QUALIFIED CONSERVATION RESTRICTIONS: RECOLLECTIONS OF AND REFLECTIONS ON THE ORIGINS OF SECTION 170(h)

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It has been over thirty years since Congress added to the Internal Revenue Code section 170(h), which allows a deduction for contributions to charity of "qualified conservation restrictions," commonly known as "conservation easements".[1] That provision was adopted over the objections of the Treasury, who had expressed reservations of both a conceptual and practical nature about the legislation, which the Treasury viewed as more than ordinarily vulnerable to abuse. I was invited to participate in this symposium, not because I have any expertise in working with these restrictions—I don't—but to provide some perspective on what might have motivated the Treasury thirty-plus years ago to take the position that it did, on what is very popular legislation among the conservation and historic preservation communities. I think of myself as no better than the second most qualified individual to fill that role. The most qualified, in my opinion, is Professor Daniel Halperin, who served as the Deputy Assistant Secretary for Tax Policy when the legislation was under deliberation, testified twice on versions of the proposed legislation,[2] and has recently written in this area.[3] But I was there at the time; I did work with Professor Halperin on his testimony and the legislation; and so I am able to offer a (sometimes more and sometimes less vaguely recalled) first-hand account of what was happening then. In some respects I find it advantageous not to have worked in this area in the intervening years. The invitation to participate in this symposium offered me an opportunity to reflect on whether I think the positions the Treasury took then rested on well-founded

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[1] Technically, the legislation took the form of an amendment to the partial interest limitation of I.R.C. § 170(f)(3)(A) (2012), creating an exception for any "qualified conservation contribution," *id.* § 170(f)(3)(B)(iii), as further defined in I.R.C. § 170(h). Tax Treatment Extension Act of 1980, Pub. L. No. 96-541, § 6, 94 Stat. 3204 (1980). Drawing on the terminological analysis offered by Professor Wolf, I will generally use the term "conservation restriction" rather than "conservation easement." *See generally* Michael Allan Wolf, *Conservation Easements and the "Term Creep" Problem*, 2013 UTAH L. REV. 787, 33 UTAH ENVTL. L. REV. 101 (2013).

[2] *See infra* notes 10 and 30.

[3] Daniel Halperin, *Incentives for Conservation Easements: The Charitable Deduction or a Better Way*, 74 LAW & CONTEMP. PROBS. 29 (2011) [hereinafter Halperin, *Conservation Easements*]; Daniel Halperin, *A Better Way to Encourage Gifts of Conservation Easements*, 136 TAX NOTES 307 (2012) [hereinafter Halperin, *Better Way*].

concerns, and to speculate on whether, if I had known then what I have learned since, I would have recommended that the Treasury approach the matter in exactly the fashion that it did.

Having wandered down that path, it seems to me that subsequent events have amply corroborated the legitimacy of the Treasury's apprehensions.[4] In retrospect, I see no reason why the Treasury should have refrained from opposing the legislation, though if I were sitting down to write the testimony once again—even without hindsight of the misconduct disclosed by a series of Washington Post articles a decade ago,[5] or the facts disclosed by the recent deluge of opinions on conservation restrictions[6]—there are respects in which the testimony might usefully have been more precise. As for how I would have encouraged the Treasury to approach the legislation, on the other hand, I now think that I would have advocated something somewhat different from the system then being proposed and that we now have. In what follows, I will briefly survey the history and the concerns that originally animated the Treasury's position on this legislation; canvass briefly what seems to me has occurred in the administration and enforcement of the resulting provision; identify one respect in which the Treasury's diagnosis of the problem may have proved to be a little wide of the mark; and then sketch the outlines of what I think might offer an improved approach to the administration of the provision.[7]

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[4] *See infra* Part III.

[5] David B. Ottaway & Joe Stephens, *Nonprofit Land Bank Amasses Billions*, WASH. POST (May 4, 2003), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062600803.html; Joe Stephens & David B. Ottaway, *Nonprofit Sells Scenic Acreage to Allies at a Loss*, WASH. POST (May 6, 2003), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601001.html; Joe Stephens & David B. Ottaway, *How a Bid to Save a Species Came to Grief*, WASH. POST (May 5, 2003), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062600944.html; Joe Stephens & David B. Ottaway, *Developers Find Payoff in Preservation*, WASH. POST (Dec. 21, 2003), http://www.washingtonpost.com/wp-dyn/content/article/2007/06/26/AR2007062601176.html. These articles provoked an investigation by the Senate Finance Committee. STAFF OF S. COMM. ON FIN., 109TH CONG., REPORT OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY (Comm. Print 2005).

[6] *See infra* notes 57–62 and accompanying text. Professor McLaughlin reports that there are currently some 200 pending cases involving conservation restrictions. Nancy McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After* Carpenter, Simmons, *and* Kaufman, 13 FLA. TAX REV. 217, 220 (2012).

[7] Professor Halperin has himself written recently about the considerations relevant to an evaluation of I.R.C. § 170(h), culminating in a proposal for substantial reform of this tax-based incentive. Halperin, *Conservation Easements*, *supra* note 3, at 45–50. As Professor Halperin has analyzed in detail the difficulties with, and deficiencies in, existing I.R.C. § 170(h), I shall borrow freely from, rather than retracing, what he has already done, with a few points of slightly different emphasis. On the other hand, the set of solutions I propose differs markedly from—though in some respects they may be complementary to—the program of reform that he has laid out. *See* Halperin, *Better Way*, *supra* note 3; *see*

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I. RECOLLECTIONS: BACKGROUND

I should preface my observations about the Treasury's position on this particular legislation with three considerations that I think would have been characteristic of the Treasury's position on any legislation of this general nature, at least during the time that I was there. First, when conservation objectives are subsidized by deductions for charitable contributions, the associated costs, in the form of revenue foregone, although usually out of sight and hard to quantify, are real. The Treasury, which is to say the rest of the taxpaying public, is indirectly picking up those costs,[8] something that supporters of these provisions do not always seem to keep in mind. Second, and closely related to the first, is that when a program of this sort is implemented through the tax system, it puts lawyers with no particular expertise in land law generally or conservation in particular in the position of having to write rules governing what at bottom is a conservation program. I have perused, but not pored over, the section 1.170A-14 Regulations; they are more than ordinarily dense with language having nothing to do with taxation as such, but would (or so I assume) seem entirely in place in regulations to be followed by a government agency such as the Bureau of Land Management in deciding just which conservation restrictions to acquire.[9] Those two considerations alone would have led the Treasury Department to question the wisdom of locating a program designed to implement conservation objectives inside the Treasury.[10] And it would have done so, I emphasize third and finally, without detracting in the slightest from the legitimacy of those objectives. I add that final observation to underscore that nothing in what follows is intended or should be interpreted as calling into question the merits of the objectives sought to

also Roger Colinvaux, *The Conservation Easement Tax Expenditure: In Search of Conservation Value*, 37 COLUM. J. OF ENVTL. LAW 1 (2012).

[8] For example, Roger Colinvaux estimated the 2003–2008 cost of § 170(h) at about $3.6 billion. Colinvaux, *supra* note 7, at 9–11.

[9] *See* Treas. Reg. §§ 1.170A-14(d)–(g) (2006). During the reauthorization process I was invited to give a talk about the Treasury's approach to the process at the Brandywine Conservancy in Chadd's Ford, Pennsylvania. I was picked up at the local Amtrak station by an individual named Gary Copeland, and on the thirty-minute drive to the Conservancy we fell into a conversation about the importance of conservation easements. In my capacity I had to ask why the tax deduction was so important, and why conservationists did not simply go out and buy the easements. Mr. Copeland's answer was, "There is no money to buy easements." I have assumed that that remains the case, and so was surprised to hear Darla Guenzler, the Executive Director of the California Council of Land Trusts, report at the symposium for which this paper was prepared that California has devoted approximately $12 billion of public resources to conservation, including the purchase of conservation restrictions.

[10] *Minor Tax Bills: Hearing Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 96th Cong., 2d. Sess. 155–56, 165–66 (1980) [hereinafter *Minor Tax Bills: Hearing*] (statement of Daniel Halperin, Deputy Assistant Sec'y, Treasury Dep't) (referencing H.R. 7318).

be accomplished by responsible advocates of governmental support for conservation restrictions. What is being questioned is both the efficacy and the cost of doing it through the tax system.

Turning to the more specific, three problematic but enduring features of the federal income tax underlay the Treasury's opposition to section 170(h). The first two are the realization requirement and preferential taxation of long-term capital gains, which together mean that gains on capital assets are not taxed as they accrue,[11] and, when they are "realized" through sale or exchange, that they are taxed at preferential rates.[12] The third is that, for charitable contributions of long-term capital gain property, a deduction is (subject to exceptions not relevant here) generally allowed in the amount of the property's fair market value.[13] Thus, in addition to the charitable deduction itself, the donor secures a second benefit, in that the previously deferred and untaxed gain is permanently exempted from tax. Those three features—especially the third (the "appreciated property rule")—combine to provide a uniquely (and perhaps needlessly)[14] high-powered incentive to making charitable contributions of appreciated property.[15] And while the impact of those provisions on charitable contributions is not unique to contributions of conservation restrictions,[16] they do provide an essential backdrop to any evaluation of the latter. In the absence of the appreciated property rule—if charitable contributions of conservation restrictions were limited to the

[11] I.R.C. § 1001(a); Eisner v. Macomber, 252 U.S. 189, 194 (1920).

[12] I.R.C. §§ 1(h), 1222(11).

