Perpetual Conservation: Accomplishing the Goal through Preemptive Federal Easement Programs

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PERPETUAL CONSERVATION:
ACCOMPLISHING THE GOAL
THROUGH PREEMPTIVE FEDERAL
EASEMENT PROGRAMS

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During the past two decades, Congress has enacted significant legislative initiatives designed to reduce degradation of our environment. These initiatives have included special efforts to conserve our land resource. To preserve the appropriate balance of power between the federal government and the states, Congress has striven to avoid the appearance of federal land use "regulation." For example, the legislative history of the conservation provisions in the Food Security Act of 1985 ("1985 Farm Bill") expressly notes that the "bill does not . . . regulate the use of private, or non-Federal land." The government can readily control land uses, and avoid the complex issues arising when federal programs affect states' rights or private property rights, by purchasing full fee title to environmentally significant lands. However, purchasing full fee title is an expensive means of achieving conservation or preservation goals. Thus, to protect environmentally significant aspects of the land resource, the government has shifted its focus to the acquisition of less costly easements from private landowners.

Easements can be created to allow the federal government to restrict environmentally degrading uses of the land. Because the easements are purchased from landowners who voluntarily agree to such restrictions, the government can influence land use without directly regulating it. Easements have been highly praised by conservation and environmental interest groups as an ideal device to achieve conservation and preservation goals. The political feas-

1. See discussion infra part II.A.
5. Although the government historically has used easement acquisition programs for various purposes, the trend toward conserving or preserving diverse land resources through easements is evidenced by the multitude of recently established federal conservation programs which include easement acquisition provisions. See discussion infra part LB.2.
6. See infra notes 23-27 and accompanying text.
7. See generally John W. Bruce & James W. Ely, Jr., The Law of Easements and Licenses in Land § 11.02 (1988) (noting that the grantor of a conservation easement may use property for any purposes not inconsistent with the easement).
8. See infra notes 45, 51-55 and accompanying text (describing distinction between
bility of federal easement acquisition programs is aptly illustrated by the Food, Agriculture, Conservation and Trade Act of 1990\(^9\) ("1990 Farm Bill"), which has greatly expanded the government's use of easements to protect environmentally significant lands, including wetlands, highly erodible croplands, forestlands, wildlife habitats, farmland, shelterbelts and windbreaks.\(^{10}\) Landowner acceptance of easement acquisition programs is evidenced by the first year's response to the Wetlands Reserve Program\(^{11}\) — 2,730 landowners indicated a willingness to enroll 466,000 acres in the program.\(^ {12}\)

Accordingly, it is important to determine how Congress can best utilize land use restriction easements to achieve lasting conservation and preservation of the land resource. Congress has called for an evaluation of federal conservation programs; specifically, Congress has sought to overcome obstacles to federal conservation goals.\(^ {13}\) One such obstacle is uncertainty in the law governing the duration of federal land use restriction easements. While the Forestry Title of the 1990 Farm Bill requires easements to be held in perpetuity and preempts state law limits on duration,\(^ {14}\) the Conservation Title of the 1990 Farm Bill incorporates state law to govern the maximum allowable duration.\(^ {15}\) No other acquisition program expressly addresses whether federal law overrides state limitations on duration.\(^ {16}\)

Use of state law to govern the maximum duration of easements will hinder the federal government's ability to advance conservation goals efficiently and effectively. In addition to the ineffi-
ciencies of compliance with diverse state laws, state laws may preclude the acquisition of easements in perpetuity.\textsuperscript{17} Even in those states which permit restrictive land use easements to be held in perpetuity, incorporation of state law may hinder federal programs because state law may place limits on qualified holders of easements or purposes for which easements may be created.\textsuperscript{18} Further, incorporation of state law may permit a state to defeat federal programs simply by modifying its laws.\textsuperscript{19}

Accordingly, federal programs should authorize acquisition of perpetual easements and preempt state laws regulating their duration. This policy will enhance conservation goals in programs which use easements to restrict harmful uses of the land resource.\textsuperscript{20} However, federal imposition of these requirements raises fundamental federalism concerns. May the federal government acquire a property right that is not a cognizable aspect of the landowner's "bundle of rights" under state law? Even if the federal government may acquire a property right not recognized by state law, may the federal government convey that right to private nonprofit entities, along with the ability to enforce its terms? Certainly, if a federal law authorizing perpetual easements is a proper exercise of congressional powers, it will preempt state laws.\textsuperscript{21} However, because state laws traditionally control the acquisition and transfer of property, and define the resulting rights and responsibilities,\textsuperscript{22} federal preemption of state property law may be perceived as an intrusion on state sovereignty which violates constitutional limitations.

This article examines the constitutional and policy concerns surrounding federal use of perpetual land use restrictive easements to achieve conservation goals. Section I explains the use of easements for conservation or preservation purposes and provides an

\begin{itemize}
  \item \textsuperscript{17} See infra notes 39-42, 457-61 and accompanying text.
  \item \textsuperscript{18} See infra notes 462-65 and accompanying text.
  \item \textsuperscript{19} States may be overly responsive to private interests dissatisfied with encumbrances on land use. See infra notes 471-73 and accompanying text.
  \item \textsuperscript{20} This article uses the term "perpetual" to mean that the interest is intended to be continuous and of unlimited duration. BLACK'S LAW DICTIONARY 1140 (6th ed. 1990). However, the term can be used in conjunction with provisions permitting modification or termination of the interest under certain circumstances. See infra notes 485-87 and accompanying text.
  \item \textsuperscript{21} U.S. CONST. art. VI, cl. 2.
  \item \textsuperscript{22} The states' traditional control over property law is used to justify the incorporation of state law in the interpretation of federal legislation. See infra notes 225, 403-13 and accompanying text.
\end{itemize}
overview of their use in federal agricultural programs. Section II explains why easement acquisition programs are more appropriate than direct land use regulation as a means to conserve environmentally significant aspects of the land resource.

Section III analyzes federalism issues and concludes that federal preemption of state limitations on the duration of easements is a proper exercise of congressional spending and property power. Moreover, this exercise of congressional power does not violate constitutional limitations intended to protect state sovereignty. Finally, section IV crafts a framework for the policy decision. Even if the exercise of congressional power is constitutional, Congress should consider the policy questions before enacting legislation that intrudes into traditional areas of state authority. After examining the policy issues, the article concludes that federal law should require perpetual easements and preempt state limitations on duration.

I. OVERVIEW OF CONSERVATION EASEMENTS

A. Land Use Restriction Easements

Land use restriction easements ("LUREs") are an innovative application of the private land use arrangements traditionally recognized at common law. An easement is a non-possessory interest in another's land, generally entitling the easement holder to use the land or to control its use. An easement typically grants an affirmative right to the easement holder; however, in the case of a LURE, the easement conveys a negative restriction on the landowner who grants the easement. In other words, the landowner vol-

23. Private land use arrangements may take the form of easements, real covenants, or equitable servitudes. See generally GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS § 1.01 (1990) ("Easements, real covenants, and equitable servitudes are used to allocate non-possessory rights in the land of another."). While historically courts have viewed these interests differently, for this article the primary significance of such arrangements is the resulting land use restrictions imposed. See id. (noting that while courts have regarded easements, real covenants and equitable servitudes as independent areas of the law, recent scholarship has advocated unification of these doctrines). Rather than use common law nomenclature, this article adopts the more modern term "land use restriction easement." The acronym "LURE" is appropriate given the federal government's use of LUREs as an "incentive" to promote voluntary modification of land use.

24. RESTATEMENT (FIRST) OF PROPERTY § 450 (1944) [hereinafter RESTATEMENT].

25. See id. § 451 (an affirmative easement entitles the owner to enter upon or use the grantor's land for a prescribed activity).

26. For this reason, a LURE is deemed a negative easement. See Andrew Dana & Michael Ramsey, Conservation Easements and the Common Law, 8 STAN. ENVTL. L. J. 2,
A landowner unilaterally agrees to limit his use of the land to conserve its resources or preserve its unique character.\textsuperscript{27}

The common law traditionally disfavored negative restrictions on land as unduly burdensome on free alienation.\textsuperscript{28} Free alienability of land was an important tradition in post-feudal and pre-industrial England.\textsuperscript{29} because a later easement holder might not be a party to the original transfer, and because there was no title registry, a later purchaser might have difficulty in discovering the existence of a negative easement.\textsuperscript{30} In addition, common law courts are reluctant to enforce negative easements unlike those traditionally permitted, such as easements for light or air which clearly benefit the dominant estate.\textsuperscript{31}

Further, LUREs are generally characterized as in gross, rather than appurtenant to an adjacent parcel of land.\textsuperscript{32} Since a LURE does not benefit any identifiable land, it is more akin to a personal

\begin{footnotesize}
\begin{enumerate}
\item[27.] See Komgold, supra note 4, at 435 ("Essentially, a conservation servitude is a negative restriction on land prohibiting the landowner from acting in a way that would alter the existing natural, open, scenic, or ecological condition of the land."); Kemble H. Garret, Note, Conservation Easements: The Greening of America?, 73 KY. L.J. 255, 256 (1984-85).
\item[29.] See Olin L. Browder, Running Covenants and Public Policy, 77 MICH. L. REV. 12, 14-19 (1978) (reviewing the legal impediments erected by English courts to prevent "running" of land use restrictions and promote alienability of property).
\item[30.] See Ellen E. Katz, Conserving the Nation's Heritage Using the Uniform Conservation Easement Act, 43 WASH. & LEE L. REV. 369, 377 (1986).
\item[31.] See, e.g., Petersen v. Friedman, 328 P.2d 264 (Cal. Ct. App. 1958) (compelling removal of television antennae and aerials which violated express easements of light, air and unobstructed view). Common law traditionally allowed only the following types of negative easements: (1) easements restricting the blockage of light and air to a building; (2) easements restricting removal of subjacent or lateral support for a building; and (3) easements restricting interference with the flow of an artificial stream. Dana & Ramsey, supra note 26, at 13. Modern courts have also recognized "view easements" and "solar easements." Id.
\item[32.] Hamilton, supra note 26, at 485. Appurtenant easements benefit a specific parcel of land, known as the dominant estate, usually adjacent to the burdened or servient estate of the easement grantor. RESTATEMENT, supra note 24, § 453. In gross easements benefit an individual personally, rather than as owner of an identified parcel of land. Id. § 454. Thus, LUREs possess the characteristics of negative or restrictive easements in gross.
\end{enumerate}
\end{footnotesize}
agreement.\textsuperscript{33} Traditionally, courts have restricted the assignment or transferability of easements in gross to protect innocent purchasers.\textsuperscript{34}

Despite the common law tradition, LUREs have proliferated in recent years as a means of conserving or preserving historical and environmental aspects of real property. Recognizing growing public support for such efforts, several state legislatures have enacted statutes validating LUREs and vitiating issues raised by application of the common law.\textsuperscript{35} Some state statutes are modeled after the Uniform Conservation Easement Act ("UCEA") promulgated in 1981.\textsuperscript{36} The UCEA defines a "conservation easement" as:

\begin{quote}
[A] nonpossessory interest of a holder in real property imposing limitations or affirmative obligations the purposes of which include retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archeological, or cultural aspects of real property.\textsuperscript{37}
\end{quote}

