation*, 42 ECOLOGY L.Q. 79, 97 (2015) (discussing how the Habitat Conservation Plan handbook under the Endangered Species Act lists conservation easements as a method for mitigating habitat loss).

231. *Forest Legacy Program*, U.S. FOREST SERV., <https://www.fs.fed.us/managing-land/private-land/forest-legacy> (last visited May 4, 2021); William T. Hutton & Walter T. Moore, *Easements in the Wake of Catastrophe: The Legal Fallout*, 1 BACK FORTY 1, 7 (1991).

232. U.S. FOREST SERV., *supra* note 231.

233. *Forest Legacy Program, 2019 Project Scoring Guide*, U.S. FOREST SERV., <https://www.fs.fed.us/sites/default/files/fy-2019-flp-project-scoring-guidance-508c.pdf> (last visited May 4, 2021).

determine what would provide a significant public benefit in a particular state.²³⁴

State officials could also consult with local government agencies or local non-profit land trusts that develop land acquisition plans with targeted high-value properties. Most of these organizations use the conservation easement as their primary, and often sole, vehicle to protect natural land.²³⁵ Land trusts and local governments are often in the best position to know of sensitive parcels and have relationships with the local community. A conservation zone program could leverage expertise from these organizations.

States already use similar selection systems for their own conservation activity. Federal and state officials can look to systems already in place. Virginia is instructive.²³⁶ The Virginia Natural Landscape Assessment is a “landscape-scale geospatial analysis for identifying, prioritizing, and linking natural lands.”²³⁷ The Assessment uses over fifty attributes, emphasizing nine, to prioritize areas by ecological integrity.²³⁸ The Assessment is used to “identify targets for protection activities such as conservation land purchases or easements.”²³⁹ Virginia also maintains a comprehensive natural heritage inventory.²⁴⁰

Similarly, Illinois maintains an inventory of natural areas. The Illinois Natural Areas Inventory is a central location on “significant natural areas” within the state and consists of property that is both publicly and privately owned.²⁴¹ The original list, which included 1,085 areas, was populated in

234. Garrett, Kemble Hagerman, *Conservation Easements: The Greening of America?*, 73 KY. L.J. 255, 266 n.52 (1984).

235. Young, *supra* note 103.

236. Virginia has a tax credit program for the donation of conservation easements. See *Land Preservation Tax Credit*, VA. DEP’T OF CONSERVATION & RECREATION (Jan. 9, 2019), <https://www.dcr.virginia.gov/land-conservation/lpc>. Virginia law provides a credit for 40% of the value; taxpayers may use up to \$20,000 per year (\$50,000 per year starting in 2022), and tax credits may be carried forward for up to 13 years or sold. Its easements are generally funded by and held by state organizations. *Id.*

237. Joe Weber, *Virginia Natural Landscape Assessment*, VA. DEP’T OF CONSERVATION & RECREATION (July 2018), <https://www.dcr.virginia.gov/natural-heritage/vaconvisvnl>.

238. *Id.*

239. *Id.*

240. *Natural Areas Inventory*, VA. DEP’T OF CONSERVATION & RECREATION (Mar. 9, 2019), <https://www.dcr.virginia.gov/natural-heritage/inventory>.

241. See, e.g., DIANE L. SZAFONI, ILL. NAT. HIST. SURV., RE-EVALUATION OF EXISTING CATEGORY I ILLINOIS NATURAL AREAS INVENTORY AREAS (2012), https://www.ideals.illinois.edu/bitstream/handle/2142/45937/INHS2012_36.pdf; see also SZAFONI ET AL., *supra* note 227.

1978.²⁴² A comprehensive update occurred in 2010.²⁴³ The state uses a combination of field studies and GIS datasets to analyze nominations.²⁴⁴ This program provides government agencies engaged in land preservation with knowledge of key lands and corridors to target for acquisitions and protection.²⁴⁵ Finally, a number of states limit their easement tax credits to the protection of certain types of resources.²⁴⁶ The success of these state-level programs, which enjoy popular and legislative support across gubernatorial administrations, suggests a state-by-state system is not just possible but politically feasible.²⁴⁷

e. *Conservation zones are consistent with successful cooperative federalism programs in the environmental arena.*

Implementing a system of conservation zones will be consistent with principles of cooperative federalism, and will promote innovation by further shifting responsibility to state and local policymakers. In a system of cooperative federalism, the federal government delegates authority to the states to implement a federally created and funded program.²⁴⁸ Cooperative federalism is the system of choice for many of the nation's environmental protection laws. These laws provide a structure under which the federal government sets standards and the states may draft laws and regulations to comply.²⁴⁹

Environmental cooperative federalism is also an effective approach in land use—an area where political sensitivities around direct federal regulation on the states and local government is quite high.²⁵⁰ Cooperative federalism is best when it fulfills a broad national policy by supplementing federal power with the energy, technical expertise, and

242. *Illinois Nature Preserves: Illinois Natural Areas Inventory*, UNIV. OF ILL. LIBR. (Dec. 2, 2019), <https://guides.library.illinois.edu/illinoisnaturepreserves/inai>.