[13] Treas. Reg. § 1.170A-1(c); *see* I.R.C. § 170(e)(1); Daniel Halperin, *A Charitable Contribution of Appreciated Property and the Realization of Built-In Gains*, 56 TAX L. REV. 1 (2002).

[14] *See* Halperin, *supra* note 13.

[15] As any law student knows upon completion of introductory tax, often from an encounter with *Haverly v. United States*, 513 F.2d 224 (7th Cir. 1975), *cert denied*, 423 U.S. 912 (1975), the income tax system generally abhors conferring a double benefit, consisting of both an exclusion from income and a deduction in computing taxable income, on one and the same transaction. *See, e.g.*, I.R.C. §§ 21(c), 129(e)(7) (disallowing a child-care credit for any expenses covered by amounts excluded from gross income under a § 129 dependent care reimbursement plan). If ordinary deductions coupled with capital gains are good, an ordinary (perhaps that should be extraordinary) deduction and no taxable gain is better. *Cf.* Daniel I. Halperin, *Capital Gains and Ordinary Deductions: Negative Income Tax for the Wealthy*, 12 B.C. L. REV. 387 (1971).

[16] During deliberations over what became I.R.C. § 170(h), I had several conversations with the late Kingsbury Browne, a Massachusetts practitioner who for all practical purposes was the *paterfamilias* of the conservation restriction legislation and the Land Trust movement more generally. Mr. Browne was fond of asking (rhetorically) whether Treasury's problem with deductions for conservation easements wasn't in truth a problem with the appreciated property rules, and suggesting that if that were so, then the appropriate remedy would be to repeal the appreciated property rules themselves. I always took that last suggestion as coming with an unstated "And good luck with that!" *But see* Halperin, *supra* note 13. My answer now would be different than it was then. *See infra* Part III.

contributor's basis[17]—I.R.C. § 170(h) would not be especially controversial. But they aren't, and it is. And so it is reasonable to ask what, if anything, is more than ordinarily problematic about conservation restrictions.

Any answer to that question has to begin with I.R.C. § 170(f)(3), adopted as part of the Tax Reform Act of 1969, which generally prohibits charitable deductions for gifts of "less than the taxpayer's entire interest in" the contributed property.[18] Although sometimes lost sight of, the original objective of I.R.C. § 170(f)(3) was to prevent exactly the sort of double benefit that the appreciated property rule now confers on contributions of conservation restrictions.[19]

As originally enacted, I.R.C. § 170(f)(3) was subject to two exceptions, one for contributions of a "remainder interest in a personal residence or a farm," the other for contributions of an "undivided portion of the taxpayer's entire interest in" the contributed property.[20] Apparently in deference to the existence of a prior revenue ruling allowing a deduction for a "scenic" easement,[21] however, the conference report on the 1969 Act indicated a congressional intention that the allowability of such deductions was to continue, notwithstanding the absence of any express statutory exception to newly enacted I.R.C. § 170(f)(3).[22] That congressional "understanding" was eventually incorporated into the statute itself by the Tax Reform Act of 1976,[23] as retroactively amended by the Tax Reduction and Simplification Act of 1977,[24] which added additional statutory exceptions to

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[17] On different grounds, Colinvaux, *supra* note 7, explores the possibility of limiting deductions for qualified conservation restrictions to basis. *See infra* note 83.

[18] Tax Reform Act of 1969, Pub. L. No. 91-172, § 201(a), 83 Stat. 487, 556–67 (1969).

[19] The stated congressional objective was to deprive taxpayers of the opportunity to obtain a "double tax benefit" from contributing the use of property to a charity, thereby securing both an exclusion from income of the contributed use value *and* a deduction for the charitable contribution. *See* STAFF OF THE JOINT COMM. ON TAXATION, 91ST CONG., GEN. EXPLANATION OF THE TAX REFORM ACT OF 1969, H.R. DOC. No. 13270, at 80–81 (1970); *cf.* Treas. Reg. § 1.170A-1(g) (2012) (denying, for the same reason, any deduction for a charitable contribution of services in kind).

[20] I.R.C. §§ 170(f)(3)(B)(i)–(ii) (1969). The statute simultaneously prescribed the procedure for valuing contributed remainder interests. *Id.* § 170(f)(4); *see also* Halperin, *Conservation Easements*, *supra* note 3, at 33–35.

[21] Rev. Rul. 64-205, 1964-2 C.B. 62.

[22] *See* Halperin, *Conservation Easements*, *supra* note 3, at 35; *see also* H. COMM. ON WAYS & MEANS, DESCRIPTION OF MISCELLANEOUS TAX BILLS, 96TH CONG., at 26 (Comm. Print 1980); Rev. Rul. 75-373, 1975-2 C.B. 77; Rev. Rul. 75-358, 1975-2 C.B. 76; Rev. Rul. 74-583, 1974-2 C.B. 80.

[23] I.R.C. § 170(f)(3)(B)(iii)–(iv) (2012) (added by § 2124(e) of the Tax Reform Act of 1976, Pub. L. No. 94-455, 90 Stat. 1520, 1919 (1976)).

[24] Tax Reduction & Simplification Act of 1977, Pub. L. No. 95-30, § 309(a)–(b), 91 Stat. 126, 154 (1977). The amendment was not completely retroactive. Easements granted between the effective dates of the provisions of the 1976 and 1977 legislation were deductible even if they were of only thirty-years' duration. *See, e.g.*, Stanley Works & Subsidiaries v. Comm'r, 87 T.C. 389, 399 (1986); *infra* note 25.

the partial interest limitation. The exception of interest to us covered any "lease on, option to purchase, or easement with respect to real property granted in perpetuity . . . exclusively for conservation purposes."[25] As amended, I.R.C. § 170(f)(3)(B)(iii)-(iv) was adopted subject to a five-year sunset date, which set the stage for the debate over reauthorization in 1979–80.[26]

Apart from its originally stated objective of preventing "double benefits" from contributions of term interests in property, the partial interest limitation has an important, added salutary effect: by requiring that the donor's entire interest in property pass to the charitable recipient, it tends to ensure that the "fair market value" for which the donor claims a deduction[27] will be the same as the value passing to the recipient, who will usually (albeit not invariably) remain as free to dispose of the contributed property as the donor was.[28] In an attenuated form, that same characteristic carries over to contributions of partial interests subject to the first two exceptions to the limitation: eventually, both a remainder interest and an undivided fractional interest will become possessory;[29] in either case the recipient

[25] I.R.C. § 170(f)(3)(B)(iii) (1976). The term "conservation purposes" was defined in § 170(f)(3)(C). The other exception was for a "remainder interest in real property" likewise granted for conservation purposes. *Id.* § 170(f)(3)(B)(iv). Section 2124(e) of the 1976 Act, like the language added to the Conference Report on the 1969 Act, bears all the hallmarks of an eleventh hour effort. It was incorporated at the tag end of a provision that otherwise dealt with depreciation and demolition of historic structures, each with a five-year sunset date. *See* 122 CONG. REC. 24317–24323 (1976). In contrast, § 2124(e) was enacted with a one-year sunset date, which required it to be revisited (as it was) the very next year; the entire section was added as a Senate floor amendment to what became the 1976 Act. *Id.* Only a single paragraph of the floor discussion, which focused on preservation of historic structures, was devoted to conservation restrictions. *Id.* Subsection (e) was nowhere mentioned in the Table of Contents to the General Explanation of the Act. *See* JOINT COMM. ON TAXATION, GENERAL EXPLANATION OF THE TAX REFORM ACT OF 1976, at vii–xii (Comm. Print 1976). As originally enacted, I.R.C. § 170(f)(3)(B)(iii) required only that a conservation restriction be of thirty years' duration; when the sunset date was extended to 1981, Congress simultaneously revised the statute to require that the restriction be granted "in perpetuity." Pub. L. No. 95-30, § 309(a), 91 Stat. 126, 154 (1977).

[26] *See* Pub. L. No. 95-30, § 309(b), 91 Stat. 126, 154 (1977).

[27] Treas. Reg. § 1.170A-1(c)(1) (2012).

[28] There have been spectacular exceptions, frequently involving works of art, when contributed to a charitable recipient such as a museum, subject to restrictions typically on the recipient's freedom to "deaccession" them. The poster child for the problems that could be created by such restrictions was surely the Barnes Foundation in suburban Philadelphia. *In re* Barnes Foundation, No. 58,788, 2004 WL 1960204, at 8–13 (Ct. Comm. Pl. Pa. Jan. 29, 2004).

[29] When it appeared that I.R.C. § 170(f)(3)(B)(ii) was being misused by the practice of not granting the recipient (typically of works of art) possessory rights commensurate with their fractional interests, Congress responded with legislation to ensure that the entire interest would eventually pass to the donee, and prescribed recapture of the deduction previously taken (with interest) if that did not occur within ten years, or if in the interim the donee did not enjoy substantial physical possession of the property. *Id.* 170(o) (added by

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eventually will be in a position to dispose of the contributed property, thereby realizing its entire fair market value at that time.

II. RECOLLECTIONS: THE TREASURY'S POSITION

In contrast, conservation restrictions take the form of a limitation, held by a charitable recipient, on the use that someone else (the fee owner) may make of the encumbered property. As such, they need never (and generally will not ever) become possessory, a characteristic that distinguishes them from property subject to the other two exceptions to the partial interest limitation—and indeed from *all* other species of charitable contributions—and in several different ways. It is on precisely those differences that the Treasury rested its objections to the enactment of I.R.C. § 170(h).