Further, the UCEA states that a conservation easement is valid even though it is not appurtenant, is assignable, is not traditionally recognized at common law, imposes a negative burden, does not touch or concern real property, and is without privity of estate or contract.\textsuperscript{38}

\begin{footnotes}
\item[33] See Katz, supra note 30, at 382.
\item[34] Traditionally, American law has restricted the alienability of easements in gross, permitting assignability only when the easement is created for a "commercial" purpose. Susan F. French, Toward A Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. CAL. L. REV. 1261, 1268 (1981-82). A minority of states disfavor the transfer of all easements in gross. See Judith S.H. Atherton, An Assessment of Conservation Easements: One Method of Protecting Utah's Landscape, 6 J. ENERGY L. & POL'Y 55, 58 n.4 (1985) (surveying various state statutes governing transfer of easements in gross). The rationale for the restrictive view is that easements should be tied to another parcel of land so that the benefits of the easement flow to a later owner of adjacent property. See Katz, supra note 30, at 382.
\item[35] See infra notes 456-59 and accompanying text; see also Atherton, supra note 34, at 86-87 (appendix listing state conservation statutes); Hamilton, supra note 22, at 525-27 (appendix listing state statutes permitting LUREs).
\item[37] Id. § 1(1).
\item[38] Id. § 4(1)-(7). Some of the issues vitiated stemmed from the common law doctrines of real covenants or equitable servitudes, in addition to common law easement doctrines. See supra note 23. See generally Katz, supra note 30, at 377-82 (discussing
\end{footnotes}
Despite the effort to promote uniformity, state statutes authorizing LUREs for conservation or preservation purposes are diverse. These statutes employ divergent provisions regarding various facets of LUREs including their creation, authorized purposes, qualified holders, acceptance, duration, enforcement, modification, and termination. Thus, state statutes do not resolve all obstacles to judicial enforcement of LUREs, particularly LUREs held by the federal government or acquired pursuant to federal conservation programs. Nonetheless, states which permit negative, in gross easements for conservation or preservation purposes utilize LUREs to achieve a variety of public goals.

The use of LUREs to protect or preserve environmentally significant aspects of real property offers a number of advantages to both the landowner and the easement holder. Foremost, LUREs offer great flexibility. LURE agreements can be drafted with specificity regarding both the restricted and the allowed uses of the land. The resulting capability of LUREs to accomplish either conservation or preservation goals offers a tremendous advantage in the protection of the diverse ecological aspects of our land re-
source. For example, while a wetland may need to be preserved to maintain its environmentally significant functions, highly erodible lands or forestlands may merely need to be conserved.

Further, since less funds are required to purchase a LURE than the full fee interest, the conservation purpose is accomplished more efficiently. Additionally, the management and possession of the realty remain with the landowner. Because title remains with the landowner, the realty remains subject to local property taxes, although property value may be reduced by the presence of a LURE. Moreover, property owners who donate LUREs may qualify for a charitable deduction from federal income taxes.

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44. Easements may be used to preserve the scenic or open-space values associated with the land, as well as to regulate uses of the land which are permitted. See supra note 26; see also BRUCE & ELY, supra note 7, ¶ 11.02 (stating that conservation easements protect open space, scenic views, wildlife habitats and outdoor recreation areas); R. Tim Willis, The Use of Easements to Preserve Oregon Open Space, 12 WILLAMETTE L.J. 124, 125-26 (1975) (explaining that an easement allows the landowner to continue to use the land, subject to the easement regulations).

45. The distinction between conservation and preservation should be noted, since these terms describe two different approaches to environmental land management. Conservation entails the use of science and technology to achieve efficient use of land resources. By contrast, preservation emphasizes the aesthetics of the land as its most important feature. Adherents of the latter view seek to preserve the land in its natural state, precluding any commercial use, efficient or otherwise. See SAMUEL P. HAYS, CONSERVATION AND THE GOSPEL OF EFFICIENCY 189-198 (1959) (characterizing the conflict as between those who favor resource development and those who argue that wildlife areas should be preserved from commercial use); CURRENT ISSUES IN NATURAL RESOURCE POLICY 31 (Paul R. Portney et al. eds., 1982) (stating that the scientific management espoused by the conservationists conflicts with the objectives of preservationists who want lands left undisturbed).

For purposes of this article, the important point is that LUREs can be used to achieve both conservation and preservation goals.

46. Hamilton, supra note 26, at 486. A LURE may not be cost effective if the device fails to protect the resource adequately. Dana & Ramsey, supra note 26, at 10 n.45.

47. Hamilton, supra note 26, at 486.

48. Id. Because federally owned property is not subject to local taxes, local residents shoulder an additional tax burden when the government protects land resources by acquiring full fee title. See id.

49. See Dana & Ramsey, supra note 26, at 9 (noting that reduction in property value due to LUREs may be offset by corresponding reduction in property taxes).

For these and other reasons, LUREs have become the vehicle of choice among private organizations for conservation and preservation of the land resource. Private organizations engaged in land acquisition include the National Trust for Historic Preservation, the Nature Conservancy, American Farmland Trust, Trust for Public Land, and the Conservation Fund. These national organizations have protected nearly seven million acres of land. In addition, the number of local land trusts has dramatically increased. In 1950, there were fifty-three such organizations; in 1990, there were 899. Local land trusts have protected approximately 2.7 million acres. Similarly, state and local entities are increasingly relying on easement acquisition programs as a means of protecting environmentally sensitive lands.

Moreover, the Supreme Court’s recent decision in *Lucas v. South Carolina Coastal Council* may result in greater support for LURE acquisition programs at the state level. *Lucas* indicates that state regulation of land use may constitute a taking under the Fifth and Fourteenth Amendments unless the regulation is grounded in the common law of nuisance. This decision may induce envi-

51. The federal tax code permits the establishment of charitable organizations for the specific purpose of accepting donations of “qualified conservation contributions” as defined in § 170(h) of the Internal Revenue Code. Regulations prescribe that a qualified organization must satisfy the general requirements for tax exempt status, must have a commitment to protect the conservation purposes of the donation, and must have the resources to enforce the restriction. See Treas. Reg. § 1.170A-14(c)(1) (1988) (defining eligible donee requirements for conservation contribution).


53. Id.

54. Id.


The Indiana Heritage Trust Program, for example, authorizes the state Department of Natural Resources to purchase real property or interests in real property. Property eligible for the program is described as property that: “(1) is an example of outstanding natural features and habitats; (2) has historical and archeological significance; and (3) provides areas for conservation, recreation and the restoration of native biological diversity.” Senate Enrolled Act of 1992, No. 387, § 3(1)(a) (to be codified at IND. CODE § 14-3-20-1). The program was enacted to ensure that Indiana’s rich natural heritage is preserved or enhanced for succeeding generations. *Id.* § 1(b).


57. *Id.; see infra* notes 180-82 and accompanying text.
Environmental interest groups to favor LUREs over lobbying for enhanced land use regulations.

Like the states, the federal government has had extensive involvement in acquiring less-than-fee interests for conservation purposes. One of the oldest and most frequently used LURE programs is the Migratory Bird Conservation Act of 1929 ("MBCA"). The MBCA was expanded in 1958 to permit the acquisition of interests in small wetland or pothole areas such as waterfowl breeding habitats. The federal government has also used LUREs to protect specific wildlife resources, access to outdoor recreation, and scenic vistas along national highways.

In particular, the 1990 Farm Bill has greatly expanded the federal government's use of LUREs for conservation purposes. To assist in understanding the flexibility of LUREs and their ready use by the federal government to attain conservation goals, it will be helpful to review the variety of LURE acquisition programs established by federal agricultural legislation.

B. The Use of LUREs in Federal Agricultural Legislation

Recently, federal use of LUREs has been incorporated into agricultural legislation to conserve and preserve farmland and forestland. This legislation reflects societal awareness of the environmentally significant and sensitive nature of wetlands and other riparian areas, wildlife habitats, and windbreaks and shelterbelts, predominantly found on lands which are or could be used for agricultural purposes. As cropland is lost to urban development and other uses, farmers must develop new croplands from natural lands, often thereby destroying wetlands and other riparian areas as well as other environmentally significant aspects of the land resource.

58. The MBCA authorizes the federal government to acquire areas of land and water suitable for migratory waterfowl, or the "interests therein." 16 U.S.C. §§ 715a, 715d (1988). The "interests" purchased by the federal government in such land are usually LUREs.


60. See, e.g., 16 U.S.C. §§ 696, 698, 698f, 698n (1988) (authorizing various wildlife and ecological preserves established by acquiring fee and easement interests).

61. See id. §§ 4601-4 to -11 (providing for state and federal acquisition of land and water areas through Land and Water Conservation Fund to preserve quality and quantity of outdoor recreation resources).

Between 1954 and 1975, eighty-seven percent of the 13.8 million wetland acres lost were converted to agricultural uses. Thus, recent Congressional action protecting these environmentally sensitive lands has come largely through agricultural legislation implemented by the United States Department of Agriculture ("USDA") and its many agencies.

1. The Early Use of LUREs for Conservation

The federal government first enacted conservation legislation to combat soil erosion on agricultural lands during the Great Depression. However, early federal programs were limited because participation was voluntary and their only benefits were technical assistance and cost-sharing. Reluctant to impose direct controls on privately owned land, Congress worked in partnership with the agricultural community to maintain the voluntary aspect of conservation legislation. The use of LUREs in federal conservation programs continues this cooperative approach. Since LUREs provide flexibility to accommodate diverse circumstances, they provide Congress with the ability to broaden federal conservation programs and increase the incentives for participation.

Congress began using LUREs in a 1973 agricultural program, the Rural Environmental Conservation Program ("RECP"). As originally enacted, the RECP authorized the Secretary of the USDA

63. U.S. DEP'T OF AGRICULTURE, AGRICULTURE AND THE ENVIRONMENT 6 (1991). In addition to the need for new cropland to offset the encroachment of urban areas, some farm policies encourage farmers to increase production needlessly. See B.J. Wynne III & Carol A. Bradley, Is the 1990 Farm Bill the Opening Shot in a "Quiet Revolution?", 44 SW. L.J. 1383, 1390 (1991) (arguing that the deficiency payment program encourages higher production to maximize eligibility for program benefits regardless of market demand).

64. These agencies include the Agricultural Stabilization and Conservation Service ("ASCS"), the Extension Service ("ES"), the Forest Service ("FS"), the Soil Conservation Service ("SCS"), and the Farmers Home Administration ("FmHA"). U.S. DEP'T OF AGRICULTURE, AGRICULTURE AND THE ENVIRONMENT 37 (1991).