243. *Id.*

244. See, e.g., SZAFONI, *supra* note 241.

245. SZAFONI ET AL., *supra* note 227.

246. See Christen Linke Young, *Conservation Easement Tax Credits in Environmental Federalism*, 117 YALE L.J. POCKET PART 218 (2008) (providing a survey of states with state-level easements providing deductibility to only properties that protect certain aspects deemed valuable by the state).

247. See Young, *supra* note 246 (“[C]onservation tax credits are politically viable even among constituencies that do not traditionally embrace environmental goals.”).

248. Dave Owen, *Cooperative Subfederalism*, 9 U.C. IRVINE L. REV. 177, 177 (2018).

249. Will Reisinger et al., *Environmental Enforcement and the Limits of Cooperative Federalism: Will Courts Allow Citizen Suits to Pick Up the Slack*, 20 DUKE ENV'T L. & POL'Y F. 1, 2 (2010).

250. R. V. Percival, *Symposium - Environmental Federalism: Historical Roots and Contemporary Models*, 54 MD. L. REV. 1141, 1173 (1995).

trust of local governments.²⁵¹ For those reasons, it makes sense in the context of land conservation: local actors know their landscapes, development priorities, and public use priorities much better than distant federal officials.

Conservation zones would likely serve as a successful instance of cooperative sub-federalism, where the state governments in turn delegate authority to local government agencies.²⁵² Cooperative sub-federalism, exemplified by states delegating to local county agencies the selection of important natural areas, has proven effective in land use and air quality governance.²⁵³ It also allows both federal and state governments to be sensitive to politically fraught issues—such as land use—where priorities and tension points may vary from community to community.²⁵⁴ For this reason, cooperative sub-federalism is good politics that can draw support from a wide cross-section of legislators and political views. And it allows the federal government to claim credit for presenting a solution to a major issue—the need to protect ecologically sensitive lands.

2. *Creation of an easement advisory panel to ensure significant public benefit.*

Next, this article proposes a renewed examination of creating an expert easement advisory panel. This expert panel could help ensure deductions provide a significant public benefit.

The panel would review donations over a certain dollar threshold for valid conservation purpose. Like the proposal for a more stringent conservation purpose, this is not a new idea. The Treasury Department briefly considered implementing such a panel in 1987, but did not seriously pursue the idea.²⁵⁵ Counsel for the Senate Finance Committee also suggested the idea of an oversight committee similar to the IRS Art Advisory Panel as early as 2005.²⁵⁶ But again, this was a cursory, one-off suggestion. Still, an easement advisory panel could assist the IRS by assessing which claimed deductions provide substantial conservation value, and which ones do not.²⁵⁷

251. Samuel Mermin, "Cooperative Federalism" Again: State and Municipal Legislation Penalizing Violation of Existing and Future Federal Requirements, 57 YALE L.J. 1, 1 (1947).

252. Owen, *supra* note 248, at 180.

253. *See id.* at 177.

254. *Id.* at 183.

255. McLaughlin, *supra* note 44, at 89.

256. Fred Stokeld, *Senators Go Easy In Questioning of Nature Conservancy Chief*, 107 TAX NOTES FED. 1333, 1351 (2005).

257. *Id.*

This panel could be modeled after a successful panel for reviewing charitable contributions of artwork. The IRS Art Advisory Panel issues statements of value for items appraised at \$50,000 or more.²⁵⁸ This panel ensures the fair market value for art claimed by taxpayers, which, like conservation land, can be difficult to value.²⁵⁹ A group of volunteer, expert appraisers conducts an appraisal.²⁶⁰ Donors must submit detailed information about the artwork.²⁶¹ The panel is extremely successful: it has allowed donors and Commissioners to agree on value in more than 95% of cases handled.²⁶²

An easement advisory panel could emulate the Art Advisory Panel. The conservation community is mildly receptive to this idea, but it has not gained traction. Senators Christopher Murphy and Richard Blumenthal endorsed a similar idea in 2016 in a letter to the IRS Commissioner, but provided no follow up or discussion beyond the letter and an associated press release.²⁶³ Senators Murphy and Blumenthal urged the Commissioner to handle easement disputes in a manner similar to the Art Advisory Panel by creating an “analogous panel” for the donation of conservation easements.²⁶⁴ This solution has not gained enough traction to be enacted. More study, both from lawmakers and from scholars, is needed to bring this across the finish line. It is also likely that a Democrat-controlled Congress, and in particular a Democrat-controlled Senate Finance Committee, will provide the initiative to make this happen.