At a practical level, whatever conservation values might be served by such restrictions depend pivotally on the existence of a recipient organization with the ability, the resources, and the commitment to implement any limitations the restrictions imposed on the burdened land. Enforcement, in perpetuity, was viewed as indispensable, to *whatever* conservation value the restriction was in principle structured to impose. The Treasury had reservations about the prospects that such restrictions would truly be enforced.[30] In addition, the Treasury was concerned that the imposition of restrictions might have little impact on, and in some instances enhance rather than reduce, the value to the donor of the encumbered land.[31] Even when they didn't, the fact that what was being contributed was a restriction that ordinarily would never become possessory severed any necessary connection between whatever loss in market value the donor experienced by reason of the restriction and whatever conservation values were being protected. For, even if what the donor had given could be valued with confidence, the Treasury questioned whether the conservation objectives flowing from the restriction would necessarily have comparable value; and it was concerned that in

the Pension Protection Act of 2006, Pub. L. No. 109-280, § 1218(a), 120 Stat. 780, 1080–81 (2006)); *see infra* Part IV.D.

[30] *See Miscellaneous Tax Bills: Hearing on H.R. 3874, H.R. 4103, H.R. 4503, H.R. 4611, H.R. 4634, H.R. 4968, and H.R. 5391 Before the Subcomm. on Select Revenue Measures of the H. Comm. on Ways & Means*, 96th Cong. 5–6, 12–13 (1979) [hereinafter *Miscellaneous Tax Bills: Hearing*] (statement of Daniel Halperin, Deputy Assistant Sec'y for Tax Policy, Treasury Dep't) (referencing H.R. 4611); *Minor Tax Bills: Hearing*, *supra* note 10, at 165–67.

[31] The Treasury had in mind situations in which imposition of the restriction might lead to savings in state or local real property taxes; or when the restriction in the value of one parcel of land might enhance the value of another; or when imposition of the restriction, as a practical matter, had no impact on the donor's use and enjoyment of the property. *See Miscellaneous Tax Bills: Hearing*, *supra* note 30, at 6, 12; *Minor Tax Bills: Hearing*, *supra* note 10, at 156, 166–67.

many instances the resulting public benefit might be objectively insubstantial.[32] Beyond those more specific concerns, the Treasury viewed the process by which the loss in value by the donor from a conservation restriction was determined as unavoidably more "speculative" and, given the incentives to aggressive valuation, vulnerable to abuse than the valuation of other charitable contributions.[33]

Both the legislative history to § 170(h)[34] and the regulations promulgated under that provision[35] pay lip service to the Treasury's expressed concerns. Despite those concerns, however, the allowance of a deduction for contributions of "qualified conservation contributions" was made permanent by the Tax Treatment Extension Act of 1980.[36] Since then, the availability of such deductions has been substantially liberalized, by making the extent to which they can reduce a taxpayer's adjusted gross income in any year more generous than with respect to any other contribution of appreciated property, and also by extending the carryover period for such deductions in excess of the annual limitation.[37]

As a result, charitable contributions of conservation restrictions attributable to unrealized appreciation are now more favorably treated than any other contributions of appreciated property. That they are is ironic, given that amongst all species of charitable contributions they are perhaps uniquely vulnerable to abuse.[38]

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[32] *See Minor Tax Bills: Hearing*, *supra* note 10, at 166–67; Colinvaux, *supra* note 7, at 21–23; *infra* note 40.

[33] *See Miscellaneous Tax Bills: Hearing*, *supra* note 30, at 12; *Minor Tax Bills: Hearing*, *supra* note 10, at 167.

[34] S. COMM. ON FIN., TAX TREATMENT EXTENSION ACT OF 1980, S. REP. NO. 96-1007, at 14–15.

[35] Treas. Reg. § 1.170A-14 (2012).

[36] Tax Treatment Extension Act of 1980, Pub. L. No. 96-541, § 6, 94 Stat. 3204, 3206 (1980). Technically, the amendment was implemented by adding a third exception to the partial interest limitation for any "qualified conservation contribution." I.R.C. § 170(f)(3)(B)(iii) (2012) (as then defined in § 170(h)).

[37] Specifically, the statute now allows contributions of conservation restrictions (whether or not attributable to unrealized appreciation) to be deducted to the extent of 50% of a taxpayer's contribution base, and provides for a fifteen-year carryover of contributions in excess of that limit; for other contributions of unrealized long-term capital gain property, the limits are 30% and five years. *Compare* I.R.C. § 170(b)(1)(B), *with* § 170(b)(1)(E) (added by the Pension Protection Act of 2006, Pub. L. No. 109-280, § 1206(a), 120 Stat. 780 (2006)), *and* Halperin, *Conservation Easements*, *supra* note 3, at 30. Legislation recently introduced in the Senate would make these liberalizations permanent. The Rural Heritage Conservation Extension Act of 2013, S. 526, 113th Cong. (2013). In addition, § 2055(f) (added by the Tax Reform Act of 1986), allows an estate tax deduction for contributions of conservation restrictions. Pub L. No. 99-514, § 1422(a)(1)–(2), 100 Stat. 2085 (1986).

[38] Indeed, it is hard to resist interpreting those liberalizations as bearing statutory witness to the propensity of § 170(h) for generating unwarranted deductions.

III. REFLECTIONS

I do not have the space in which to consider what has become of all of the Treasury's concerns. Many of those issues, from a variety of perspectives, have been addressed extensively elsewhere, both by those interested in perfecting and those who are critical of the allowance of deductions for conservation restrictions.[39] There is evidence, to be sure, of contributions of restrictions that, as the Treasury had worried, have had no discernible impact on the use made by (or the value to) the donor of the burdened property, or have actually functioned to confer value on the donor.[40] The requirement that donated restrictions be held and

[39] *E.g.*, McLaughlin, *supra* note 6; Nancy A. McLaughlin, *Internal Revenue Code Section 170(h): National Perpetuity Standards for Federally Subsidized Conservation Easements, Part 2, Comparison to State Law*, 46 REAL PROP. TR. & EST. L.J. 1 (2011); Colinvaux, *supra* note 7; Halperin, *Conservation Easements*, *supra* note 3; Halperin, *Better Way*, *supra* note 3; JEFF PIDOT, REINVENTING CONSERVATION EASEMENTS: A CRITICAL EXAMINATION AND IDEAS FOR REFORM (Lincoln Inst. of Land Policy, 2005).

[40] *E.g.*, Kaufman v. Shulman, 687 F.3d 21, 30–31 (1st Cir. 2012) (describing contribution of a façade easement in a registered historic district that imposed essentially the same restrictions as the contributed easement); Trout Ranch, LLC. v. Comm'r, 493 F. App'x 944 (10th Cir. 2012) (easement found to have restricted development to a plan that, given local planning regulations, would have been the most profitable development plan in any event); 1982 East, LLC v. Comm'r, 101 T.C.M. (CCH) 1380 (2011) (finding that contributed easement and unused development rights in east side New York City townhouse duplicated restrictions already imposed by local landmark preservation law); Herman v. Comm'r, 98 T.C.M. (CCH) 197 (2009) (claimed deduction of $22 million for contribution of "unused development rights" above a building on 5th Avenue that did not prevent alteration of the underlying building itself). The recipient of the contributions in *Kaufman*, *1982 East*, and *Herman* was the National Architectural Trust (NAT), which consented to an injunction against many of its practices in soliciting and valuing contributions of façade easements. *See Kaufman*, 687 F.3d at 32; *infra* note 66. The record in *Kaufman* is striking (if not altogether surprising) for its inclusion of evidence of express reassurances to the Kaufmans by NAT that the contribution of the easement would not put their home "at a market value disadvantage when compared to the other properties in the same neighborhood." *Kaufman*, 687 F.3d at 31. The issue recently made the front page of the Boston Globe, in connection with the Massachusetts senatorial campaign of Gabriel E. Gomez, who evidently claimed a deduction of $281,500 for the contribution of a façade easement on his residence in the Cohasset Common Historic District; the recipient was NAT. *See* Frank Phillips, *Gomez Took $281,500 Home Tax Deduction*, BOSTON GLOBE, May 9, 2013, at A1. Apparently Gomez also did some shopping for a high valuation. Frank Phillips, *Appraiser Says Gomez Didn't Pay For Home Valuation*, BOSTON GLOBE, May 16, 2013, at B1. Dan Wasserman, Editorial Cartoon, *Gabriel Gomez Tries to Spin*, BOSTON GLOBE, May 19, 2013, at K6.

As a resident of the Town of Brookline, Massachusetts, I cannot resist adding that Brookline has adopted a policy of discounting residential property tax valuations of land burdened by a conservation restriction by as much as 95%, depending on whether the restriction does (95%) or does not (75%) permit public access. *See Land Conservation Tools*, TOWN OF BROOKLINE, http://www.brooklinema.gov/index.php?option=com_ enforced in perpetuity has been a matter of substantial, ongoing controversy.[41] Most importantly, however, much as the Treasury anticipated, the allowance of deductions for conservation restrictions has been plagued by problems of valuation. And what I wish to focus on is what I view as the central issue: the matter of valuation procedures, putting aside the collateral valuation problems identified by the Treasury.[42] That is, I want to confine my attention to the methodology most commonly used to value a conservation restriction. On that score it seems to me that the Treasury's apprehensions were entirely well-founded, although it may not have anticipated quite correctly what would emerge as the central source of difficulty, or just how vulnerable to abuse the process would prove to be. There are, it seems to me, two aspects to that vulnerability: one intrinsic to the process (and highlighted in the Treasury's testimony), the other traceable as far as I can tell to the legislative history of the provision.