"Secretary") to purchase perpetual LUREs for soil conservation or wetlands preservation, as well as to promote sound use and management of flood plains, shorelands, and aquatic areas of the nation.68 The 1985 Farm Bill amended the RECP by replacing the provision requiring perpetual LUREs and authorizing LUREs "for a term of not less than 50 years."69

The 1985 Farm Bill also initiated an innovative use of LUREs in conjunction with farm debt restructuring.70 The bill authorized the Secretary to acquire and retain LUREs on certain lands, for a term of not less than fifty years, as a means of debt restructuring on Farmers Home Association ("FmHA") loans made before December 23, 1985.71 In addition, to promote conservation purposes the bill authorized the FmHA to grant-or sell LUREs held on farmland to a unit of state or local government or to a private nonprofit organization.72 Besides allowing LUREs to protect farmland, this provision is distinctive because it permits the federal government to transfer LUREs to local governments or private third parties.73

Although other conservation programs initiated in the 1985

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70. The debt restructuring program was touted as allowing the farmer to stay on the farm while promoting conservation goals. See, e.g., Preparation for the 1990 Farm Bill: Hearings on Conservation Issues and Agricultural Practices and Oversight on the Forestry Title of the 1990 Farm Bill Before the Subcomm. on Conservation and Forestry of the Senate Comm. on Agriculture, Nutrition, and Forestry, 101st Cong., 1st & 2d Sess. 427 (1990) [hereinafter Senate Hearings] (statement of Sen. Robert W. Kasten, Jr.).
71. 7 U.S.C. § 1997(b) (1988). The easement-for-debt restructuring is in the form of a "write-down" which reduces the borrower's debt. Farmer Programs Account Servicing Policies, 7 C.F.R. § 1951.906(c)(6) (1992). The debt restructuring program requires that: (1) the land must be either uplands, wetlands, or highly erodible lands; (2) the realty must be secured by an FmHA loan held by the Secretary and the borrower must have been unable to repay the loan in a timely manner; or (3) the realty must have been administered by the Secretary under the conservation title; and (4) the realty must have been row cropped for each of the three years preceding the bill's date of enactment (except in the case of wetlands or wildlife habitats). 7 U.S.C. § 1997(c) (Supp. II 1990). The 1985 Farm Bill was approved on December 23, 1985. 99 Stat. at 1660.
72. 7 U.S.C. § 1985(c)(1) (Supp. II 1990) (authorizing conveyance of "an easement, restriction, development rights, or the equivalent" held by the United States in certain farmland). Farmland in FmHA's inventory becomes eligible for sale to the public only when: (1) the Secretary has determined that the land is unsuitable for sale to persons who qualify for assistance under other farm programs; or, (2) no qualified person has purchased the land within twelve months after the land was first made available. Id.
73. Id.
Farm Bill were proving to be effective, conservationists and other interest groups were dissatisfied with the implementation of the FmHA LURE provisions. During Congressional proceedings on the 1990 Farm Bill, frequent calls were made to strengthen these provisions. Witnesses pointed out that the debt-for-easement program had been used by the FmHA in fewer than five cases, even though the FmHA had forgiven more than 1.8 billion dollars of debt owed by approximately 9,600 borrowers. Furthermore, it was noted that the FmHA had acquired LUREs on less than 200 of the more than 1,200 properties recommended for easement programs by the Fish and Wildlife Service.

Following enactment of the 1985 Farm Bill, there was a growing recognition of LUREs as an ideal means to conserve or preserve environmentally sensitive lands. Much of the testimony on the conservation provisions of the 1990 Farm Bill supported greater use of LUREs by the federal government. The following passage is representative of statements made during congressional hearings:

Greater attention needs to be given to using conservation easements to build a lasting conservation legacy. Conservation easements are a valuable tool for protecting wetlands, forest lands, or other environmentally sensitive lands in perpetuity. In designing authority for acquiring easements, opportunities to develop cooperative partnerships with states, such as establishing federal/state matching requirements for funding, should be considered.

Congress heard the message. While the 1990 Farm Bill largely

74. Witnesses asserted that the 1985 Farm Bill, and Presidential orders directing federal agencies to minimize destruction of wetlands, required the federal government to place LUREs on properties in FmHA inventories before those properties were resold, leased or transferred. See, e.g., Formulation of the 1990 Farm Bill: Hearing Before the Subcomm. on Conservation, Credit, and Rural Development, House Comm. on Agriculture, 101st Cong., 2d Sess., pt. XIII at 127 (1990) [hereinafter House Hearings] (statement of Eric W. Schenck); see also Exec. Order No. 11,988, 3 C.F.R. § 117 (1977) (as amended by Exec. Order No. 12,148, 3 C.F.R. § 412 (1979)); Exec. Order No. 11,990, 3 C.F.R. § 121 (1972) (as amended by Exec. Order No. 12,608, 3 C.F.R. § 245 (1987)).

75. House Hearings, supra note 74, at 127 (statement of Eric W. Schenck).

76. Id. In using his authority to acquire LUREs, the Secretary must consult the Fish and Wildlife Service in selecting eligible property, formulating the terms of LUREs, and enforcing the agreements. 7 U.S.C. § 1997(f) (1988). Critics of FmHA's efforts also charged that only 25,000 acres of land had been placed under permanent easements, when the program could have been used to protect over 500,000 acres of wetlands in FmHA's inventory. Senate Hearings, supra note 70, at 610 (statement of Peter A. Berle).

77. House Hearings, supra note 74, at 123 (statement of Eric W. Schenck).
reiterates policies in the 1985 Farm Bill, the 1990 legislation greatly expanded the use of LUREs for conservation purposes. In addition, the 1990 Farm Bill expanded the types of land which federal LUREs may protect.

2. LURE Provisions in the 1990 Farm Bill

The LURE programs in the 1990 Farm Bill incorporate a number of common features. In general, the programs are available to eligible owners or operators of land with specific characteristics. Participants must agree to implement conservation or preservation measures in accord with approved plans. The incentive for participation is usually a combination of cash payments and cost-sharing of conservation or restoration measures. The cash payments may not exceed the difference in value between the unencumbered land and the land encumbered by the LURE. Payments are generally disbursed in five to twenty annual installments. Characteristics of the protected resource and variations in the LURE provisions distinguish the programs from each other.

a. The FmHA Provisions

The 1990 Farm Bill extends and broadens the provisions authorizing the FmHA to acquire LUREs in return for debt-restructuring. LUREs may now be acquired before the farmer actually defaults on an FmHA loan. The provision may be used if the exchange of an easement "better enables a qualified borrower to repay the loan in a timely manner." In addition, the pre-Decem-

79. See, e.g., 16 U.S.C. § 3837a(b) (Supp. II 1990) (describing requirements for wetland easement conservation plans under the Wetlands Reserve Program). The Wetlands Reserve Program requires effective restoration of wetlands through the use of inspections, improvements and repairs. Id. § 3837a(b)(1). The program prohibits the alteration of wildlife habitats or other features of the land, unless specifically authorized by the conservation plan. Id. § 3837a(b)(2). However, the land may be used for certain "compatible economic uses" consistent with the long-term protection of the wetland resource. Id. § 3837a(d). These uses include hunting and fishing, managed timber harvest, and periodic haying or grazing. Id.
80. See, e.g., id. §§ 3837a(f), 3837c(a)-(b) (describing compensation to owners and duties of the Secretary regarding cost-sharing and technical assistance).
81. E.g., id. §§ 3837a(f), 3839b(2)(B).
82. E.g., id. § 3837a(f).
85. Id.
ber 23, 1985, loan requirement was removed, allowing restructuring on all qualified loans. The regulations prescribe that LUREs obtained through restructuring must be for periods of not less than fifty years; however, the LUREs may be longer or perpetual if justified. Unfortunately, though, the 1990 Farm Bill did not resolve the noted failure of the FmHA to use LUREs as a means of debt restructuring.

The 1990 Farm Bill did add a section requiring the FmHA to establish perpetual LUREs on wetlands in inventoried property. However, the provisions are carefully crafted to limit adverse impacts on the marketability of productive cropland. In particular, the statute limits the placement of LUREs to ensure that the property continues as the same basic enterprise when sold or leased to qualified individuals. Maintaining the voluntary aspect of agricultural conservation measures, this section requires the FmHA to notify borrowers considering easement-for-debt restructuring in writing that a LURE may be placed on their land.

b. The Agricultural Resource Conservation Program

The 1990 Farm Bill also significantly expanded the Conservation Reserve subchapter, renaming it the Agricultural Resources Conservation Program. As amended, two programs incorporate

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86. Id. § 1997(c)(3)(A)(i). In a case involving a new loan which is not delinquent, the Secretary may treat up to 33 percent of the loan principal as prepaid in exchange for the grant of an easement. Id. § 1997(e)(1), (2)(B). In the case of new loan which is delinquent, the Secretary may only reduce the debt by the value of the land on which the easement is acquired, or the difference between the amount of the outstanding loan and the value of the land, whichever is greater. Id. § 1997(e)(1), (2)(A).

87. Farmer Programs Account Servicing Policies, 7 C.F.R. pt. 515, subpt. S, exhibit H, § VI (1992). Justifications for perpetual LUREs include: a contribution to the protection of wildlife habitats; the protection of a significant historical site or groundwater recharge area; a benefit from removing the acreage from production; or the provision of a substantial investment of public funds to achieve conservation goals. Id. § VI(B), (E)-(F).

88. Current regulations leave the option of using LUREs as a means of debt restructuring to the farmer; the FmHA will act only if a borrower’s application for loan servicing includes a specific request for the debt-for-easement option. Farmer Programs Account Servicing Policies, 7 C.F.R. § 515.909(a) (1991).


90. Id. § 1985(g)(2).

91. The phrase “same basic enterprise” was explained as follows: “The Senate did not intend for the circumstance to arise where the amount and location of easements established on . . . a cotton or dairy farm acquired by the FmHA would prevent the property from being marketed as a cotton or dairy farm.” H.R. CONF. REP. NO. 916, 101st Cong., 2d Sess. 1126 (1990), reprinted in 1990 U.S.C.C.A.N. 5286, 5651.


93. Id. § 1985(g)(6).

LUREs: (i) the Environmental Conservation Acreage Reserve Program, which expands the Conservation Reserve Program and creates the Wetlands Reserve Program; and (ii) the Environmental Easement Program.95

(i) The Conservation Reserve Conversions

The 1985 Farm Bill established the Conservation Reserve Program ("CRP") authorizing the Secretary to enter into installment contracts to retire 45 million acres of erosive cropland from production for ten year periods.96 Mindful of the need to continue conservation of lands enrolled in the CRP beyond the initial terms of CRP contracts, Congress amended the CRP to encourage farmers to convert the lands to other conserving uses. An owner or operator enrolled in the CRP under a contract in effect on November 28, 1990, may extend the contract to a maximum term of fifteen years97 if vegetative cover areas are devoted to hardwood trees, windbreaks, shelterbelts, or wildlife corridors.98

In addition, a qualified owner or operator may transfer into the Wetlands Reserve Program ("WRP") by restoring to wetlands areas of highly erodible cropland currently devoted to vegetative cover.99 This conversion is conditioned on the owner's grant of a long-term or perpetual LURE to the Secretary.100 The incentive of extended monetary payments to farmers under the new CRP provisions should readily increase the federal government's acquisition of LUREs.

(ii) The Wetlands Reserve Program

The WRP directs the Secretary to attempt to enroll one million


97. Act of July 22, 1992, Pub. L. No. 102-234, § 1(b)(1), 106 Stat. 447, 444 (to be codified at 16 U.S.C. § 3835a(a)(2)(A)). The contract may only be extended if the original term of the contract was less than 15 years. Id.


99. Id. § 3835a(b). The Secretary must permit the conversion if (1) the areas are prior converted wetlands, (2) there is a high probability that the area can be successfully restored to wetland status, and (3) the restoration otherwise meets the requirements of the WRP. Id. § 3835a(b)(1), (3)-(4). The Secretary may terminate or modify a CRP contract if the land subject to the contract is transferred to the WRP. Id. § 3837(f).