A taxpayer advocate organization, not affiliated with the land conservation movement, viewed this as a “workable proposal.”²⁶⁵ Similarly, one prominent, national independent tax lawyer described this as a “fine idea.”²⁶⁶ Adam Looney of the Brookings Institution goes a step further and suggests requiring pre-approval or review of easements in order to qualify for the tax deduction.²⁶⁷ Finally, an IRS advisory panel made such a suggestion, albeit only for historic preservation easements,

258. Rev. Proc. 96-15, 1996-1 C.B. 627.

259. *Art Appraisal Services*, INTERNAL REVENUE SERVICE (Nov. 25, 2019) <https://www.irs.gov/appeals/art-appraisal-services>.

260. Rev. Proc. 96-15, 1996-1 C.B. 627.

261. *Id.*

262. Murphy & Blumenthal, *supra* note 12.

263. Kristen A. Parillo, *Conservation Easement Groups Divided on Tackling Valuation Abuse*, 163 TAX NOTES 316 (2019).

264. Murphy & Blumenthal, *supra* note 12.

265. Parillo, *supra* note 263; see also PETE SEPP, NAT'L TAXPAYERS UNION, SHORTSIGHTED: HOW THE IRS'S CAMPAIGN AGAINST CONSERVATION EASEMENT DEDUCTIONS THREATENS TAXPAYERS AND THE ENVIRONMENT 20 (2018).

266. Small, *supra* note 167, at 1093.

267. LOONEY, *supra* note 116, at 35.

in 2017.²⁶⁸ Perhaps a symposium, panel, or IRS conference could bring the thought leaders and policy makers together to make progress and implement this reform.

Such a move could be unpopular. It would require additional government oversight. It would also require more funding for the IRS, which seems unlikely given the whittling away of the IRS budget and infrastructure over the years.²⁶⁹ It would also create additional regulation and administration. Indeed, these reasons contributed to the lack of political will to create an advisory panel from 2010 through 2020.²⁷⁰

However, on the other hand, it could be considered more popular now that the Democratic Party controls the White House and Congress. Senator Ron Wyden of Oregon is the new Chair of the Senate Finance Committee, which oversees easement investigations, the tax code, and the IRS. Senator Wyden has long been an advocate of providing greater accountability for easements.²⁷¹ Perhaps more importantly, this new apparatus would result in substantial savings to the federal government and federal taxpayers, as many studies show that increased IRS funding will bring in more tax revenue.²⁷²

Despite these concerns, the panel could operate efficiently while assuaging concerns of increased government administration. The easement advisory panel could emulate the Art Advisory Panel by selecting volunteer easement appraisers, or paying them a low fee, and

268. INTERNAL REVENUE SERV. ADVISORY COUNCIL, INTERNAL REVENUE SERV., 2009 GENERAL REPORT (2009).

269. KATHLEEN BURKE & SHANNON MOK, CONG. BUDGET OFF., TRENDS IN THE INTERNAL REVENUE SERVICE'S FUNDING AND ENFORCEMENT (2020); Paul Kiel & Jesse Eisinger, *How the IRS Was Gutted*, THE INTERCEPT (Dec. 11, 2018, 5:00 AM), <https://www.propublica.org/article/how-the-irs-was-gutted>; Andrew R. Roberson & Kevin Spencer, *IRS Funding Woes Realized? Audit Rate at 15 Year Low!*, NAT'L L. REV. (Mar. 30, 2018), <https://www.natlawreview.com/article/irs-funding-woes-realized-audit-rate-15-year-low>; STAFF OF H. COMM. ON THE BUDGET, 117TH CONG., FUNDING THE IRS PAYS OFF: PREVENTING TAX DODGING BY WEALTHY FILERS IS THE FIRST STEP TO FIXING OUR TAX CODE (2020).

270. Scott Horsley, *On Tax Day, the IRS is Short of Money*, NPR (Apr. 15, 2019, 7:28 AM), <https://www.npr.org/2019/04/15/713411490/on-tax-day-the-irs-is-short-of-money>; DEBOT ET AL., CTR. ON BUDGET AND POL'Y PRIORITIES, TRUMP BUDGET CONTINUES MULTI-YEAR ASSAULT ON IRS FUNDING DESPITE MNUCHIN'S CALL FOR MORE RESOURCES (2017).