Both difficulties stem from the fact that conservation restrictions by and large are not transferable; in the usual case there will be little data to use in arriving directly at a market valuation. Consequently, they are typically valued using so-called "before and after" valuation, that is, before and after the imposition of the

content&view=article&id=719&Itemid=1060 (last visited May 18, 2013). At a residential tax rate of $11.65/$1000 of assessed valuation, the annual property tax savings on $100,000 of pre-discount assessed value would be over $1,100, with a present value (discounted at 5%, in perpetuity) of over $22,000.

[41] *See, e.g.*, *Kaufman*, 687 F.3d at 31 (provision in façade easement permitting holder to consent to changes in façade or abandon its rights did not violate requirement of Treas. Reg. § 1.170A-14(g)(1) that it be "enforceable in perpetuity"); Comm'r v. Simmons, 646 F.3d 6 (D.C. Cir. 2011) (*semble*); Carpenter v. Comm'r, T.C.M (CCH) 1001 (2012) (conservation restriction extinguishable by agreement of parties violates Treas. Reg. § 1.170A-14(g)(6)(i)); Belk v. Comm'r, 140 T.C. 1 (2013) (conservation restriction authorizing swap for restriction covering other land violates "granted in perpetuity" requirement of § 170(h)(2)(C)). It has likewise led to spirited academic debates. *E.g.*, Jessica E. Jay, *When Perpetual Is Not Forever: The Challenge of Changing Conditions, Amendment and Termination of Perpetual Conservation Easements*, 36 HARV. ENVTL. L. REV. 1 (2012); C. Timothy Lindstrom, Hicks v. Dowd*: The End of Perpetuity?*, 8 WYO. L. REV. 25 (2008); Nancy McLaughlin & William Weeks, Hicks v. Dowd*, Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010); Ann Taylor Schwing, *Perpetuity Is Forever, Almost Always: Why it is Wrong to Promote Amendment and Termination of Perpetual Conservation Easements*, 37 HARV. ENVTL. L. REV. 217 (2013). For an especially thoughtful survey of the potential consequences of the perpetuity requirement, together with a study of actual practices in Massachusetts, see Zachary Bray, *Reconciling Development and Natural Beauty: The Promise and Dilemma of Conservation Easements*, 34 HARV. ENVTL. L. REV. 119 (2010). I offer some thoughts on this aspect of the problem below. *See infra* Part IV.D.

[42] *See supra* notes 30–33 and 40 and accompanying text. I also wish to put aside whether the conservation value of a contributed restriction to the recipient and the general public is well approximated by the loss in value to the donor. See Colinvaux, *supra* note 7, at 29–41, for the proposition that it is not. Although I have not looked into the matter in detail, I am not aware of any studies suggesting empirically that it is.

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restriction.[43] The intrinsic difficulty is that this procedure differs from valuing other exceptions to the partial interest limitation (and other contributions generally) in requiring not one but *two* valuations, the first before imposition of the conservation restriction, and at least presumably (like other contributions) based on fair market value, and the second as burdened by the restriction. As far as I can tell the need for a second valuation—which the Treasury felt would be essentially speculative[44]—is almost unique to conservation restrictions, at least in the context of charitable contributions.[45] For the other exceptions to the partial interest limitation—remainder interests and undivided fractional interests in property—only one valuation is needed: the fair market value of the property, generally at the time of the contribution.[46] Those valuations may sometimes be hard to come by, especially with contributions of works of art;[47] but, as a rule, once fair market value has been established, the heavy lifting has been done.[48] With a conservation restriction, in contrast, current fair market value is only the beginning. The second valuation, in principle at least, is more likely to be problematic, entailing conjectures about the value of the land after having been burdened by a restriction for which, by assumption, objective indicia of market value are unavailable.

As bad as it might be, the expected difficulty of arriving at "after" valuations appears to have become materially compounded by the presence of "before" valuations that seem divorced from any plausible assessment of the property's actual market value.[49] Those latter, in turn, seem typically to stem from valuations arrived at using some estimate of the burdened property's "highest and best use."

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[43] Treas. Reg. § 1.170A-14(h)(3)(i) (2012); Stanley Works v. Comm'r, 87 T.C. 389, 399 (1986).

[44] *See Minor Tax Bills: Hearing*, *supra* note 10, at 167.

[45] To my knowledge, the only other area of the income tax where this methodology is employed is the determination of the amount of a casualty loss under Treas. Reg. § 1.165-7 (2011). There are other areas, outside the charitable contribution context, where more complex valuation methods are required. Perhaps the provision most similar in spirit to § 170(h) is so-called special use valuation of family farms and small businesses for estate tax purpose under I.R.C. § 2032A (2012). The comparison is instructive. Given the intricate machinery imposed by that provision to obtain a reduction in value currently limited to $1,070,000, the generosity so casually conferred by Congress on contributions of conservation restrictions is hard to understand. *See supra* note 37.

[46] In the case of a contribution of a fractional interest, I.R.C. § 170(o) now requires that subsequent contributions of fractional interests be valued at the *lesser of* the value of the property at the time of the original fractional contribution or the time of the subsequent contribution. I.R.C. § 170(o)(2).

[47] *See, e.g.*, Erin Thompson, *The Relationship Between Tax Deductions and the Market for Unprovenanced Antiquities*, 33 COLUM. J.L. & ARTS 241, 243–45 (2010).

[48] The valuation of remainder interests may involve some uncertainty as to timing and the choice of discount rates, but those problems by and large can be mechanically resolved. *See* Treas. Reg. § 1.170A-12 (2012).

[49] *See infra* notes 57–62 and accompanying text.

That approach appears to have been sanctioned by a passage from the legislative history that was explicitly carried over into the 170(h) regulations.[50] Echoing the Senate Report, the regulations provide that

> the fair market value of the property before contribution of the conservation restriction must take into account not only the current use of the property but also an objective assessment of how immediate or remote the likelihood is that the property, absent the restriction, would in fact be developed, as well as any effect from zoning, conservation, or historic preservation laws that already restrict the property's potential highest and best use.[51]

It is hard to know exactly what to make of that language.[52] Discussions about reauthorizing what became I.R.C. § 170(h) did focus on the role played by conservation easements in countering economic pressures for, as an example, residential development of land whose natural state it might otherwise have seemed desirable to preserve. Valuing land at its "highest and best" use naturally denotes valuing it for use at its most profitable feasible level.[53] And the quoted language seems implicitly to condone valuing property before imposition of a conservation restriction taking account of the highest and best use.

Explicitly, on the other hand, the language itself seems to push back *against* the mechanical use of such valuation, with allusions to the possibility that the prospects for development might be "remote," or that valuation might already be "restricted" by other land use regulations, concerns that had been voiced by the Treasury. Indeed, the passage in the committee report may plausibly be read as an acknowledgement of the Treasury's repeated expressions of concern for the prospect of allowing deductions for contributions that restricted donors from doing things (like developing their land) that they had no real intention of doing.[54] As

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[50] *Compare* S. COMM. ON FIN., TAX TREATMENT EXTENSION ACT OF 1980, S. REP. NO. 96-1007, at 15, *with* Treas. Reg. § 1.170A-14(h)(3)(ii).

[51] Treas. Reg. § 1.170A-14(h)(3)(ii).

[52] It is worth mentioning that I have no personal recollection of any specific discussion about the import of the language, although I do recall the question of the relevance of the proximity of development to valuation coming up.

[53] *E.g.*, Stanley Works v. Comm'r, 87 T.C. 389, 400–02 (1986).

[54] *E.g.*, *Minor Tax Bills: Hearing*, *supra* note 10, at 167. After questioning whether the value to the recipient of a conservation restriction would equal the value the transferor had given up, the Treasury testimony went on to observe that

> even assuming that . . . the value to the recipient should be considered to be equal to the value of the rights foregone by the transferor, it may in valuing those rights be difficult to take account of the likelihood that the property in fact will be developed or the time that may lapse between the date of transfer and the time of development.

Id.

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such, the Committee Report language could be seen more as cautioning against, than as expressly condoning, speculative highest and best use valuations of conservation restrictions.

Be all that as it may, nothing in the regulation, or the Committee Report language by which it was inspired, suggests that valuing land before imposition of a conservation restriction, even taking into account its "highest and best" use, implies the permissibility of "before" valuations that differ markedly from current fair market value, as required generally by the regulations governing the valuation of charitable contributions.[55] I belabor this point because a substantial fraction of the decisions recently rendered involve "highest and best use"–based "before" valuations that appear to have little or nothing to do with, and almost invariably are substantially in excess of, what appears to be the property's current market value. I have not, in the context of an essay prepared for this symposium, had the opportunity to look into the matter in detail.[56] It is not obvious to me, however, what justification exists for such procedures. But the practice seems widespread, and seems to be a common characteristic of cases involving very (I am tempted to say wildly) aggressive valuations. Indeed, it would not be off the mark to suggest that valuations claimed in the reported decisions seem to turn on its head what most concerned the Treasury thirty years ago. The "after" valuations do not as a rule seem particularly troubling: they are usually in the vicinity of the property's *current* fair market value, in the use to which it is currently put. It is, rather, the "highest and best use"-based *before* valuations that have typically seemed "speculative." And the appraisals offered to support the claimed valuations do not really seem to assess fair market value "before and after" imposition of a restriction; they are more like (decidedly) hypothetical highest and best use–based "before" valuations, with "after" valuations based on something pretty close to current fair market value.