100. Id. § 3835a(b)(2).
acres of eligible land into the program by the end of the 1995 calendar year.\textsuperscript{101} Land is eligible if it is determined to be a farmed wetland, or a wetland converted after December 23, 1985,\textsuperscript{102} and if the “likelihood of the successful restoration ... and the resultant wetland values merit inclusion of such land in the program taking into consideration the cost of such restoration.”\textsuperscript{103}

To participate in the WRP, the owner of the eligible land must grant a long-term or perpetual LURE to the Secretary. The Secretary is directed to give priority to obtaining perpetual LUREs over those for shorter terms.\textsuperscript{104} Perpetual LUREs qualify for cost-sharing of between seventy-five and one hundred percent of the eligible costs; otherwise, the government share is limited to between fifty and seventy-five percent of the eligible costs.\textsuperscript{105} Further, a lump-sum payment is permitted only if a perpetual LURE is acquired.\textsuperscript{106} The WRP thus encourages the acquisition of LUREs, particularly perpetual LUREs,\textsuperscript{107} to protect wetlands.\textsuperscript{108}

(iii) The Environmental Easement Program

The Environmental Easement Program (“EEP”) directs the Secretary to acquire LUREs “in order to ensure the continued long-term protection of environmentally sensitive lands or reduction in

\begin{footnotes}
\item[101] \textit{Id.} \textsection 3837(b). Lands are enrolled in the WRP through the acquisition of a LURE by the Secretary. \textit{Id.} \textsection 3837(g).
\item[102] \textit{Id.} \textsection 3837(c)(1).
\item[103] \textit{Id.} \textsection 3837(c)(2). The Secretary may also include in the WRP:
\begin{itemize}
\item (1) farmed wetland and adjoining lands, enrolled in the conservation reserve, with the highest wetland functions and values, and that are likely to return to production after they leave the conservation reserve;
\item (2) other wetland of an owner that would not otherwise be eligible if the Secretary determines that the inclusion of such wetland in such easement would significantly add to the functional value of the easement; and
\item (3) riparian areas that link wetlands that are protected by easements or some other device or circumstance that achieves the same purpose as an easement.
\end{itemize}
\item[104] \textit{Id.} \textsection 3837c(d).
\item[105] \textit{Id.} \textsection 3837c(b).
\item[106] Otherwise, the compensation may be paid in five to twenty annual installments. \textit{Id.} \textsection 3837a(f).
\item[107] However, a sale of a LURE may be taxed as a capital gain. See \textit{I.R.C.} \textsection 1222(3) (1988). Thus, income tax consequences of a lump sum payment may influence grants of perpetual LUREs.
\item[108] The Secretary has additional authority to purchase wetlands or interests in wetlands through the Wetlands Resources Chapter. 16 U.S.C. \textsection 3922 (1988). The authorization permits the Secretary to acquire wetlands not protected under the Migratory Bird and Conservation Act and requires purchases to be consistent with the wetlands priority plan. \textit{Id.} \textsection 3921.
\end{footnotes}
the degradation of water quality” on eligible farms or ranches. The LUREs must be either perpetual or for the maximum duration permitted by state law. Eligible lands include lands in the CRP, lands covered by the Water Bank Act, croplands containing riparian corridors, environmentally sensitive areas, or critical wildlife habitats. To participate in the EEP, in addition to granting a LURE to the Secretary, a landowner must also agree to implement a natural resource conservation management plan. However, the landowner may use the land for recreational activities such as hunting and fishing. The EEP thus significantly expands the categories of land which may be protected by LUREs.

c. The Farms for the Future Act

The Farms for the Future Act (“Farms Act”) promotes preservation of farmland resources on a national basis. The legislation authorizes the Secretary, through the FmHA, to establish the Agricultural Resource Conservation Demonstration Program to provide federal guarantee and interest rate assistance for eligible loans to state trust funds. The regulations utilize LUREs to achieve the program goals. The interim rule provides that guaranteed loans can be used to purchase “development rights easements, conservation easements, . . . and farmland in fee simple,” and

110. Id.
111. However, if the CRP land is likely to remain out of production and does not pose an off-farm environmental threat, the land is not eligible. Id. § 3839(b)(1). Further, if CRP land contains timber stands or pasture land converted to trees the land is also ineligible. Id. § 3839(b)(2).
114. Id. § 3839a(a)(1). In addition, landowners are required to make appropriate deed restrictions, obtain written consent from holders of security interests, produce commodities which benefit wildlife, and refrain from grazing or harvesting practices which defeat the purpose of the easement. Id. § 3839a(a)(2)(A)-(B), (E)-(G).
115. Id. § 3839b(4). The Secretary is authorized to pay up to 100% of the cost of establishing conservation measures under this program. Id. § 3839c(b).
117. Id. § 1466(a). Eligibility requirements dictate, among other things, that a state must operate or administer a land preservation fund and assist local governing bodies or private nonprofit or public organizations in carrying out preservation measures. Id. § 1465(c)(3).
notes that the Secretary intends all LUREs to be perpetual. Borrowers are required to prepare a State Farmland Preservation Plan, which must include a detailed description of the restrictions to be imposed by any easements. Further, the borrower must then demonstrate the legal authority necessary to comply with provisions of the plan. An important distinction from other uses of LUREs in the Conservation Title of the 1990 Farm Bill is that LUREs acquired under the Farms Act are purchased and held by the states through their trust funds rather than by the federal government.

d. The Watershed Protection and Flood Prevention Program

The Watershed Protection Program (“Watershed program”) was created in 1954 to protect and improve the nation’s land and water resources. Like the CRP, the program authorizes the Secretary to enter into agreements with landowners based on conservation plans carried out over ten year periods in return for cost-sharing by the federal government. The 1990 Farm Bill expanded the Watershed program by authorizing cost-sharing for perpetual LUREs on wetlands or floodplains to perpetuate, restore, and enhance the natural capabilities of land and water resources. Eligible project sponsors include state and local agencies, soil and water conservation districts, approved nonprofit irrigation and reservoir companies, and water users’ associations. Thus, like the Farms Act, LUREs acquired under this program are held by state or private nonprofit entities rather than by the federal government.

e. The Forest Legacy Program

The 1990 Farm Bill includes the Forest Stewardship Act,
authorizing the Secretary to cooperate with state forestry officials, nongovernmental organizations and the private sector in implementing federal programs affecting non-federal forestland.129 One such program is the Forest Legacy Program ("FLP").130 The FLP authorizes the Secretary, in cooperation with appropriate state and local governments,131 to acquire LUREs or full fee interests132 to protect environmentally important forest areas, riparian areas, and other ecological resources.133

Criteria for priority lands eligible for the FLP are established by the Secretary together with state advisory committees, subject to the purposes of the FLP.134 However, where a state has not approved the acquisition of land under section 515 of title 16,135 the FLP is necessarily limited to those lands within the state which have been approved for inclusion.136 While the FLP is cooperatively established, title to the LUREs acquired under the program must be held exclusively by the federal government.137 Further-


131. The FLP requires the Secretary to cooperate with state, regional and other appropriate units of government. Id. § 2103c(a). The Secretary is also expected to coordinate with state or regional programs deemed consistent with the FLP. Id. § 2103c(b).

132. Id. § 2103c(c).

133. See id. § 2103c(a). The LUREs must require the landowner to engage in sound forest management practices, consistent with the purposes for which the land was entered in the FLP. Id. § 2103c(i). Although the LURE may permit hunting, fishing, and recreational uses on the protected land, the landowner is precluded from converting the property to other uses. Id. The Secretary must pay the fair market value of the LURE to the landowner and may require cost-sharing of up to 75%. Id. § 2103c(j).


135. Section 515 directs the Secretary to locate and purchase "forested, cut-over, or denuded lands within the watersheds of navigable streams" if necessary to regulate the flow of navigable streams or for the production of timber. 16 U.S.C. § 515 (1988). Purchases under § 515 must be approved by the legislature of the state where the land lies. Id.


137. Id. § 2103c(c).
more, the FLP requires LUREs held under the program to be perpetual, despite state law limits on duration.\(^{138}\)

In sum, the 1985 Farm Bill instituted the use of LUREs as an innovative conservation device.\(^{139}\) The 1990 Farm Bill has greatly expanded the use of LUREs in federal conservation programs.\(^{140}\) Originally viewed primarily as a means to protect wetlands, LUREs are now commonly employed throughout conservation programs to protect such diverse resources as farmland, forestland, windbreaks and shelterbelts.\(^{141}\) In addition, farmers have indicated a willingness to work with the federal government to achieve conservation goals through voluntary land acquisition programs.\(^{142}\) In the future, the use of LUREs may become an even more important feature of federal agricultural policies. However, due to the importance of our agricultural economy, and the impact of this economy on federal conservation goals, LUREs must be used in an efficient and effective manner.

II. ARE LURE ACQUISITION PROGRAMS AN APPROPRIATE FEDERAL MEANS TO ATTAIN CONSERVATION GOALS?

The greatly expanded use of LURE acquisition programs in the 1990 Farm Bill demonstrates the political acceptability of using LUREs as an incentive to achieve conservation and preservation goals. However, some commentators argue that the government should directly regulate the use of environmentally sensitive lands

\(^{138}\) Id. § 2103c(k)(2). The provision states in full:

Notwithstanding any provision of State law, no conservation easement held by the United States or its successors or assigns under this section shall be limited in duration or scope or be defeasible by —

(A) the conservation easement being in gross or appurtenant;

(B) the management of the conservation easement having been delegated or assigned to a non-Federal entity;

(C) any requirement under State law for re-recordation or renewal of the easement; or

(D) any future disestablishment of a Forest Legacy Program area or other Federal project for which the conservation easement was originally acquired.

\(^{139}\) Id. Section 2103c(d)(1) specifies that easements acquired under the program may be held in perpetuity.

\(^{140}\) See supra notes 70-73 and accompanying text.

\(^{141}\) Many other types of land are also protected by LUREs under current federal land acquisition programs, including riparian areas, highly erodible lands, and wildlife corridors. See supra notes 99, 103, 113, 133 and accompanying text.

\(^{142}\) See supra note 12 and accompanying text.
rather than rely on voluntary agreements which impose conservation costs on the government. Therefore, before addressing how to use LUREs most effectively, it is important to justify LURE acquisition programs as the most appropriate means for conserving and preserving environmentally important land resources located largely on lands which are or could be used for agricultural purposes. This section explores some of the constitutional and economic considerations surrounding the alternative of direct regulation of land uses.