271. Asha Glover, *Grassley, Wyden Follow up on Conservation Easement Probe*, TAX NOTES TODAY FED. (June 11, 2019), <https://www.taxnotes.com/tax-notes-today-federal/partnerships-and-other-pass-through-entities/grassley-wyden-follow-conservation-easement-probe/2019/06/11/29ln0>.

272. Janet Holtzblatt, *How Much More Money Could The IRS Collect If Congress Gave Them More Money?*, TAX POL'Y CTR., (Sept. 28, 2020), <https://www.taxpolicycenter.org/taxvox/how-much-more-money-could-irs-collect-if-congress-gave-them-more-money>; STAFF OF H. COMM ON THE BUDGET, *supra* note 269.

asking for commitments of just one to two years.²⁷³ Serving on the Art Advisory Panel is considered a prestigious role; such a position would likely be similarly prestigious in the conservation community.²⁷⁴

The Treasury Department, in collaboration with the Senate Finance Committee, could also create benchmarks and parameters that limit the types of easements eligible for review. For example, a dollar threshold could exempt all deductions under a certain amount from review. Or regulations could direct the panel to focus its attention on deduction claims for specific types of property, such as golf courses. In addition, the rules could trigger mandatory review for deductions where taxpayers meet criteria such as owning the property for a relatively short period of time, which may suggest an intent to create a tax shelter. Additional criteria could include status as a limited liability company, partnership, or other non-human entity, or if the terms of the easement allow significant development on the property. The IRS could administer these criteria by adding questions to its existing forms. Finally, the new rules could create a statute of limitations and only permit the panel to review deductions within three years of the date when they are claimed, ensuring that taxpayers, land trusts, and the communities that benefit from an easement would have a sense of security that their easement and deduction could not be reviewed many years down the line. The Secretary of the Treasury should develop standards for donations that must receive approval, such as a minimum dollar threshold.

The easement advisory panel would also fit within the existing framework of substantiating charitable donations. The tax code provides an existing framework for requiring taxpayers to substantiate charitable donations. Different requirements, such as documentation and appraisal, are required for contributions in excess of \$500, \$5,000, and \$500,000.²⁷⁵ The easement advisory panel could be incorporated within this framework such that panel review is required for easement deductions in excess of the minimum dollar threshold.

Easements that are approved by the panel will receive a safe harbor from further IRS scrutiny. In tax law parlance, a “safe harbor” means that a taxpayer will not be subject to penalty if they meet certain criteria. Safe

273. Rica Zeitoune, *Spotlight: The IRS Art Advisory Panel*, CTR. FOR ART L. (June 6, 2019), <https://itsartlaw.org/2019/06/06/spotlight-irs-art-advisory-panel/>.

274. Glenn Dixon, *The Secretive Panel of Art Experts that Tells the IRS How Much Art is Worth*, WASH. POST (Dec. 6, 2017), https://www.washingtonpost.com/lifestyle/magazine/the-secretive-panel-of-art-experts-that-tells-the-irs-how-much-art-is-worth/2017/12/06/a8bd9dec-a3aa-11e7-8cfe-d5b912fab99_story.html.

275. I.R.C. §§ 170(f)(8)-(11).

harbors often protect individual taxpayers and small businesses who in good faith slightly underestimate their tax withholdings and pay the vast majority of the amount of tax.²⁷⁶ A safe harbor is likely a good idea given the complicated nature of valuating easements.²⁷⁷

Similar programs are successful at the state level. Multiple states require pre-approval of easement donations before claiming a state-level tax deduction. For instance, in Colorado, following reports of abuse in the state-level program, the state now implements an effective oversight and audit process to ensure tax credit applications further the state's intended purpose of the program.²⁷⁸ The Conservation Easement Oversight Commission screens potential donations prior to issuing a credit in its easement tax credit program.²⁷⁹ A similar process occurs in Georgia.²⁸⁰ These oversight programs require little public expenditure and provide a large payoff in terms of both building public trust and confidence and saving potentially lost tax dollars.

Other states with state income tax credits for easement donations also explicitly require the taxpayer to show a benefit. For example, in Florida, there is a presumption against such benefit for parcels under forty acres in size; such parcels must be reviewed by the state's Acquisition and Restoration Council.²⁸¹ Other states, including Virginia and New Mexico, require certification of conservation purpose and value.²⁸² In Virginia, easements valued at more than \$1 million must be reviewed by a state-affiliated committee established by law.²⁸³ Similarly, in New Mexico, state law requires credits to be approved by the Secretary of the Department of Energy, Minerals and Natural Resources, who must consult with the Natural Lands Protection Committee, which consists of

276. See, e.g., I.R.C. §§ 164, 6555.

277. Kristen A. Parillo, *Conservation Easement Safe Harbor May Allow Compromise*, 167 TAX NOTES FED. 931, 1071 (2020).

278. DEP'T OF REGUL. AGENCIES, COLO. OFF. OF THE STATE AUDITOR, CONSERVATION EASEMENT TAX CREDIT PROGRAM, AFTER CHANGES IN 2014, at 11 (2016), https://leg.colorado.gov/sites/default/files/documents/audits/1561p_conservation_easement_tax_credit_program_0.pdf.