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[55] Treas. Reg. § 1.170A-1(c). Stated differently, in a decently functioning real estate market one would expect current market value to reflect developmental potential as well as current use. *See, e.g.*, Van Zelst v. Comm'r, 100 F.3d 1259 (7th Cir. 1996); Whitehouse Hotel Ltd. v. Comm'r, 139 T.C. 304, 310–14 (2012), *appeal filed*, Docket No. 13-60131 (5th Cir. March 1, 2013) where, in considering "highest and best use"–based valuation at $43 million of a structure purchased two years earlier for $6.6 million, the court observed that the claim that developers "will leave money on the table by paying more than the local market would demand . . . simply . . . defies common sense." *Whitehouse Hotel*, 139 T.C. at 336.

[56] What appears to be the initial decision in this area, *Stanley Works*, did value then-undeveloped land for a higher use, namely as a pumped storage electric generating facility, a use for which the land in question had been under more-or-less continuous evaluation for a number of years by both private and official actors. 87 T.C. at 393. The opinion approved the use of a procedure calculated to get at average land acquisition costs actually incurred in connection with similar facilities in the same geographic region, not the sort of speculative discounted cash flow analyses typically found in the more recent opinions.

Among the decisions dealing with open space restrictions we find an easement granted in December 2000, over property purchased in October 1999 and September 2000 for a total of $2.2 million, claimed to have a value of $3.1 million;[57] we find an easement granted over 8 acres in the vicinity of Gary, Indiana, acquired for about $100,000 and zoned for 8 single-family lots, claimed to have a value of $3.245 million;[58] and we find an easement over 185 acres dedicated to a golf course, developed in connection with and situated in the midst of a 400-lot residential development that was mostly sold by the time the easement was granted, claimed to have developmental value of $10.8 million (compared to its value of $277,000 as a golf course).[59] Decisions involving façade easements include one on an east side townhouse in New York City, acquired for $8 million and renovated for $3.35 million more, leading to a claimed deduction of $6.47 million two years after it was first acquired;[60] "air rights" over an 11-story

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[57] Hughes v. Comm'r, 97 T.C.M. (CCH) 1488 (2009). The donor's appraiser valued the two parcels at $4.1 million, largely by reason of an assumption that the value of the larger parcel had more than doubled in value in fourteen months, in part because of assumptions about the demand for residential lots into which he assumed it could be subdivided, despite the fact that it was located in rural Gunnison County, Colorado, a land area twice the size of Rhode Island with a rural population density of less than one person per square mile. *Id.* at 1489.

[58] Boltar, LLC v. Comm'r, 136 T.C. 326 (2011). The land in *Boltar* had been acquired 7 years earlier and was partly under the jurisdiction of the Army Corps of Engineers. The claimed value of the easement stemmed from an appraisal premised on an apparently erroneous assumption that the land could be developed into 174 residential condominiums. *Id.* at 330.

[59] Belk v. Comm'r, 140 T.C.. 1 (2013). Belk went off on the ground that the contributed restriction was not "perpetual," since it permitted substitution of the burdened property. *Id.* at 7. Neither discussed nor even alluded to was whether the simultaneous development of the residential subdivision and the golf course left the developer free to *further* develop the land on which the golf course had been situated. *Id.* at 5. *But see* Kiva Dunes Conservation, LLC v. Comm'r, 97 T.C.M. (CCH) 1818 (2009). *Kiva Dunes* involved simultaneous development of a residential community and golf course, in which that same possibility was not addressed. *Id.* If it wasn't, it does not seem like a trivial omission: in that case a $30 million deduction was allowed. Such practices have provoked proposals, even by the staunchest congressional advocates of tax benefits for conservation restrictions, to ban the allowance of deductions for restrictions on golf courses. *See* The Rural Heritage Conservation Extension Act of 2013, S. 526, 113th Cong. § 3 (2013); U.S. DEP'T OF THE TREASURY, GENERAL EXPLANATION OF THE ADMINISTRATION'S 2014 REVENUE PROPOSALS 161 (2013).

[60] 1982 East, LLC v. Comm'r, 101 T.C.M. (CCH) 1380 (2011). The contribution consisted of a façade easement valued at $2.6 million, and "unused development rights" valued at $3.87 million. The contribution was disallowed, among other things, on the ground that the protections afforded by the easement duplicated those imposed by New York's Landmarks Preservation Law.

1982 East raises another issue that, so far as I can tell, was left unaddressed by the § 170(h) regulations. The opinion does not report the appraised value of the townhouse

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apartment building in the same part of New York City with a claimed value of $22 million;[61] and a contribution claimed to be valued at $7.5–13 million, based on different hypothetical development scenarios for use as a luxury hotel, of a property in New Orleans that had been recently acquired for about $10 million.[62]

The claimed contribution in each of these cases was either substantially revalued or disallowed on technical grounds after litigation. But they (and others like them)[63] bear witness to the aggressive approach to valuation that seems endemic to this corner of the law. And as the difficulties have actually emerged, the problem is, if anything, more pernicious than the Treasury imagined. If, as it anticipated, the source of the problem had involved speculative "after" valuations, the deductions claimed for qualified conservation restrictions would at least have been limited to not more than the property's fair market value before the restriction was imposed, something for which objective data would typically be available. But with before values now being proposed based on discounted cash flow analyses of hypothetical, more-or-less contrived developmental possibilities, there is no natural objective limit on the before valuations, or on the value that can be assigned to a contributed conservation restriction. So the process can in principle, and does now in practice, lead to claimed deductions in excess of those that could be obtained from a contribution of the entire underlying property instead. In a word, the methodology has been perverted so as to produce valuations that are fictitious.

IV. REFORM

On the evidence, it seems undeniable that the availability of deductions for contributions of conservation restrictions has created irresistible temptations to aggressive valuation, as well as incentives to engage in systematic exploitation of the vulnerabilities of this regime. It induced one organization that, in the course of the original legislative deliberations, depicted itself as the quintessentially

after renovation, but it would surely have been at least the $11.5 million sum of the acquisition and renovation costs. On completion, however, it was subject to a $9.35 million mortgage. On those assumptions, the maximum deduction that would have been allowable on contribution of the *entire* property would have been limited to its value, net of the liability, or about $2.15 million, substantially less than the loss in value claimed for the easement *by itself*.

[61] Herman v. Comm'r, 98 T.C.M. (CCH) 197 (2009). The building was located on Fifth Avenue, was eight stories high at the street and eleven at the back, and was lower than the adjacent buildings. The air rights were valued based on "hypothetical expansions to the existing apartment building," none of which had apparently been considered by the New York City Landmarks Preservation Commission. The contribution was disallowed on the ground that a contribution of "air rights" did not satisfy the technical requirements of § 170(h).

[62] Whitehouse Hotel Ltd. P'ship v. Comm'r, 131 T.C. 112 (Oct. 30, 2008), *vacated and remanded*, 615 F.3d 321 (5th Cir. 2010), on *remand* 139 T.C. 304 (2012), *appeal filed*, Docket No. 13-60131 (5th Cir. March 1, 2013).

[63] McLaughlin, *supra* note 6.

responsible steward of its charitable objectives,[64] into a pattern of abuse of its public trust that included extensive self-dealing.[65] It has led to the creation of other organizations seemingly dedicated to exploiting the provision.[66] The problems that emerged prompted an extensive study by the Senate Finance Committee.[67] Recommendations for reform by the Joint Committee on Taxation[68] were resisted by an umbrella organization of recipient organizations, the Land Trust Alliance, on the ground that "more enforcement" would suffice to remedy the problems.[69] In the end, the proposed reforms were largely ignored. But enforcement in this area seems to be consuming disproportionate IRS resources, and the opportunity cost seems particularly high in an era of declining audit coverage in general.[70] In the meantime, the flow of cases suggests that section 170(h) has served as a printing press for low-cost, high-reward tickets to the audit lottery with expected payoffs that are simply too substantial to resist, an inference

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[64] This statement is based on my personal recollection of meetings with representatives of the Nature Conservancy before § 170(h) was adopted. On being asked about the possibility that such legislation might be abused, they routinely deployed the Nature Conservancy's record of responsibility in managing lands under its control as a response.

[65] *See* sources cited *supra* note 5.

[66] The National Architectural Trust, later renamed the Trust for Architectural Easements, was the easement donee in a number of litigated cases. *E.g.*, 1982 East, LLC v. Comm'r, 101 T.C.M. (CCH) 1380 (2011) (involving the contribution of a façade easement on, and unused development rights with respect to, a townhouse located in a New York City preservation district with a claimed value of $6.5 million); *Herman*, 98 T.C.M. (CCH) at 197 (unused development rights with respect to a Fifth Avenue apartment building with a claimed value of almost $22 million); Kaufman v. Shulman, 687 F.3d 21, 31 (1st Cir. 2012) (façade easement with respect to townhouses in the South End of Boston with a claimed value of $220,000, despite assurance from NAT representatives that "such easements did not reduce resale value"); Rothman v. Comm'r, 104 T.C.M. (CCH) 126 (2012) (façade easement over a townhouse); Scheidelman v. Comm'r, 682 F.3d 189 (2d Cir. 2012) (façade easement over townhouses in Brooklyn). In 2011, the Justice Department secured an injunction against NAT to prevent it from telling potential donors to expect deductions of 10–15% of the value of their property, and from arranging easements that lack proper conservation purposes. *See* Press Release, U.S. Dep't of Justice, D.C. Federal Court Bars Company from Promoting Alleged Tax Scheme Involving Improper Easements on Historic Buildings (July 18, 2011), http://www.justice.gov/opa/pr/2011/July/11-tax-933.html.