A. Regulation versus Incentives

Constitutional authority for federal environmental regulations generally derives from the Commerce Clause, which empowers Congress to "regulate Commerce . . . among the several states." In addition to the regulation of interstate activities, the broad interpretation of the commerce power in conjunction with the Necessary and Proper Clause permits Congress to regulate intrastate activities if the impact of the regulation is the effectuation of commerce policies. For example, under the Commerce Clause, Congress generally cannot regulate a manufacturing process itself because it is not interstate commerce. Yet labor conditions in manufacturing plants can be regulated if the particular regulation is a necessary and proper means of effectuating some congressional policy relating to interstate commerce. Thus, even though the

143. See, e.g., William L. Church, Farmland Conversion: The View From 1986, 1986 U. ILL. L. REV. 521, 544 (noting the high costs of incentives as a means to preserve agricultural land); Steven L. Dickerson, The Evolving Federal Wetland Program, 44 SW. L.J. 1473, 1497 (1991) (advocating federal programs in which wetlands would be purchased directly through public financing); Renee Stone, Wetlands Protection and Development: The Advantage of Retaining Federal Control, 10 STAN. ENVTL. L. J. 137, 166 (1991) (opposing delegation to the states of federal regulatory control over wetlands and arguing in favor of an improved federal regulatory scheme).
144. U.S. CONST. art. I, § 8, cl. 3.
146. See United States v. E.C. Knight Co., 156 U.S. 1, 14-15 (1895) (holding that suppression of monopoly in sugar manufacture is unconstitutional where monopoly does not implicate interstate commerce); cf. Swift & Co. v. United States, 196 U.S. 375, 396-98 (1905) (allowing Congress to suppress an agreement primarily affecting trade within a state because the secondary effects on interstate commerce were not remote or accidental).
147. See, e.g., NLRB v. Jones & Laughlin Steel Corp., 301 U.S. 1, 41-42 (1937) (upholding regulation of intrastate labor relations as a necessary and proper means to protect interstate commerce from industrial strife). Although it is often stated that Congress may regulate an activity which "affects commerce," that is an inaccurate statement of the constitutional requirement. Congressional regulation of intrastate activity must advance an interstate commercial goal. While these same regulations may simultaneously further other,
production of agricultural products may be solely an intrastate activity, Congress may constitutionally regulate certain aspects of agricultural production if the regulation promotes interstate commerce policies.148

Further, under the Commerce Clause, the federal government may regulate to achieve extraneous ends which accomplish objectives not specifically entrusted to the federal government.149 By employing a means within the scope of the commerce power, Congress may influence affairs beyond the scope of its enumerated powers and traditionally within the domain of the states.

Accordingly, the Commerce Clause empowers Congress to regulate activities causing air pollution, water pollution, and other environmental hazards to promote the general welfare, so long as the impact of the regulation promotes interstate commerce policies. For instance, congressional activities which may be upheld include: regulation of pollution that has effects in more than one state; regulations that protect or preserve the quality of waters used for navigation, industry or irrigation; regulations that protect waters which attract interstate travelers for recreational or scientific purposes or which attract migratory birds; or regulations that protect habitats for endangered wildlife species which draw interstate travelers.150

non-commercial goals, the presence of an interstate commercial purpose is constitutionally required. See United States v. Darby, 312 U.S. 100, 103 (1941) (indicating the commerce power is measured by what it regulates, not by what it affects); see also David E. Engdahl, Preemptive Capability of Federal Power, 45 U. Colo. L. Rev. 51, 59-61 (1973) (regulating labor conditions is permissible if it is a necessary and proper means of controlling interstate commerce); David E. Engdahl, Some Observations on State and Federal Control of Natural Resources, 15 Hous. L. Rev. 1201, 1206 (1978) (Congress may regulate intrastate activities only when the purpose of the regulation is to effectuate an interstate commercial policy).


149. The Supreme Court recognized that this type of legislation was constitutional in Darby, 312 U.S. at 114-17. In Darby, the Court held that even if Congress had enacted federal labor standards to address purely humanitarian ends, the legislation was nonetheless within the scope of the Commerce Clause because the means — a prohibition on shipment in interstate commerce of products manufactured under wage and hour conditions failing to meet statutory standards — was a regulation of commerce. Id. at 103. The Court deemed the regulation “indubitably a regulation of commerce” and held that regulations of commerce, whatever their motive and purpose, are within the plenary power conferred on Congress by the Commerce Clause. Id. at 113, 115.

150. See, e.g., Utah v. Marsh, 740 F.2d 799, 803 (10th Cir. 1984) (finding that discharge of dredge or fill material into Utah lake could have substantial economic effects
Congress could use the commerce power to protect environmentally significant lands currently protected by the use of LUREs. Among other functions, wetlands perform an important role in the ecosystem by purifying waters flowing into aquifers which are frequently tapped for irrigation purposes.\textsuperscript{151} Agricultural activities which affect wetlands could therefore be regulated. Similarly, activities which erode farmland or deplete private forestland could be regulated due to their adverse effect on our nation’s ability to meet its food and timber needs.\textsuperscript{152} Further, other riparian areas, wildlife corridors, windbreaks, and shelterbelts at least indirectly affect interstate commerce by virtue of their role in maintaining the balance of the ecosystems which generate marketable commodities and thus interstate movement.\textsuperscript{153} Although more tenuously related, regulation of agricultural activities affecting such lands may similarly be within the scope of the Commerce Clause used in conjunction with the Necessary and Proper Clause.\textsuperscript{154}

To date, however, Congress has elected to regulate directly

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\textsuperscript{151} See 16 U.S.C.A. § 3901(a)(5) (West Supp. 1992) (wetlands enhance water quality and water supply by serving as ground water recharge areas, nutrient traps, and chemical sinks).

\textsuperscript{152} See Hodel v. Indiana, 452 U.S. 314, 324 (1981) (preservation of prime farmland is a federal interest that may rationally be addressed through the Commerce Clause); see also Margaret R. Grossman, Prime Farmland and the Surface Mining Control and Reclamation Act: Guidance for an Enhanced Federal Role in Farmland Preservation, 33 Drake L. Rev. 209 (1983-84) (discussing role of federal government in preserving farmland).

\textsuperscript{153} Cf. Pailla v. Hawaii Dep’t of Land & Natural Resources, 471 F. Supp. 985, 994-95 (D. Haw. 1979), aff’d, 639 F.2d 495 (9th Cir. 1981) (finding endangered species of fish, wildlife and plants to have national aesthetic, ecological, educational, historical, recreational, and scientific value; programs which protect and improve these resources or their habitats preserve the possibilities of interstate movement of persons who come to observe or enjoy them). See also George C. Coggins & William H. Hensley, Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?, 61 Iowa L. Rev. 1099, 1147 (1976) (Congress may regulate interstate trade in a particular species under the Commerce Clause).

\textsuperscript{154} The Necessary and Proper Clause may be exercised to attain an extraneous end as long as the means used bear some relation to the effectuation of an enumerated power. See, e.g., Heart of Atlanta Motel, Inc. v. United States, 379 U.S. 241, 258 (1964) (upholding congressional prohibition against racial discrimination in local motels as a necessary and proper means of preventing harmful effects on interstate commerce).
only those agricultural practices involving the application of inputs, such as pesticides and other agrichemicals, which are more readily perceived as being potentially harmful.\textsuperscript{155} The basis for Congress' reluctance to regulate directly is at least threefold: Congress prefers to work in partnership with the agricultural industry; direct regulation of agricultural uses of land is more readily subject to challenges under the Fifth Amendment; and unique characteristics of the agricultural industry prevent society from absorbing its share of costs associated with regulation.

1. The Tension Between Private Ownership and Societal Rights

Although Congress has expressly recognized the need to conserve environmentally important land resources and "to assure their management in the public interest for this and future generations,"\textsuperscript{156} Congress has declined to regulate directly against farmers' individual land use decisions. This restraint in federal regulation conflicts with the federal government's growing awareness of the public interest -- or social rights -- in privately held land. Social rights are those rights possessed by communities at large. Communities are generally more concerned about the rights of future generations than are individual persons. Therefore, as Professor Lynton Caldwell has noted, concerns for social rights in environmentally important land look to the future, and require managed land use to preserve for the future, rather than for the highest and best use of the land for the present.\textsuperscript{157}

In large part, the reluctance to impose direct regulations on private land use stems from the common law concept of private ownership. Land use laws today, and the rights and obligations of landowners, are based on inherited values and beliefs. For over three hundred years, American culture has strongly linked ownership of real property with individual freedom.\textsuperscript{158} The traditional


\textsuperscript{158} Caldwell, supra note 157, at 320; see J.G.A. POCOCK, VIRTUE, COMMERCE AND HISTORY 103 (Richard Rorty et al. eds., 1985) (finding that in the Western tradition property has been a means by which citizens achieve autonomy); see also JEREMY WALDRON, THE RIGHT TO PRIVATE PROPERTY 129-30 (1988) (stating that many writers have suggest-
notion of private ownership permits the landowner to use the land as she pleases, so long as her use does not unreasonably affect another's enjoyment of her land. This notion of land ownership entails "no obligation for stewardship on behalf of the general society." Landowners thus claim a right to use, deplete, and even destroy their land to achieve short-term gain.

The tension between traditional aspects of private ownership and societal rights in private land is central to most contemporary land use issues. As Professor Caldwell has aptly stated: "People committed to an ethic of . . . ecological sustainability continue to collide with those who make land use decisions upon a very different ethic, an ethic that regards economic development and monetary return as evidence of the land's highest and best use." For better or worse, the traditional notion of private ownership is firmly ingrained in the agricultural community. Agricultural production makes direct use of the land resource. The decisions a farmer makes about how the land is used directly affect the success of the farming operation. Because agricultural regulation directly infringes on the farmer's freedom of choice with respect to land use, it is readily considered undesirable federal land use regulation.

ed the importance of property ownership lies not only in its material benefits, but also in the assistance property ownership provides in developing individual human autonomy). 159. Caldwell, supra note 157, at 324; see also Eric T. Freyfogle, Context and Accommodation in Modern Property Law, 41 Stan. L. Rev. 1529, 1555 (1989) (calling for new limits on land ownership requiring more than simple restraint from land uses harming others); ALDO LEOPOLD, A SAND COUNTY ALMANAC (1966) (man's strictly economic relationship with the land entails privileges but no obligations; a "land-ethic" is required to guide man through ecological situations where the path of social expediency is not discernible).

160. Caldwell, supra note 157, at 324; see Freyfogle, supra note 159, at 1555 (arguing against protection of the landowner's expectation that he has the power to waste, destroy and leave fallow the land); see also Tribe, supra note 157, at 1347 (criticizing the myopic view often taken regarding the need for environmental protection policies).

161. Caldwell, supra note 157, at 325.

162. Id. at 329.

163. By contrast, most industrial production is much less dependent on land use decisions. Accordingly, Congress is able to achieve many environmental goals by regulating business conduct. While this business conduct takes place on privately held land, Congress can regulate the conduct itself without directly regulating the use of the land. However, distinguishing between regulation of business conduct and regulation of land use is often difficult. For example, a given environmental regulation may be so severe that a particular land use becomes commercially impractical. See California Coastal Comm'n v. Granite Rock Co., 480 U.S. 572, 587 (1987) (explaining that land use planning selects between alternative uses of the land, while environmental regulation limits damage to the land re-
The agricultural community generally considers itself a strong steward of the land. Farmers take great pride in their ability to manage a successful agricultural operation through independent land use decisions and vigorously oppose perceived infringements upon private ownership rights. However, a farmer's stewardship generally is not focused on the public's interest in the land; rather, the farmer focuses on his own private interest in making the highest and best use of the land.

Congress has realized that direct regulation of agricultural land use would interfere with the independent spirit of the American farmer and conflict with the farmer's perception of himself as a strong steward of the land. Avoiding the potentially adverse political ramifications, Congress has only taken minimal steps to provide legal protection for private land as a public resource. Although Congress has responded to the growing public support for protection of environmentally significant lands, Congress has declined to test its relationship with farmers by directly regulating agricultural land use decisions. Instead, Congress has chosen to work in partnership with the agricultural community to achieve conservation goals. Control of the land through voluntary incentives neither challenges nor expands the core concept of land ownership. Therefore, the use of LURE acquisition programs permits Congress to maintain its tradition of indirect, non-confrontational control over agricultural land use decisions.