279. See *Conservation Easement Oversight Commission & Workgroups*, COLO. DEP'T OF REGUL. AGENCIES, <https://conservation.colorado.gov/conservation-easement-oversight-commission-workgroups> (last visited Apr. 10, 2021).

280. GA. COMP. R. & REGS. 391-6-.04 (2021).

281. *Conservation Easements on Properties Containing Fewer than 40 Acres*, FLA. DEP'T OF ENV'T PROTECTION (Oct. 24, 2019), <https://floridadep.gov/lands/environmental-services/content/conservation-easements-property-containing-fewer-40-acres>.

282. LOONEY, *supra* note 116, at 35 (listing examples of states with these programs).

283. *Land Preservation Tax Credit*, VA. DEP'T OF CONSERVATION & RECREATION, <https://www.dcr.virginia.gov/land-conservation/lp-taxcredit> (last visited Apr. 10, 2021).

a number of public officials, such as the Commissioner of Public Land and the Director of the Game and Fish Department.²⁸⁴

Given the support from tax experts and the existence of state-level plans, this is a workable solution to ensure the tax expenditure promotes effective conservation. It also provides substantial benefit by leveraging the knowledge of local officials—those who know the most about the land—with the simultaneous advantage of avoiding direct responsibility and allegations of government overreach.²⁸⁵ And perhaps most importantly, it provides political cover for lawmakers.²⁸⁶ Drawing inspiration from state processes will also leverage the desire of environmentalists to increasingly turn to local and state efforts to protect the natural environment.²⁸⁷

3. *Increased public disclosure of easement data through the tax code to measure conservation value.*

Congress should require more public disclosure from both easement donors and the organizations holding easements. Although conservation easements are widely known, the conservation outcomes of the properties are relatively unknown.²⁸⁸ Current IRS oversight is minimal and inquiries rarely look into specific land protection activity.²⁸⁹ Adding additional disclosure requirements for conservation purposes would abide with the spirit of this regulation. Most qualified conservation organizations, and any truly committed to conservation, would have this information readily available, as they would use it as part of their decision-making process when choosing whether to pursue a project. The easement deduction universe needs major changes to provide the public with greater access to information, in part to allow for citizen oversight and increased accountability.²⁹⁰

284. *Land Conservation Tax Credits*, N.M. FORESTRY DIV., <http://www.emnrd.state.nm.us/SFD/LandConservationTaxCredit.html> (last visited Apr. 10, 2021); N.M. Stat. Ann. § 75-5-4 (West 2019).

285. Owen, *supra* note 248, at 195.

286. *Id.* at 195 (“[C]ooperative federalism regimes can allow legislators to duck thorny policy conflicts.”).

287. Young, *supra* note 246.

288. Adena R. Rissman, *supra* note 45, at 145 (“Despite the widespread use of conservation easements, their outcomes are relatively unknown.”); *see also* Morris and Rissman, *supra* note 9, at 1241 (“[T]here is a major disjuncture between the large, diffuse public costs of conservation easements, and the much smaller scales at which data about conservation easements are compiled.”).

289. McLaughlin, *supra* note 44, at 61; *see also* Susan N. Gary, *Regulating the Management of Charities: Trust Law, Corporate Law, and Tax Law*, 21 U. HAW. L. REV. 593, 620 (1999).

290. *See* Morris & Rissman, *supra* note 9, at 1281 (Major changes are needed to provide greater public access to information through comprehensive tracking systems.”).

Increased disclosure requirements for conservation purposes will put more information out in the open. Most oversight of conservation activity comes from the donors that finance land trusts with funds to finance ongoing operations.²⁹¹ Increased disclosure would provide these individuals with greater information about their donations and create further oversight. Finally, this will increase the amount of information available to journalists, who provide crucial oversight of easement activity.²⁹²

Implementation could come in the form of requiring both the donor and qualifying organization to publicly disclose both easement value and specific conservation benefits. This proposal will strengthen tax administration. Again, increasing disclosure of purported conservation benefits is not a new idea. The Obama Administration previously introduced this idea in an early draft budget document but did not explore it in detail as competing budget reform priorities prevailed.²⁹³ The sole published criticism of this additional requirement comes from industry insiders and attorneys who benefit from working on a high volume of easement transactions, parties with strong conflicts of interest.²⁹⁴

Increased public disclosure will create greater citizen engagement and oversight, as well as opportunities for government enforcement, since “more public disclosure prevents people from gaming the system with charitable contribution deductions and playing the audit lottery.”²⁹⁵ Many easements simply restate the language of the tax code, rather than providing useful information about the actual property.²⁹⁶ Such regurgitation is not useful.