[67] STAFF OF S. COMM. ON FIN., 109TH CONG., REPORT OF STAFF INVESTIGATION OF THE NATURE CONSERVANCY (Comm. Print 2005).

[68] JOINT COMM. ON TAXATION, OPTIONS TO IMPROVE TAX COMPLIANCE AND REFORM TAX EXPENDITURES 277–87 (2005).

[69] *See* Halperin, *Conservation Easements*, *supra* note 3, at 29, 44 n.4, 81–86.

[70] *Id.* at 44. The accuracy-related penalty regime of I.R.C. § 6662, which ranges as high as 40% in the case of a "gross valuation misstatement," operates after the fact; it does not appear to have functioned thus far as a deterrent.

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that is corroborated by the liberalization of the percentage limitations and carryover rules for contributions of conservation restrictions.

The perceived need for remedial action has been growing.[71] Some concrete proposals, beyond those recommended by the Joint Committee on Taxation in 2005, have been advanced. Chief among them is Daniel Halperin's proposal to convert the existing deduction into a system of credits, limited in amount, and allocated by a government agency with genuine expertise in land management in general and conservation in particular.[72] That, at least, would put the costs of conservation restrictions on the table, where they belong, and put someone in the position of making considered decisions about the allocation of resources in this area.

Short of that, however, is there anything else that might be done to stem the outpouring of aggressively valued, objectively troubling restrictions, while preserving incentives for continued contributions of responsibly valued restrictions that serve legitimate conservation objectives? Let me outline a series of steps that, if adopted, strike me as offering a realistic prospect of implementing those two goals.

A. Disclosure

Two recent developments that have been chronicled in the existing literature are (1) a movement towards standardization of the terms on which conservation restrictions are granted,[73] and (2) a movement, at both state and national levels, towards documenting the existence of conservation restrictions in databases accessible to the public.[74] Given the growing level of federal expenditures through the revenue loss associated with conservation restrictions, and the difficulties of detection and costs of enforcement, it seems to me that an essential first step in implementing the Land Trust Alliance's call for improved enforcement is a national, uniform, publicly available database that documents *every* conservation restriction for which a charitable deduction has been claimed. Among other things, the information reported to the database would be required to include the details of

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[71] *E.g.*, Halperin, *Conservation Easements*, *supra* note 3, at 45–50; Colinvaux, *supra* note 7, at 3–4, 47; PIDOT, *supra* note 39; JOINT COMM. ON TAXATION, *supra* note 68, at 277–87.

[72] *See* Halperin, *Conservation Easements*, *supra* note 3, at 45–50. *See generally* Halperin, *Better Way*, *supra* note 3. A similar proposal has been advanced by Colinvaux, *supra* note 7; more particularized reforms have been proposed in U.S. DEP'T OF THE TREASURY, *supra* note 59, at 161–62.

[73] PIDOT, *supra* note 39, at 9–10; Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROBS. 1 (2011); *see also* McLaughlin, *supra* note 6, at 291, 295.

[74] *E.g.*, James L. Olmstead, *The Invisible Forest: Conservation Easement Databases and the End of the Clandestine Conservation of Natural Lands*, 74 LAW & CONTEMP. PROBS. 51 (2011); Pidot, *supra* note 73.

the deduction claimed by reason of the contribution;[75] the amount reported would have to match the amount claimed on the donor's return; and the submission of the required information for inclusion in the database would be a pre-condition to allowance of any deduction. In effect, the information that would be required to be included in this database already exists in the form of the documentation of the contribution filed with the donor's return. Standardization of what is required to be reported should not be excessively complex. The expertise of those who are already developing national databases for non-tax purposes could be drawn upon in implementing this proposal.[76] Indeed, the databases might conceivably be compiled on an integrated basis.

There will be those who would view the disclosure of the amounts claimed as deductions as an objectionable revelation of what is otherwise confidential return information. It nevertheless strikes me as reasonable for the government to insist on detailed disclosure of the basis on which (if not the exact dollar extent to which) it is supporting the use of conservation restrictions. What is more, given the already extensive disclosure required of public charities, including the specialized disclosures now required with respect to conservation restrictions,[77] this added disclosure does not seem like a major new inroad.

By itself, such a database would serve as an up-to-date resource on the extent of federal support through the tax system for conservation activities.[78] What is more, disclosure alone could serve as a partial counterweight to the very low up-front cost that is currently associated with claiming a deduction even for an aggressively valued conservation restriction. The prospect of disclosure and easy detection, and the resulting enhancement in the possibility of challenge, could by itself function as a deterrent to the most egregiously aggressive positions, by substantially simplifying the process of detection and reducing the costs of enforcement.

B. Private Enforcement

The creation of a publicly available database offers the potential to accomplish more. With public disclosure of the amounts claimed as deductions for conservation restrictions, enforcement need not be left to the IRS alone. It would be consistent with existing provisions of U.S. law (such as the *qui tam* provisions

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[75] That is, it would include the amount claimed as a deduction, the date of acquisition and the cost (or other adjusted basis) of the contributed property, and the details of the appraisal data offered in support of the amount claimed.

[76] *See generally* Olmstead, *supra* note 74; Pidot, *supra* note 73.

[77] *See* Halperin, *Conservation Easements*, *supra* note 3, at 36–37 nn.46–48.

[78] It could also be structured to serve as a repository for (possibly mandatory) reporting of monitoring and enforcement activities by all private organizations that have accepted contributions of qualified conservation restrictions. Such reports could be linked with reports of the original contributions themselves, to create a record not only of the creation but also of the history of each qualified conservation restriction.

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of the False Claims Act[79]) to allow for the possibility of private litigation to contest the valuation of contributed conservation restrictions.[80] The authorizing legislation could provide for a private contestant to be compensated out of the additional taxes (and penalties) collected as a result of the contest, and possibly for a separate award of attorneys' fees. At the same time, it could readily be structured so as to deter frivolous contests, by providing for an award of attorneys' fees from a contestant *to* the taxpayer in the event of an *unsuccessful* contest. To ensure satisfaction of such an award, and as a further deterrent to the casual initiation of contests with a low probability of success, contestants could be required to post a bond to guarantee payment of an attorneys' fee award if the contest did not succeed.

C. Deterring Excessive Valuation

Just those two provisions, I suggest, could have some deterrent effect on contributions of restrictions involving truly aggressive valuations, and might help alleviate the substantial enforcement burden that now rests exclusively with the IRS. What neither does, however, is impose any direct control on abusive valuation, nor does either of them directly alter the calculus facing a prospective donor at the time of contribution. Given the practices reflected in recent decisions, what is needed is some sort of explicit limit on the values that are used as the starting point in determining "before and after" valuations. It would also seem desirable to associate some up-front cost with the act of claiming a deduction for a conservation restriction, by using a mechanism that will have more of a deterrent effect on aggressively valued than on conservatively valued contributions. I offer two suggestions.

1. Capping "Before" Valuations

As I have already noted, the Treasury's expressed concerns about the speculative nature of the "after" aspect of before and after valuation did not adequately anticipate how serious the valuation problems would actually turn out to be. Aggressive "before" valuations, if anything, have proved to be central to the most dramatically inflated valuations of conservation restrictions. As I also noted, the ability to generate such elevated valuations depends on the appreciated property rules—the non-taxation of unrealized appreciation, and the allowance of charitable contributions out of untaxed unrealized appreciation—combined with the fact that the claimed values of contributed conservation restrictions generally cannot be corroborated or policed by reference to market-based comparable sales.

[79] 31 U.S.C. §§ 3729–33 (2006).

[80] I have made a somewhat similar suggestion in another problematic context. *See* Theodore S. Sims, *Corporate Returns: Beyond Disclosure*, 96 TAX NOTES 735 (2002). In the current setting, however, my colleague Alan Feld shares credit (or blame, as the case may be) for the idea.

The implicit premise of the aggressive "before" valuations found in the opinions seems to be that "highest and best use"–based estimates of development potential can induce sudden increases in the value of recently acquired property. In a reasonably functioning real estate market, however, that premise, as one court put it, "simply . . . defies common sense."[81] The premise is also at odds with the empirical fact that, at least on average over the thirty years since § 170(h) was made permanent, U.S. real estate values, as reflected in housing prices, have not appreciated by much more than the rate of inflation, as measured by the consumer price index (CPI). Between December 1982 and March 2013, the CPI for all urban consumers grew at a compound annual average rate of about 2.9%; during the same period U.S. housing prices grew at about 3.4%.[82] Over the long haul, real estate may appreciate by more than the rate of inflation, but not by *that* much more, and certainly not at rates that would justify routine assertions of doubling or trebling of prices (or at least "values") in a short space of time.

The data, then, suggest one obvious, easily administered limitation on the value of property used as the starting point in valuing conservation restrictions. The "before" values should be limited to cost, adjusted for inflation.[83] That would put a stop to the most transparently aggressive valuation of conservation restrictions in respect of recently acquired realty, while allowing for higher starting points in valuing property that had been held for longer periods of time. In some instances a mechanical limitation of this sort might prove unduly parsimonious. I suggest,

[81] Whitehouse Hotel Ltd. P'ship v. Comm'r Internal Revenue, 139 T.C. 304, 336 (2012).