Furthermore, direct regulation of agricultural land use has been unnecessary because the agricultural community is generally responsive to incentive-based conservation programs. This positive voluntary response is attributable to a unique aspect of an

164. See Church, supra note 143, at 545 ("The heart of American agriculture is the independence and individual motivation of . . . landowning farmers.").


166. Interestingly, in response to dissatisfaction from environmentalists regarding the use of incentives rather than direct regulation, Congress and the states often justify their inaction by arguing that land use regulation is a local matter — a sentiment negated by the ever-increasing federalization of land use controls. See Craig A. Arnold, Conserving Habitats & Building Habitats: The Emerging Impact of the Endangered Species Act on Land Use Development, 10 STAN. ENVTL. L.J. 1, 2-3 (1991) (noting that the federal government exercises considerable control over land use decisions through such legislation as the Clean Air Act and the Clean Water Act).

167. See supra note 12 and accompanying text.
agricultural landowner's stewardship. While a farmer's view of "the best use of the land" includes short-term profitability, it may also include a long-term perspective, frequently deriving from a desire to pass on fertile land to children or grandchildren. The "intergenerational equity" aspect of agricultural stewardship, though distinguishable from a recognition of "social rights in the property, promotes the same concept of managed use of the land for the future. Thus, farmers who oppose the firmer controls of direct land use regulation are generally receptive to incentives to preserve agricultural land.

2. Direct Regulation May Constitute a Taking

Legislation which restricts particular uses of privately owned land is subject to constitutional scrutiny under the Fifth Amendment. The Fifth Amendment prohibits the taking of private property for public use absent just compensation. It is well established that although property may be regulated to some extent, physical appropriation of property constitutes a taking. On the other hand, regulation which merely has an adverse effect on the landowner's "bundle of property rights" is a more difficult problem.

The Supreme Court has indicated that the takings analysis involves "essentially ad hoc, factual inquiries." However, three

168. Current statistics indicate that close to one half of the owners of agricultural lands are not the farmers of the land. See 1 BUREAU OF THE CENSUS, DEPT OF AGRICULTURE, 1987 CENSUS OF AGRICULTURE, PART 51, UNITED STATES SUMMARY AND STATE DATA 49 (1989) (only 1,138,179 of the 2,082,759 farms in America are operated by those whose principal occupation is farming). Rather, farm operators run the farm on behalf of the owner. Because many landowners can rely on income not supplied by farming, the desire to generate high profit must compete with the desire to preserve future uses of the land. These landowners may be particularly receptive to incentive-based conservation programs.

169. Ronald D. Culler, General Counsel, Indiana Comm'r of Agriculture, Address at the Governor's Conference on the Environment (June 29, 1992) (on file with the Case Western Reserve Law Review).

170. Id.

171. See U.S. CONST. amend. V ("nor shall private property be taken for public use, without just compensation").


173. See Pennsylvania Coal Co. v. Mahon, 260 U.S. 393, 415-16 (1922) (recognizing regulation preventing a landowner from mining coal on his land as a taking).

174. Penn Cent. Transp. Co., 438 U.S. at 124; see also First English Evangelical Lu
factors are particularly significant for this inquiry: (1) the economic impact of the regulation on the landowner; (2) the extent to which the regulation has interfered with distinct investment-backed expectations; and (3) the character of the governmental action (i.e., whether the regulation constitutes a physical invasion or occupation of real property).

In addition, at least two categories of regulatory action are deemed takings without further inquiry. First, regulations that compel the property owner to suffer a permanent physical occupation of the property require compensation, no matter how minute the intrusion nor how weighty the public purpose. Second, compensation is due when regulation denies all economically beneficial or productive use of the land. The latter category may be available to some landowners as a result of regulation precluding agricultural uses of land.

Finally, the Supreme Court has justified some regulations as necessary exercises of the police power related to policies expected to produce widespread public benefits. The imposition of such regulations may affect property values without invoking an obligation to compensate. This principle was circumscribed by the Court's recent decision in *Lucas v. South Carolina Coastal Council*. *Lucas* held that where regulation deprives land of all economically beneficial use, the state can avoid compensation only if it can identify principles of background nuisance or property law that similarly prohibit the use. In other words, the state must show

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theran Church v. Los Angeles County, 482 U.S. 304, 316 (1987) (while typical takings result from state condemnation under power of eminent domain, takings can also occur without formal proceedings); *Hendler*, 952 F.2d at 1373.


176. See, e.g., *Loretto v. Teleprompter Manhattan CATV Corp.*, 458 U.S. 419 (1982) (compelling acquiescence of landlords to placement of cable television facilities in apartment buildings is a taking despite the fact that cable equipment would only occupy one and one-half cubic feet of the property).

177. See *Nollan v. California Coastal Comm'n*, 483 U.S. 825, 834 (1987) (no taking occurs where a land use regulation does not deny an owner economically viable use the land).

178. See *Penn Cent. Transp. Co.*, 438 U.S. at 125, 133-34 (upholding land use regulations where the state reasonably concludes that the health, safety, morals, or general welfare will be protected); *Golblatt v. Hempstead*, 369 U.S. 590, 595-96 (1962) (upholding prohibition on mining operations in a residential area where ordinance would yield safety benefits); *Hadacheck v. Chief of Police*, 239 U.S. 395, 410-11 (1915) (upholding prohibition against manufacturing of bricks within city limits as a valid exercise of police power).


that the proscribed use was not part of the landowner's original title or bundle of rights.\textsuperscript{181} Thus, a state's ability to avoid compensation for regulations which prohibit all productive uses of land has been diminished.\textsuperscript{182}

The \textit{Lucas} Court, however, did not resolve a critical issue underlying all regulatory takings cases; namely, the appropriate property interest to be evaluated in the regulatory takings analysis.\textsuperscript{183} This underlying issue may be decisive in determining whether regulations precluding agricultural uses of certain lands constitute a taking. The divergent views regarding the appropriate definition of property in takings cases are aptly expressed in the majority and dissenting opinions in \textit{Keystone Bituminous Coal Association v. DeBenedictis}.\textsuperscript{184}

The \textit{Keystone} majority reiterated that a taking may be found in a facial claim only if the regulation denies the landowner economically viable use of the land.\textsuperscript{185} The majority stated that the appropriate test requires a comparison of the value that has been taken from the property as a whole and the value that remains with the property.\textsuperscript{186} The majority rejected the petitioners' view that because they lost economically viable use of "certain segments" of their property, a taking had occurred as to those particular segments.\textsuperscript{187} The dissenters accepted that proposition, however, and opined that the takings analysis may focus on an identifiable

\textsuperscript{181} \textit{Id.} at 2899.

\textsuperscript{182} Or, perhaps it is more accurate to say that a state may now be less inclined to regulate land uses directly because of the problematic issues which inevitably arise from the holding in \textit{Lucas}, drawing the complex nuisance doctrine into the already difficult takings analysis.

\textsuperscript{183} "Regrettably, the rhetorical force of our 'deprivation of all economically feasible use' rule is greater than its precision, since the rule does not make clear the 'property interest' against which the loss of value is to be measured." \textit{Id.} at 2894 n.7. The Court did not resolve this issue primarily because the lower court found that the regulation in question deprived Lucas of all economic value of his property. \textit{Id.}

\textsuperscript{184} 480 U.S. 470 (1987).

\textsuperscript{185} \textit{Id.} at 495. The test of a facial claim that statutory enactment constitutes a taking is whether the regulation denies an owner economically viable use of the land. \textit{See} \textit{Hodel v. Virginia Surface Mining \\& Reclamation Ass'n, Inc.}, 452 U.S. 264 (1981) (distinguishing between a takings claim relating to the mere enactment of a statute and a claim relating to the individual impact of government action by rejecting a claim filed before enforcement of the statute).

\textsuperscript{186} \textit{Keystone}, 480 U.S. at 497. The majority noted that the issue in the case was "whether there has been any taking at all when no coal has been physically appropriated, and the regulatory program places a burden on the use of only a small fraction of the property that is subjected to regulation." \textit{Id.} at 499 n.27.

\textsuperscript{187} \textit{Id.} at 496-97.
segment of property, particularly where that segment is severable and valuable in its own right.\textsuperscript{188}

In Keystone, the regulation in question prevented the mining of fifty percent of the coal beneath certain structures to avoid problems associated with subsidence.\textsuperscript{189} The majority noted that the regulation required the petitioners to leave in place only two percent of over 1.46 billion tons of coal, and that the petitioners had not claimed that any of their four mines had failed to be profitable.\textsuperscript{190} In contrast, the dissent noted that the 27 million tons of coal required to be left in the ground constituted an identifiable and severable property interest.\textsuperscript{191} Further, the dissent noted that unlike many property interests, the bundle of rights in coal is sparse: "For practical purposes, the right to coal consists in the right to mine it."\textsuperscript{192} According to the dissent, because the regulation completely destroyed the petitioners' interest in a segment of property required to be left in the ground, the regulation effectuated a taking.\textsuperscript{193}

The resolution of this point is crucial in determining whether federal legislation precluding certain uses of agricultural land constitutes a taking. Environmentally significant lands, such as wetlands, riparian areas, highly erodible lands, windbreaks, shelterbelts, or wildlife corridors, generally constitute discrete segments of the overall acreage used by a farmer. Under the Keystone majority opinion, direct regulation precluding agricultural uses of environmentally significant segments of property will not constitute a taking if the landowner remains able to operate the farm profitably.

Like coal, however, the bundle of rights in agricultural property is sparse, consisting largely of the right to farm. Further, the Court in Lucas noted that the answer

\textsuperscript{188} Id. at 517, 520 (Rehnquist, C.J., dissenting).
\textsuperscript{189} "[S]ubsidence is the lowering of strata overlying a coal mine, including land surface, caused by extraction of underground coal." Id. at 474. Subsidence is well recognized as an environmental concern. See F.T. Lee & J.F. Abel, Jr., U.S. Dep't of the Interior, Subsidence from Underground Mining, Geological Survey Circular 876 at 1, 9, 12 (1983) (citing aquifer contamination and methane gas poisoning of animal and plant life as possible environmental harms due to subsidence).
\textsuperscript{190} Keystone, 480 U.S. at 496.
\textsuperscript{191} Id. at 517 (Rehnquist, C.J., dissenting).
\textsuperscript{192} Id. (quoting Commonwealth ex rel. Keator v. Clearview Coal Co., 100 A. 820, 820 (1917)).
\textsuperscript{193} Id. at 518.
may lie in how the owner’s reasonable expectations have
been shaped by the State’s law of property — i.e., whether
and to what degree the State’s law has accorded legal
recognition and protection to the particular interest in land
with respect to which the takings claimant alleges a diminu-
tion in (or elimination of) value.194

Both federal and state laws have recognized a landowner’s right to
farm.195 Thus, under the dissent’s view, regulation vitiating that
right could constitute a taking affecting discrete segments of the
land.