Increased public disclosure will allow journalists to provide better oversight. The news media provide important oversight on easements. For example, the *Washington Post* broke stories on the first easement tax shelter in the early 2000s, where it held The Nature Conservancy to the fire and helped ensure that a respected conservation organization reformed its practices.²⁹⁷ And from 2017 to 2020, the *Wall Street Journal*

291. McLaughlin, *supra* note 44 at 61.

292. See Morris & Rissman, *supra* note 9, at 1246 (explaining how the “[l]ack of tracking drastically curtails the ability for public-policy analysts to evaluate the costs and benefits of conservation easements.”)

293. U.S. DEP’T OF THE TREASURY, *supra* note 140, at 215-16.

294. Weeks et al., *supra* note 196, at 341 (arguing the requirement would be “ambiguous and redundant”).

295. Matthew A. Madara, *No Surprises Seen in Disallowed \$33 Million Charitable Deduction*, 156 TAX NOTES 435 (2017).

296. Rissman, *supra* note 45, at 153.

297. See, e.g., Joe Stephens, *Overhaul of Nature Conservancy Urged*, WASH. POST (Mar. 31,

provided groundbreaking reporting on both high-profile instances of easement abuse, and the current syndicate transaction tax shelter scheme.²⁹⁸

Reforms to existing IRS reporting mechanisms could serve as the method for providing this information. This could crack down on massive deductions with little conservation benefit, as well as easement donations that provide conservation value but also provide a completely disproportionate deduction. The apparatus for collecting this information already exists. The IRS requires donors to file Form 8283, "Noncash Charitable Contributions," to substantiate their charitable donations.²⁹⁹ Congress and the Treasury could require donors to provide more detailed information when claiming easement donations.

Similarly, the IRS requires charitable organizations such as land trusts receiving conservation easements to file Form 990, "Return of Organization Exempt from Income Tax."³⁰⁰ The Treasury could require qualified conservation organizations to provide a more detailed accounting of the ecological, public access or recreation, or other benefits of property received. The Senate Finance Committee staff previously endorsed revising Form 990, but Congress never followed through on the idea.³⁰¹ The recipient organization also must sign Form 8283.³⁰² This could also be modified. The form currently says "acknowledgement does not represent acknowledgment with claimed [full market value]."³⁰³ This could be modified to state that the donee organization does not find that the claimed full market value shocks the conscience or raises other alarm bells. These simple changes to existing IRS reporting requirements could greatly increase the amount of disclosure and public information available

2004), <https://www.washingtonpost.com/archive/politics/2004/03/31/overhaul-of-nature-conservancy-urged/b3aad95f-6acf-4e27-ba7c-6b15ff3dc0ef/>; Joe Stephens & David Ottaway, *Nature Conservancy Suspends Land Sales*, WASH. POST (May 13, 2003), <https://www.washingtonpost.com/archive/politics/2003/05/13/nature-conservancy-suspends-land-sales/ccd75a02-7f0b-4f31-8209-85640b4b42eb/>.

298. Journal reporter Richard Rubin has provided excellent reporting on this issue for years. See, e.g., Richard Rubin, *Senate Report Slams Land-Conservation Tax-Break Deals*, WALL ST. J. (Aug. 25, 2020, 2:47 PM), <https://www.wsj.com/articles/senate-report-slams-land-conservation-tax-break-deals-11598371269>.

299. *Instructions for Form 8283*, INTERNAL REVENUE SERV., <https://www.irs.gov/instructions/i8283> (last visited May 23, 2021).

300. *Exempt Organization Annual Filing Requirements Overview*, INTERNAL REVENUE SERV., <https://www.irs.gov/charities-non-profits/exempt-organization-annual-filing-requirements-overview> (last visited May 23, 2021).

301. *The Tax Code and Land Conservation: Report on Investigations and Proposals for Reform: Hearing Before the S. Comm. on Finance*, 109th Cong. 9 (2005).

302. INTERNAL REVENUE SERV., *supra* note 299.

303. *Id.*

on deductions claimed for donations of easements.