[82] In the aggregate, housing prices grew by a factor of 2.7 during that period, while the overall price level grew by a factor of 2.4. These comparisons are the author's calculations, drawing data from the BUREAU OF LABOR STATISTICS, U.S. DEP'T OF LABOR, CONSUMER PRICE INDEX, ftp://ftp.bls.gov/pub/special.requests/cpi/cpiai.txt (last visited May 16, 2013), using data on housing prices compiled by the OECD, and found on the website of the Federal Reserve Bank of St. Louis. *See* Org. for Econ. Cooperation and Dev., *Consumer Price Index: Housing for the United States*, OECD (May 3, 2013), http://research.stlouisfed.org/fred2/data/USACPIHOUMINMEI.txt (based on OECD (2010)); Org. for Econ. Cooperation and Dev., *Main Economic Indicators—Complete Database*, OECD (May 14, 2013), http://dx.doi.org/10.1787/data-00052-en.

[83] More precisely, it should be the lesser of that number or current fair market value. Price series for changes in real estate values may not be as readily or quickly available as the CPI, and their construction may not be as standardized. For longer intervals between acquisition and contribution a real-estate based price series might nevertheless be the better choice, in view of the fact that, over long horizons, real estate values generally have outpaced inflation. For shorter intervals use of the CPI probably would suffice.

Colinvaux, *supra* note 7, at 29–40, explores the possibility of limiting deductions for conservation restrictions to basis. His rationale is that basis might provide a better measure of conservation value of a restriction than estimates of the loss of market value to the recipient, though in the final analysis he questions whether it does. The proposal advanced here is to limit "before" values to basis adjusted for inflation, as a way of curtailing unrealistically aggressive "before and after" valuations.

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however, that occasionally erring on the low side is justified in the quite special case of conservation restrictions. Not only do they benefit from the generosity of the appreciated property rule[84] but, given the difficulties of valuing them, they are, as reflected in the reported decisions, uniquely vulnerable to abuse. Against that background a possibly restrictive but easy-to-administer prophylactic limitation seems entirely in order. What is more, the possibility of hardship could be ameliorated by allowing for the use of a higher "before" valuation than the inflation-indexed acquisition cost based on presentation of compelling evidence that a higher starting point is warranted.[85]

2. An Excise Tax on Contributions of Conservation Restrictions

It likewise would seem desirable to alter at the threshold the calculus facing a prospective donor of a conservation restriction. One way of accomplishing that could be through the imposition of an excise tax, based on the amount initially claimed as a deduction for the contribution of a conservation restriction, levied on the donor at the time of contribution. This could be structured so as to differentially deter aggressive valuations by fixing the amount of the tax at the time of contribution, *without any downward adjustment* if the value of the contribution is reduced on audit, after litigation, or even by reason of an amendment to the tax return on which the contribution was claimed. For a conservation restriction that has been carefully valued, the excise tax would alter the economics of the contribution so as to make it less valuable, but it would still leave a substantial incentive to making the contribution;[86] more importantly, it would never leave the donor worse off than if they had refrained from making the contribution in the first place. In the case of an aggressive valuation that is vulnerable to challenge, on the other hand, a substantial reduction in the value ultimately allowed might well leave the donor worse off. Consequently, the regime I propose would leave in place a substantial incentive to contributing conservation restrictions, while simultaneously creating a substantial deterrent to overvaluing them.[87]

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[84] *See supra* notes 11–17 and accompanying text.

[85] A higher valuation might, for example, be justified by evidence of unusual contemporaneous changes in the value of the other land nearby. But prudence would suggest that the presentation of such evidence should only be permitted at the end of some statutorily prescribed minimum period (such as five or ten years) following initial acquisition.

[86] *See supra* notes 13–15 and accompanying text.

[87] If the excise tax rate (e) is less than the donor's marginal rate (m), an accurately valued easement (where the amount claimed, C, equals the amount allowed, A) will always have positive economics, because

$$eC < mA \Leftrightarrow \frac{e}{m} < \frac{A}{C} = 1$$

Insofar as it alters in advance the economics of contributing conservation restrictions, the proposed excise tax would function in some respects like the proposed percentage reduction in the appraised value of a conservation restriction allowed as a deduction, included among the compliance options surveyed by the Joint Committee on Taxation in 2005.[88] It would differ, however, in two crucial respects. If structured as an excise tax on the amount claimed as a deduction, rather than as a reduction in the amount allowed, it would highlight the change in the economics by framing it as an excise that each prospective donor must explicitly pay. While to that extent the difference may be a matter of optics,[89] almost surely it would attract the attention of prospective donors in a way that simply reducing the allowable deduction almost equally surely would not. More importantly, however, the difference would be more than mere optics. By subjecting the prospective donor to an excise tax based on the *claimed* valuation, without any prospect of a reduction in the excise in the event that the claimed valuation was reduced, it would associate a real cost with the *position* the donor takes in his return, not just with the ultimate outcome.[90] That, it seems to me, would induce most prospective donors at the very least to ask, before signing, “Do I *really* want to claim this valuation? Because once I do there is no turning back.”

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so that the excise tax (eC) will always be less than the tax savings from the contribution (mA). By the same token, an overvalued easement will have negative economics (eC > mA) if the amount eventually allowed as a fraction of the amount originally claimed is less than the excise tax rate as a fraction of the donor’s marginal rate:

$$\frac{A}{C} < \frac{e}{m}.$$

For e = 10% and m = 40%, an easement found to have been overvalued by a factor of more than four would have negative overall economics. It is to be noted that the impact of an excise tax in the range of 10–15%, which would reduce the value of deducting a contribution by a 40% marginal rate taxpayer by 25–35%, is less drastic than the two-thirds writedown proposed by the Joint Committee on Taxation in 2005. *See* JOINT COMM. ON TAXATION, *supra* note 68, at 282–83.

[88] *See id.* at 282–84 (proposing that the deduction allowed on contribution of an open space easement be limited to one-third of the easement’s appraised value).

[89] From a financial perspective, the imposition of an excise tax would have the same qualitative impact as a fractional disallowance of the deduction; both would reduce the payoff from the deduction.

[90] This feature of the proposed excise tax would also (among other things) differentiate it from the existing regime of accuracy-related penalties imposed by I.R.C. § 6662 (2012), which (like most penalties) are imposed after the fact, based on the change in valuation. It should be noted that the steepest of those penalties, 40% of the underpayment due to a gross overvaluation imposed by § 6662(h), is the equivalent of a 16% excise tax on the overvaluation of a contribution by a 40% bracket contributor. It would be possible, in principle, to integrate the two regimes, in which event the upfront excise would function something like a down payment on the gross overvaluation penalty eventually due.

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It will, I expect, immediately be objected that an up-front excise tax would sound the death knell of conservation contributions. There are compelling grounds for believing that would not be so. It is reasonable to think that most such contributions are made by taxpayers in the topmost brackets; for them, an excise tax in the range I have in mind—10–15% of the claimed deduction—would still leave a nominal tax benefit, net of the excise, of 25–30% of the amount deducted, realized with the return for which the deduction is claimed and the excise tax is due.[91] For an accurately valued conservation restriction that still leaves a substantial inducement, especially given the already high-powered nature of the incentive to making charitable contributions of appreciated property.[92] Indeed, we already impose a filing fee (albeit much more modest in amount) with respect to façade easements on structures in registered historic districts.[93] More importantly, opinions in a number of reported cases bear witness to the willingness of potential contributors of conservation restrictions to proceed in the face of more substantial threshold monetary costs, in the form of fees (as high as 10% of the value of the proposed conservation restriction) charged by some recipient organizations.[94] It therefore seems unlikely that a suitably designed excise tax on contributions of conservation restrictions would deter responsibly valued contributions. If, on the other hand, the tax was levied on the amount initially claimed, it simultaneously would, together with existing accuracy-related penalties, pose a substantial risk for contributions that are aggressively valued. It therefore offers a reasonable prospect of distinguishing at the outset, rather than merely after-the-fact, and at substantial enforcement and administrative cost, between responsibly valued contributions of conservation restrictions, on the one hand, and claims that deserve to be discouraged.

D. The Problem of Perpetuity

The requirement that deductible conservation restrictions be perpetual has proven to be somewhat vexing. As the provision started out life in the Tax Reform Act of 1976, deductibility required only that a restriction be of thirty years' duration.

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[91] Depending on the excise tax rate and the donor's marginal rate, this would be roughly equivalent to reducing the amount allowed as a deduction by between 25–40%, substantially less than the 67% reduction proposed as part of the 2005 Joint Committee Options. For taxpayers for whom the percentage limitations bind, and who must make use of a carryover, payment of the excise tax could be apportioned amongst those returns on which the deduction is allowed.

[92] *See supra* notes 13–15 and accompanying text.

[93] I.R.C. § 170(f)(13) (imposing a $500 filing fee, the proceeds of which are dedicated to the enforcement of § 170(h)). The proceeds of the proposed excise tax could be similarly devoted.

[94] *E.g.*, 1982 East, LLC v. Comm'r, 101 T.C.M. (CCH) 1380, 2011 WL1398804, at *3–5 & n.8 (2011) (10% cash contribution); Kaufman v. Shulman, 687 F.3d 21, 24 & n.2 (1st Cir. 2012) (to the same effect). The recipient in those cases was the National Architectural Trust. *See supra* note 66.