In essence, the determination that state action constitutes a
taking requires the general public, rather than an individual owner,
to pay the costs of regulating the property for a public pur-
pose.196 As noted previously, the purpose of congressional land
use regulation is to promote stewardship on behalf of the general
society and to protect societal rights in private lands.197 For this
reason, the Supreme Court affirmed the notion that private
landowners should be compensated when they are called upon to
sacrifice all economically beneficial uses of their property for the
sake of the public good.198

However, the fact that legislation precluding certain land uses
will trigger the Fifth Amendment does not mean that Congress
cannot regulate. Rather, it only means that when Congress does
regulate, compensation is due. Therefore, the financial implications
of direct regulation are a significant concern for the federal govern-
ment. If direct regulation constitutes a taking, the compensation due
to a landowner, on an individual basis, is most likely equivalent to
the cost of a LURE.199 However, direct regulation may result in
affected landowners invoking inverse condemnation,\textsuperscript{200} forcing the government to incur substantial expenses in an ad hoc manner. In contrast, the use of LURE acquisition programs enables the government to make annual decisions regarding the allocation of resources for regulation of land use.\textsuperscript{201} Thus, the use of LUREs to accomplish regulatory goals is not only more politically acceptable, but also more fiscally manageable.

3. Market Based Considerations

In addition to the economic consequences of regulation with respect to the takings question, economic characteristics of the agricultural market should also be considered. Society cannot share the economic burden resulting from agricultural regulation in the same way that society absorbs the burden of other environmental regulations. The cost of compliance with direct environmental regulation is generally internalized by industry and passed to the consumer.\textsuperscript{202} For example, the cost of obtaining permits under the Clean Air Act or the Clean Water Act can generally be reduced to dollar amounts and recouped from society through price mechanisms.\textsuperscript{203}

The cost of compliance with agricultural land use regulations, in contrast, is not so readily recouped. First, it is more difficult to place a dollar value on restricted use of agricultural lands. The primary cost associated with protection of wetlands or other environmentally significant lands is reduced productivity in a given year.\textsuperscript{204} Because external variables affect agricultural productivity

\begin{itemize}
\item \textsuperscript{200} Inverse condemnation describes the manner in which a landowner recovers compensation for a taking of property when condemnation proceedings have not been instituted. \textit{Agins,} 447 U.S. at 258 n.2.
\item \textsuperscript{201} The 1990 Farm Bill directed the Secretary to establish a wetlands priority conservation plan. \textit{See} 16 U.S.C. § 3921 (1988). The plan must prioritize the types of wetlands and interests in wetlands for acquisition by federal and state governments. \textit{Id.} § 3921.
\item \textsuperscript{202} \textit{See} Arnold W. Reitze, \textit{A Century of Air Pollution Control Law: What's Worked; What's Failed; What Might Work,} 21 ENVTL. L. 1549, 1619 (1991) (noting that the cost of emissions controls contributes to higher prices paid by consumers).
\item \textsuperscript{203} \textit{See, e.g., Agency to Seek Rate Hike for Air-Pollution Permits, BUS. FIRST — Louisville, May 25, 1992, at 1} (noting that per ton emissions fees for operating permits under the Clean Air Act will require businesses to pay more); \textit{Environmental Price Tags, NATION'S BUS.,} Apr. 1992, at 36 (surveying small business efforts to pass on costs of environmental compliance through higher prices).
\item \textsuperscript{204} \textit{See} J.W. LOONEY \textit{ET AL, AGRICULTURAL LAW: A LAWYER'S GUIDE TO REPRESENTING FARM CLIENTS} 240-41 (1990) (economic factors bearing on a decision to implement conservation efforts include the cost of the measures and the loss of productivity
\end{itemize}
from year to year, the loss in productivity due to land use regulation is difficult to isolate and quantify. Further, true costs are difficult to assess, since decreases in productivity may be offset by gains from maintaining a healthy ecosystem over the life of the farm. Similarly, it is difficult to measure the ecological or societal benefits of wetlands, shelterbelts, wildlife corridors, or farmlands. Indeed, many people would view the permanent loss of environmentally significant land characteristics as an immeasurable cost. Thus, the cost to ensure the continued existence of these lands may be too high to internalize and distribute through traditional pricing processes.

Additionally, the agriculture industry is unique in that farmers are "price takers," not price setters. In contrast to most industries, the market price for crops is determined by a complex marketing chain. Therefore, farmers inquire what price they will be from idled land). See also Julian C. Jürgensmeyer and James B. Wadley, Agricultural Law (1983).

205. Agricultural production is regularly subject to numerous uncontrollable factors such as weather, pests, disease, etc. See Orlando E. Deluge, A Comprehensive State and Local Government Land Use Control Strategy to Preserve the Nation's Farmland is Unnecessary and Unwise, 34 Kan. L. Rev. 519, 530 (1986) (noting the "wide variety of factors" affecting overall farm output).

206. See id. at 531 (noting that the decrease in soil erosion has contributed to an increase in agricultural output over the last fifty years).

207. See Steven L. Dickerson, The Evolving Federal Wetland Program, 44 Sw. L.J. 1473, 1475-76 (1991) (the economic value of wetlands often goes unnoticed until, in their absence, the harmful effects of water pollution, lake eutrophication and land erosion are felt). Many farmland benefits actually occur off the farm. "[E]ven erosion control, which is typically perceived as benefiting the farmer by preserving the productibility of the soil, produces only minor on-farm benefits." George A. Gould, Agriculture, Nonpoint Source Pollution, and Federal Law, 23 U.C. Davis L. Rev. 461, 487 (1990).

208. See Gould, supra note 207, at 487 (stating that only the "most saintly" farmer would internalize such costs).

209. Farmers are price takers because, unlike most industries, they do not establish the price for their products. See id. at 488 (noting that as price takers farmers have little ability to pass on production costs to consumers); see also C.B. Baker, Structural Issues in U.S. Agriculture and Farm Debt Perspectives, 34 Kan. L. Rev. 457 (1986) (noting the burden of imposing prices on farmers); Gerald Torres, Theoretical Problems with the Environmental Regulation of Agriculture, 8 Va. Envtl. L.J. 191, 206 (1989) (comparing the status of farmers as price takers to the paradigm of perfect competition where no producer can affect the price received for his goods single-handedly).

210. The Chicago Board of Trade, a commodities exchange, establishes a base price for agricultural commodities. The price paid for products at local grain elevators is generally calculated according to the current Board of Trade price and the elevator's "basis," which takes into account storage and other costs, as well as transportation costs to terminal markets. Telephone Interview with Ronald D. Culler, General Counsel, Indiana Comm'r of Agriculture (Aug. 1992). For a more detailed discussion of commodities trading, see NOR-
paid for the crop at the local grain elevator; they do not calculate the inputs invested and negotiate an appropriate selling price.\textsuperscript{211} Farmers have little ability to pass on to consumers the added costs of production or the costs of lost opportunities.\textsuperscript{212}

Direct regulation of agricultural land uses also impairs fair competition in the agricultural industry. Because the significance of wetlands, riparian areas, and highly erodible lands varies according to geographic location, direct regulation has a disparate impact on agricultural producers in different regions of the country. Unlike the manufacturing of goods, agriculture has no set rules for producing an abundant crop; farming practices must be readily adaptable and often change annually.\textsuperscript{213} By contrast, a typical manufacturing process is likely to remain uniform nationally from year to year. Direct regulation restricting uses of environmentally significant lands would affect some farmers to a greater extent than others, depending on geographic characteristics of the cropland or production circumstances of a given year.\textsuperscript{214} The potential result is that some agricultural producers may obtain an unfair competitive advantage.

Because society is not a ready partner in absorbing the costs of agricultural land use regulation, direct federal regulation of agricultural land is not economically justified, even if constitutionally valid. An alternative to direct regulation is encouraging conservation practices through incentives. The use of LUREs as an incentive to protect environmentally significant lands is politically acceptable, fiscally manageable, and economically justifiable. Unlike direct regulation, LURE acquisition programs are an appropriate means to attain conservation and preservation goals. However,

\textsuperscript{211} See Baker, supra note 209, at 460 (noting that “markets transmit prices to farmers who respond with decisions on what and how much to produce and with what combination of resources and production practices.”).

\textsuperscript{212} See Gould, supra note 207, at 488; Daniel R. Mandelker, \textit{Controlling Nonpoint Source Water Pollution: Can It Be Done?}, 65 CH.-KENT L. REV. 479, 490 (1989) (noting that farmers are an unorganized production group and therefore have difficulty passing costs of land use controls to consumers).

\textsuperscript{213} See Deluge, supra note 205, at 526 (noting the signaling effect of agricultural prices which reflects changes in the agricultural economy and transmits this information to farmers, causing rational farmers to react quickly and efficiently).

\textsuperscript{214} See Gould, supra note 207, at 488 (noting the heterogeneous nature of the farm economy and the disparate impact of pollution control efforts on farmers).
LUREs are the better policy choice only if they achieve conservation goals in a cost-effective, efficient manner.

B. Incentives: The Better Policy Choice Only if Efficient and Effective

To assure that LURE acquisition programs achieve conservation goals, they must be structured to permit the acquisition of enforceable, perpetual LUREs efficiently and effectively. To maximize its return on the investment of scarce public funds, the federal government should be able to acquire LUREs with minimal research into each state’s real property laws. In addition, the federal government should be able to enforce easement restrictions in perpetuity. Thus, a critical question is whether federal or state laws should determine the permissible duration of the easements. In resolving this question, Congress must choose from among two competing alternatives. Federal legislation may permit state law to determine the maximum duration of LUREs. Alternatively, federal legislation may preempt state law limitations on duration.

The 1990 Farm Bill answered this question with great inconsistency. On one hand, in the Conservation Title, the WRP and the EEP expressly permit state law to determine the maximum duration of the LUREs acquired by the federal government. On the other hand, the FLP in the Forestry Title authorizes the federal government to acquire LUREs in perpetuity despite state law to the contrary. While authorizing a number of programs relating to the purchase of LUREs, the 1990 Farm Bill does not conclusively resolve whether federal or state laws govern duration.

Besides these contradictory provisions, other LURE programs are ambiguous about whether federal or state laws govern duration.

215. The WRP prescribes that “[a] conservation easement granted under this section . . . shall be for 30 years, permanent, or the maximum duration allowed under applicable State laws.” 16 U.S.C. § 3837a(e)(2) (Supp. II 1990) (emphasis added). Similarly, the EEP provision states that: “The Secretary shall . . . carry out an environmental easement program . . . through the acquisition of permanent easements or easements for the maximum term permitted under applicable State law from willing owners of eligible farms or ranches in order to ensure the continued long-term protection of environmentally sensitive lands . . . .” Id. § 3839(a) (emphasis added).

216. Id. § 2103c(c), (d)(1), (k)(2) ("Notwithstanding any provision of state law, no conservation easement held by the United States . . . shall be limited in duration or scope."). The statute further provides: “Notwithstanding any provision of State law, conservation easements shall be construed to effect the Federal purposes for which they were acquired and, in interpreting their terms, there shall be no presumption favoring the conservation easement holder or fee owner.” Id. § 2103c(k)(3).
These ambiguous provisions authorize the federal government to acquire perpetual LUREs, but they do not preempt contrary state law limitations on duration. For example, the RECP directs that LUREs acquired by the federal government must be for a term of at least fifty years. While the 1985 amendments removed a perpetual duration requirement and substituted the current fifty year minimum, the government is still authorized to acquire LUREs for terms greater than fifty years, including LUREs of perpetual duration. However, the RECP provisions do not expressly preempt state limits on duration, nor do they expressly incorporate state laws governing duration.

Similarly, the CRP provisions do not preempt state law limitations on duration. The CRP provisions condition conversions to the WRP on the grant of a long-term or permanent LURE. Although the conversion provisions are not explicit, LUREs acquired through conversion to the WRP presumably fall within the WRP provisions incorporating state law.