Such a proposal to place greater responsibility on the recipient charity would need to be narrowly tailored. In 2006, concerned with fraudulent easement deductions, the George W. Bush Administration proposed imposing significant financial penalties, based in proportion to the easement value, on charitable organizations that accepted faulty easements or did not monitor them.³⁰⁴ This proposal stalled and ultimately failed, in part due to concerns that it was overly broad and could inadvertently punish too many organizations.³⁰⁵ Similar concerns here are also valid, as the proposal could prove challenging for some recipient organizations, especially smaller ones, to comply with.

Finally, to improve this process, lawmakers again could turn to the process for information collection and reporting on Opportunity Zones. The IRS is currently developing methods to track Opportunity Zone benefits.³⁰⁶ Republican and Democrat lawmakers are crafting bipartisan legislation to increase reporting of metrics, as well as to create a process to eliminate zones that are not considered low-income.³⁰⁷ Similarly, conservation zone metrics can eliminate zones that no longer provide conservation purposes and ensure protected properties provide a public benefit.

“Transparency, accountability, and program evaluation are critical for ensuring and improving conservation easement effectiveness.”³⁰⁸ Pressure from the IRS may lead to more accountability throughout the field.³⁰⁹ Increased oversight will make the easement deduction a more effective tax expenditure.³¹⁰

4. *These changes will likely withstand court challenges.*

Finally, the proposed legislative fix and subsequent Treasury regulations are likely to be upheld in the courts. The federal courts tend to be deferential to Treasury interpretations of the Internal Revenue

304. See Christopher Quay, *Bush Seeks Tougher Conservation Easement Enforcement*, 51 EXEMPT ORG. TAX REV. 219 (2006).

305. *Id.*

306. Marie Sapire, *What Will Qualified Opportunity Funds Have to Report*, 165 TAX NOTES FED. 928 (2019).

307. H.R. 5011, 116 Cong. (1st Sess. 2019); S. 2787, 116 Cong. (1st Sess. 2019).

308. Rissman, *supra* note 45, at 172.

309. *Id.*

310. See generally James L. Olmsted, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 L. & CONTEMP. PROBS. 51 (2011) (discussing the benefits of increased easement disclosure and explaining key pieces of information that should be made available to the public).

Code.³¹¹ And while the Supreme Court has held that tax law no longer is a special province of the law that receives its own set of unique administrative law rules with blind deference, tax law still receives substantial *Chevron* deference.³¹² The federal tax law is recognized as the most complicated of all legislative schemes.³¹³ First, in general, it is well-settled that deference is given to tax legislation.³¹⁴ For example, in *INDOPCO*, an iconic Supreme Court tax case, the Court explained that income tax deduction is a matter of legislative grace and that “deductions are strictly construed.”³¹⁵ The lower courts have followed this. More recently, in *Altera*, the Ninth Circuit determined that Administrative Procedure Act rulemaking was properly done and deference was justified in the Treasury’s promulgation of a new set of tax regulations.³¹⁶ In addition, the Supreme Court has made clear that tax legislation directing the Treasury to implement rulemaking still receives a high level of deference.³¹⁷ This fits within the clear framework of the first *Chevron* step: if Congress unambiguously intends to give the Treasury the authority to develop broad-based regulations, deference is justified. The second step is also likely satisfied, given the continued deference towards complicated Treasury regulations.

V. CONCLUSION

In 1983, pioneering conservationists Putnam Livermore and Thomas S. Barrett—co-founders of The Trust for Public Land—wrote that the conservation purposes requirement leaves “much room for interpretation and . . . much room for dispute.”³¹⁸ This statement foreshadowed a debate

311. See, e.g., *Altera Corp. v. Comm’r*, 898 F.3d 1266 (9th. Cir. 2018).

312. *Id.*; *Mayo Found. for Med. Educ. & Rsch. v. United States*, 562 U.S. 44 (2011); *Chevron, U.S.A., Inc. v. NRDC*, 467 U.S. 837, 843 (1984) (“If the intent of Congress is clear, that is the end of the matter, for the Court, as well as the agency, must give effect to the unambiguously expressed intent of Congress . . . if the statute is silent or ambiguous with respect to the specific issue, the question for the Court is whether the agency’s answer is based on a permissible construction of the statute.”).

313. David A. Brennan, *Treasury Regulations and Judicial Deference in the Post-Chevron Era*, 13 GA. ST. U. L. REV. 387, 388 (1997).