Congress altered that in 1977 to require that a deductible restriction be "granted in perpetuity." [95] And one thing on which the Treasury insisted throughout reauthorization was that deductible contributions be perpetual. The Treasury regulations thus contain a variety of provisions intended to implement the congressional intention to limit deductions to restrictions that would protect unique or otherwise significant land areas or structures in perpetuity.[96] It is likewise fair to say the appellate courts have not displayed unqualified sympathy to the full range of the regulations' requirements, certainly as respects façade easements.[97] Academic opinion on the subject has also been divided, with some observers arguing that even "perpetual" restrictions ought to be susceptible to modification by mutual agreement of the holder and the owner of the burdened land, while others assert that, under applicable state laws, a "perpetual" restriction is required to be exactly that.[98] Beyond the possibility of voluntary amendment or termination, there is the always-lurking concern that enforcement of restrictions on the books may be less than ideally vigorous.

It is easy to sympathize with the view that, as substantial federal resources are being devoted to financing conservation restrictions, those resources should not be wasted by allowing liberal relinquishment of or amendment to, or tolerating indifferent enforcement of, the resulting restrictions.[99] Stepping back momentarily from the legal details, on the other hand, clichés jump readily to mind. Circumstances change. Today's Mojave Desert could be the 22nd century's west coast. Forever is a very long time. And from a more strictly legal perspective it has been over three centuries since the success of Sir Orlando Bridgman's skills at conveyancing provoked the advent of the common law rule against (*nota bene*) perpetuities, in the absence of which the Barony of Grostock would have been tied up according to the wishes of the Third Earl of Arundel, expressed in indentures executed in 1647, until nearly the beginning of the 20th century.[100]

The rule against perpetuities, it must immediately be said, does not actually apply to conservation restrictions, both because the interests in question are non-contingent, and because they are granted to charitable recipients. But they are an external, perpetual restraint on the use that may be made of the burdened land. And

[95] *See supra* notes 23–24 and accompanying text.

[96] S. REP. NO. 96-1007, at 9 (1980); Treas. Reg. § 1.170A-14(g) (2012).

[97] See *supra* note 41, for a sampling of the opinions. *See* Comm'r v. Simmons, 646 F.3d 6, 11 (D.C. Cir. 2011) (provision in façade easement permitting holder to consent to changes in façade or abandon its rights did not violate requirement of Treas. Reg. § 1.170A-14(g)(1) that it be "enforceable in perpetuity," though the court did express the view that the requirement that any such consent comply with applicable law would provide adequate protection); *see also Kaufman*, 687 F.3d at 31.

[98] For a sampling of the literature, see *supra* note 41; Bray, in particular, contains an excellent survey of the issues raised by the perpetuity requirement.

[99] *E.g.*, McLaughlin, *supra* note 6.

[100] The Duke of Norfolk's Case, (1682) 22 Eng. Rep. 931. For more detail, see the edifying and amusing account in ASHBEL G. GULLIVER, CASES AND MATERIALS ON FUTURE INTERESTS 362–88 (1959).

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the existence of the doctrine provides some grounds for sympathy with the argument that "perpetual", even when used with respect to federally financed conservation restrictions, should be able to bend with the changes wrought by time. If fee title cannot be tied up for more than about 100 years, it is hard to see why land subject to a conservation restriction should.

The regulations do address this issue. They expressly recognize that a subsequent change in conditions may make impossible or impractical the continued use of the property for the originally intended conservation purposes. They prescribe means by which such realities may be addressed, and what should be required of the proceeds from relinquishment of a restriction if that should occur.[101] They likewise provide that a conservation restriction need not be viewed as invalid simply because of future events, the possibility of which is so remote as to be negligible.[102] But some recent decisions have refused to invalidate contributions that provided for modification or abandonment on more liberal terms than those contemplated by the regulations.[103] And the regulations do not, in any event, prescribe what is to happen when a contribution for which a deduction has previously been taken simply ceases to be enforced.

The mixed success with which the regulations' implementation of the perpetuity requirement has been met is cause for both controversy and consternation.[104] If, however, the concerns are not merely with conservation for its own sake, but with the dissipation of restrictions for which the federal government has paid, there is a secondary solution that would at least function as a corrective when, for whatever reason, a conservation restriction ceases to fulfill its intended objectives: recapture the tax benefits previously conferred when the conservation restriction was originally granted. Something of that sort is already prescribed with respect to charitable contributions of undivided fractional interests in property. If such interests do not become complete within (at the latest) ten years following the initial contribution, or if the donee in the interim is not accorded possessory rights commensurate with its fractional interest, the deduction is recaptured, together with interest from the date of the original contribution, and a penalty equal to 10% of the amount recaptured is imposed.[105]

My final suggestion, then, for ameliorative legislation is to impose a similar recapture rule with respect to conservation restrictions that have become outdated, in the sense that it no longer seems reasonable to insist that they continue to be enforced; or, more generally, to any contributed restriction that is no longer *being* enforced. In

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[101] Treas. Reg. § 1.170A-14(g)(6).

[102] *Id.* § 1.170A-14(g)(3).

[103] *See* sources cited *supra* notes 41 and 97.

[104] *See supra* note 41.

[105] I.R.C. § 170(o)(3) (2012) (added by § 1218(a) of the Pension Protection Act of 2006, Pub. L. No. 109-280, 120 Stat. 780 (2006)); *see also* § 170(e)(7) (added by § 1215(a)(2) of the Pension Protection Act), providing for recapture of deductions in excess of basis when contributed works of tangible personal property are disposed of by the recipient organization within three years following their contribution.

either case, Congress could (as it already has with respect to undivided fractional interests) require that the conservation restriction be taken back into income by the owner of the burdened land at the time the restriction is relinquished or otherwise ceases to be enforced.[106] Recapture resulting from this provision thus would not necessarily be taken into income by the owner who originally contributed the restriction and obtained the tax benefit of the contribution. The recapture potential, like the restriction itself, would effectively run with the land. There is nothing obviously unfair about that. The original deduction would have been allowed, after all, on the premise that granting it depressed the value of the land, by the amount claimed as a deduction. Any subsequent purchaser would presumably then buy at a favorable price, taking into account the depressing impact on value of the restriction. If, then, a later owner is, for *whatever* reason—such as a consent by the holder to modification, abandonment, demise of the organizational holder, or simple desuetude—relieved of the burden of the restriction, a recapture rule would do no more than recover the subsidy originally granted when the restriction was created, by way of taxing the landowner on the windfall benefit from being relieved of the burden of the restriction.

To the objection that it would be burdensome to preserve the requisite information indefinitely, one can only reply that that is exactly what is implied by the requirement that to obtain a deduction in the first place the restriction must be in perpetuity. I do not, I should add, envision that the proposed recapture rule would be a substitute for the regulations' existing provisions intended to ensure enforcement of deductible contributions in perpetuity. One might reasonably anticipate, on the other hand, that a recapture provision would both take the pressure off the requirement that deductible restrictions be enforced in perpetuity, and reduce the temptation to create conservation restrictions that the grantor does not truly expect will be perpetually enforced.[107]

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[106] As under existing § 170(o), the amount taken into income would be adjusted for the passage of time, for example, by increasing it by one version or another of the applicable federal rate. Because recapture might often be occasioned by events not anticipated at the time the restriction was created and beyond the landowner's control, it would not seem appropriate to add to the recapture a penalty of the sort provided for in existing § 170(o)(3)(B).

[107] The possibility of recapture suggests an alternative perhaps worth considering. We could return to something like the *original* version of § 170(h), and allow current deductions for contributions of conservation restrictions having a fixed term (such as thirty years), but *subject to recapture* over time as the expiration of the restriction drew near. That is, we could allow temporary deductions, for the contribution of temporary restrictions, thus reducing the potential dead-hand effects of perpetual restrictions. Such an alternative would be easy to fashion, simply by assuming that the value of the land appreciated as the expiration of the restriction approached, in some pattern fixed in advance. The model that jumps immediately to mind is the rate at which income accrues on original issue discount debt under I.R.C. § 1272(a). Such recapture, like the recapture rule proposed in the text, would likewise run with the land.

V. CONCLUSION

To sum up, I think it fair to say that the concerns that motivated the Treasury to object to the adoption of § 170(h) more than thirty years ago have been more than justified by what has happened since. It has led to the allowance of substantial deductions for contributions that generate little in the way of public benefit. It has produced a regime of uniquely high-powered incentives so rich with opportunities for abuse that the temptations have proved impossible to resist: supposedly responsible stewards of the public trust have become mired in public scandal; new organizations have arisen all but expressly dedicated to taking advantage of § 170(h) by attempting to secure deductions for restrictions that have no real impact on the donors' use or enjoyment of their newly "restricted" land. The valuation problems that were of primary concern to the Treasury Department have proven, if anything, to be more serious than the Treasury anticipated. Those developments have produced calls to replace the existing regime with a system of federal matching grants, or a system of tax credits for contributions of conservation restrictions, but in limited annual amounts and only upon approval by some regulatory body with expertise in the allocation of resources to conservation. Short of that, however, I have suggested a series of steps that could remedy some of the most glaring difficulties of the existing regime. Public disclosure of the details of all contributed easements seems to me the essential first step. Beyond that, authorizing private challenges to the valuation of contributed restrictions would alleviate some of the pressure on the resources that the IRS has been obligated disproportionately to devote to this particular corner of the law. But I also think that more direct measures are called for, including a limit on the "before" values used in "before and after" valuation. And a properly structured excise tax, assessed on the claimed value of contributed restrictions, could go a long way towards discouraging the most aggressively overvalued contributions of conservation restrictions. Given the pending interest in altering the structure of this provision of the law, these additional steps strike me as well worth considering.