314. See, e.g., Ariel S. Greenblum, *The Best Treasury Regulations Are Born from Clear Legislative Intent*, 169 TAX NOTES FED. 525 (2020); David F. Shores, *Deferential Review of Tax Court Decisions: Dobson Revisited*, 49 TAX LAW. 629, 638 (1996); Leandra Lederman, *(Un)appealing Deference to the Tax Court*, 63 DUKE L.J. 1835, 1868–74 (2014); Jonathan H. Choi, *An Empirical Study of Statutory Interpretation in Tax Law*, 95 N.Y.U. L. REV. 363, 399–400 (2020).

315. *INDOPCO, Inc. v. Comm’r*, 503 U.S. 79, 84 (1992).

316. See *Altera*, 898 F.3d at 1266.

317. *Mayo Found.*, 562 U.S. at 44.

318. BARRETT & LIVERMORE, *supra* note 21, at 52.

that continues to this day.

Rewriting the definition of “conservation purposes” to require that the conservation of a donated property be pursuant to a government policy and yield a significant public benefit will further the intent of the lawmakers that wrote section 170(h) in the 1980s. For example, the Senate Finance Committee in 1980 explained how “deductions for conservation easements should be directed at the preservation of unique or otherwise significant land areas or structures.”³¹⁹ This standard, combined with heightened review through oversight and disclosure, will create a backstop against the continued practice of abusive transactions and deductions. These changes will help achieve the Committee’s goals of obtaining assurance that the contribution would be substantial enough to justify the allowance of a deduction.³²⁰ A more stringent requirement for conservation purpose will also help resolve the issue of inflated valuations.

Conservation easements exemplify “the ecological interrelationship” between individuals and their environment.³²¹ Accordingly, the deduction has longstanding, bipartisan support from lawmakers across the country.³²² Land conservation tax provisions frequently pass without significant opposition because, as Senator Charles E. Grassley explains, “[t]hey are relatively noncontroversial and very bipartisan.”³²³

Across the nation, at the federal, state, and local levels, “public funds are being poured into generous tax incentive and easement purchase programs precisely because conservation easements are beneficial to the community.”³²⁴

319. S. REP. NO. 96-1007, at 9 (1980).

320. *Id.* at 10.

321. See, e.g., BARRETT & LIVERMORE, *supra* note 21, at 1.

322. Letter from Rick Santorum, U.S. Sen., to Chuck Grassley and Max Baucus, U.S. Sens. (Mar. 30, 2005), <https://www.taxnotes.com/tax-notes-federal/charitable-giving/santorum-speaks-conservation-easement-donation-deduction/2005/04/11/pwk6?highlight=conservation%20easement> (expressing opposition to rollback of charitable contribution for conservation); see also Letter from Mark Sanford, S.C. Gov., to Chuck Grassley and Max Baucus, U.S. Sens. (Apr. 11, 2005), <https://www.taxnotes.com/tax-notes-federal/charitable-giving/south-carolina-governor-asks-grassley-save-conservation-easement-deduction/2005/04/11/pwggw?highlight=conservation%20easement>.

323. Warren Rojas, *Taxwriters Keep Hope Alive for More Tax Bills*, TAX NOTES TODAY FED. (Jun. 13, 2001), <https://www.taxnotes.com/tax-notes-today-federal/budgets/taxwriters-keep-hope-alive-more-tax-bills/2001/06/13/zzt3?highlight=%22Taxwriters%20Keep%20Hope%20Alive%20for%20More%20Tax%20Bills%22>.

324. McLaughlin, *supra* note 93, at 680.

Easement contributions jumped from just less than \$1 billion per year in 2012 to nearly \$7 billion in 2016.³²⁵ The federal government, through its lost revenue, spends almost the same amount on conservation easements as it does on the entire national park system, and more than the entire budget for all other federal land conservation, protection, restoration, and management programs combined.³²⁶ In its 2020 report, the Senate Finance Committee concluded that Congress, the IRS, and the Treasury must take action to preserve the deduction's integrity.³²⁷ These proposals will help ensure that integrity moving forward. Reworking the conservation purposes requirement—ensuring the existence of a significant public benefit in claimed deductions—will ensure the nation's largest land acquisition program results in substantial public benefit.³²⁸ The changes proposed in this article will ensure a major federal tax expenditure achieves its intended goals without overly burdening taxpayers.

325. BROOKINGS INST., HOW WE CALCULATED THE REVENUE COSTS OF SYNDICATED CONSERVATION EASEMENTS 2 (2017).

326. *Id.* at 2-3.

327. *Syndicated Conservation-Easement Transactions: Hearing Before the S. Comm. on Finance*, 116th Cong. 4 (2020).

328. Francine J. Lipman, *No More Parking Lots: How the Tax Code Keeps Trees Out of a Tree Museum and Paradise Unpaved*, 27 HARV. ENV'T L. REV. 471, 471-74 (2003).