The FmHA LURE provisions require the Secretary to impose perpetual LUREs upon the disposition of specified properties in the federal inventory. The LUREs established pursuant to this section may be held by state governmental entities, private nonprofit organizations, or the federal government. The FmHA debt-servicing provisions require LUREs of at least 50 years, and specifically allow for longer terms under certain circumstances. However, since the debt-servicing provisions do not incorporate state laws governing duration, it is unclear whether state laws can prohibit perpetual LUREs. At the same time, the provisions do not expressly state that federal law will preempt contrary state laws limiting duration.

The Watershed program and the Farms Act authorize the federa-
al government to assist approved sponsors in the acquisition of perpetual LUREs. Under both programs the federal government is not the holder of the LURE. The Farms Act regulations require the borrower to show that the LURE will be valid, perpetual and enforceable. Regulations governing the Watershed program may use a similar approach. Although the programs do not expressly authorize LUREs to be perpetual notwithstanding state laws, only those states with laws permitting perpetual LUREs can benefit from these programs.

The uncertainty and inconsistency resulting from the LURE acquisition provisions in the 1990 Farm Bill hinder the effective use of LUREs by the federal government. The choice is between permitting state law to govern duration or expressly preempting state law limitations on duration. Selecting the latter approach will ensure that all LUREs acquired under federal conservation programs are perpetual. A policy decision should be made enabling the federal government to acquire perpetual LUREs and to enforce restrictions in perpetuity. By minimizing the need for research into individual state property laws, and by maximizing the return on investment of public funds, federal LURE acquisition programs will be permitted to function efficiently and effectively.

Importantly, the authorization of perpetual LUREs and the preemption of contrary state law limitations on duration raise fundamental federalism concerns. These concerns result from the condition rendering perpetual LUREs enforceable despite state laws to the contrary, rather than from the inherent use of voluntary easement acquisition programs. In other words, may the federal government acquire an enforceable property right from a landowner that is not part of the landowner’s “bundle of rights” under state law? Further, even if the federal government is permitted to acquire a property right not recognized by state law, may it convey that right to private nonprofit entities or local governments, when private entities and local governments cannot obtain similar rights under state property laws?


If a federal law authorizing enforceable perpetual LUREs is a proper exercise of congressional power under the Constitution, the federal law will preempt contrary state laws. However, because state laws traditionally control the acquisition and transfer of property and define resulting rights and responsibilities, the federal law may readily be seen as an intrusion on state sovereignty. Before engaging in a policy analysis of the alternative choices for LURE acquisition programs, it must first be determined whether the federal government may constitutionally require LUREs to be perpetual. Therefore, the next section examines whether federal legislation authorizing enforceable, perpetual LUREs is a proper exercise of congressional power despite constitutional protections of state sovereignty.

III. THE CONSTITUTIONALITY OF FEDERAL LEGISLATION AUTHORIZING PERPETUAL LUREs AND PREEMPTING STATE LAW LIMITATIONS ON DURATION

Congress has opted to pursue conservation and preservation of the land resource through the more politically acceptable, economically justifiable and fiscally prudent means of incentives. Therefore, the constitutional question is whether Congress may exercise the spending power and the property power to enact legislation authorizing the federal government to acquire enforceable, perpetual LUREs that preempt contrary state laws limiting duration.

LURE acquisition programs authorize the federal government to purchase interests in realty from willing landowners so long as the landowners agree to certain restrictive terms. It is well established that the federal government may use the property power to acquire property and interests in property through negotiated purchase. The federal government may use that property to attain any end within the scope of its enumerated powers. Further, pursuant to the spending power, Congress may buy property from will-

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225. This tradition is demonstrated by judicial application of state law to determine property rights, even when construing federal legislation. See, e.g., Reconstruction Fin. Corp. v. Beaver County, 328 U.S. 204, 210 (1946) (allowing state definition of real property to control question of whether government property would be taxed, since the state definition did not run counter to terms of the federal act).
227. See discussion supra part I.B.2.
228. See infra notes 338-40 and accompanying text.
ing landowners to promote the general welfare. Thus, the constitutional issues examined in this article go beyond whether Congress has the power to enact LURE acquisition programs. Rather, the more complex issue is whether federal LURE programs may subject the availability of funds to a condition that the LURE must be perpetual despite state laws to the contrary. Subissues include whether Congress can legislate that the federal government may acquire a property right that is not a cognizable aspect of the grantor's "bundle of rights" under state property law, and whether this property right will be enforceable when transferred to third parties. Arguably, the property right acquired by the federal government is inconsistent with a state's public policy as reflected in its property laws. The key question, then, is whether the federal spending program has — through a particular condition — overstepped the bounds of fundamental federalism.

The essence of federalism is that "states as states" have legitimate interests which the national government must respect even though federal laws, if constitutionally proper, are supreme. Unfortunately, federalism concerns often go unappreciated. This is attributable in part to recent decisions of the Supreme Court and in part to the surprisingly large population of lawyers, including those in Congress, who lack a sufficient understanding of federalism. While the Supreme Court's decision in Garcia v. San Antonio Metropolitan Transit Authority has tempered protection of state autonomy, federalism concerns regarding the appropriate balance of powers between the states and the federal government are still relevant in assessing exercises of congressional power.

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229. See infra notes 241-46 and accompanying text.
231. See, e.g., Engdahl, supra note 147, at 51-52 (noting academic view that Supreme Court decisions during the New Deal disposed of serious constitutional concern for federalism and allocated questions of governmental power to the political branches of government); Ben W. Heineman, Jr., The Law Schools' Failing Grade on Federalism, 92 YALE L.J. 1349, 1355 (1983) (although issues of federalism deserve detailed law school attention, they have largely been ignored and left to economists, think tanks, and public policy schools).
233. See id. at 554.
234. Id. at 586 (O'Connor, J., dissenting); see also New York v. United States, 112 S. Ct. 2408, 2419 (1992) (although the scope of the federal government's authority with respect to states has changed over the years, the federal structure required by the Constitution remains unchanged).
State sovereignty has strong defenders on the Supreme Court: Chief Justice Rehnquist and Justice O'Connor have expressed their belief that the "Court will in time again assume its constitutional responsibility" to define the scope of protected state autonomy.\(^\text{235}\)

Even if states do not object to federal legislation that infringes on their autonomy, the Supreme Court has still noted that federalism concerns must be addressed to uphold the fundamental purpose of our government's federal structure:

The Constitution does not protect the sovereignty of States for the benefit of the States or state governments as abstract political entities, or even for the benefit of the public officials governing the States. To the contrary, the Constitution divides authority between federal and state governments for the protection of individuals.\(^\text{236}\)

The notion that federalism protects individuals is significant because, although some states have expressed concerns about the amount of federal land holdings within their boundaries,\(^\text{237}\) many states are not likely to object to federal legislation authorizing perpetual LUREs. Most states recognize the importance of conserving or preserving environmentally significant lands, yet lack the requisite funds to operate effective state acquisition programs. Accordingly, before advocating federal legislation to authorize perpetual LUREs and preempt state limitations on duration, it is crucial to ensure that fundamental federalism precepts are maintained.

Legislation conditioning the availability of federal funds in exchange for a LURE on terms requiring the LURE to be perpetual is a conditional offer of federal funds. The use of such a conditional offer is a means within Congress' spending power.\(^\text{238}\) Further, in cases where the federal government is the holder, the LURE creates enforceable rights in the federal government. In these cases, legislation authorizing the LURE is analogous to a rule respecting property interests belonging to the United States — a means within Congress' property power.\(^\text{239}\) Therefore, the federal legislation can be characterized as an exercise of the spending power for the general welfare and as an exercise of the property

\(^{235}\) Garcia, 469 U.S. at 589 (O'Connor, J., dissenting).

\(^{236}\) New York, 112 S. Ct. at 2431.

\(^{237}\) See infra note 299 and accompanying text.

\(^{238}\) See infra notes 248-51 and accompanying text.

\(^{239}\) See discussion infra part III.B.
power to create enforceable rights protecting the federal interest in conservation.240 Within the appropriate doctrinal frameworks, this section will analyze the constitutionality of federal legislation authorizing enforceable, perpetual LUREs and preempts contrary state law limitations on duration.

A. The Spending Power Analysis

Article I of the Constitution provides: "The Congress shall have Power To lay and collect Taxes, Duties, Imposts and Excises, to pay the Debts and provide for the common Defence and general Welfare of the United States . . . ...."241 The proper interpretation of this language was at one time a point of considerable debate.242 However, in United States v. Butler,243 the Supreme Court approved the theory that the clause should be construed as a grant of a distinct enumerated power to spend for the "general" welfare as distinguished from a local or particular purpose.244

240. Although the "means" used by Congress through the LURE provisions are not within the scope of the commerce power, the "ends" or objectives of the LURE provisions in agricultural legislation can be characterized as an effectuation of congressional Commerce Clause policies. For example, environmentally important lands such as forestlands, farmland and highly erodible croplands, wetlands, riparian corridors and wildlife habitats directly or indirectly affect interstate commerce; by virtue of their important role in the ecosystems, these lands generate marketable commodities and hence interstate movement. See Hodel v. Indiana, 452 U.S. 314, 324 (1981) (prime farmland is a federal interest that Congress may address through the commerce power); cf. George C. Coggins & William H. Hensley, Constitutional Limits on Federal Power to Protect and Manage Wildlife: Is the Endangered Species Act Endangered?, 61 IOWA L REV. 1099, 1146 (1976) (arguing Congress has virtually unlimited power to set aside property for national parks and refuges to protect local wildlife).

Further, lands protected by LUREs may be used for fishing or hunting or for wildlife habitats. These uses of the land draw people for recreational or scientific purposes and may affect interstate movement. See United States v. Byrd, 609 F.2d 1204, 1210 (7th Cir. 1979) (holding that recreational and scientific use of inland lakes significantly affects interstate commerce). Accordingly, federal legislation permitting perpetual LUREs, and furthering commerce policies by assuring long-term protection, may also fall within the category of an exercise of the necessary and proper power to effectuate both a congressional policy within the scope of the commerce power, as well as extraneous ends. See discussion supra section II.A and infra section III.C.

242. Madison asserted that the power to spend was limited to the legislative fields enumerated by the Constitution. Hamilton, on the other hand, maintained that the spending clause confers a power separate and distinct from the other enumerated powers. United States v. Butler, 297 U.S. 1, 65 (1939); see Albert J. Rosenthal, Conditional Federal Spending and the Constitution, 39 STAN. L. REV. 1103, 1111-13 (1987) (surveying historical interpretations of the spending power).
244. Id. at 66-67. The opinion in Butler reflects the Hamiltonian view that the words
Butler is instructive because in that case the Court implied that an agricultural subsidies program promoted the general welfare even though the program only benefitted farmers who set aside certain land. Later decisions firmly established that federal spending for agriculture programs promotes the general welfare. Because LUREs are an agricultural incentive program similar to the program in Butler, they may also be considered an exercise of the power to spend for the general welfare.

The scope of the spending power is expansive. It has been broadly construed to authorize spending that cannot be justified as an exercise of other enumerated powers. Further, within certain limits, Congress may impose conditions on recipients of federal spending to compel or encourage conduct which could not be compelled through direct regulation. The limits are twofold. First,
the spending power may not either directly\textsuperscript{249} or indirectly\textsuperscript{250} infringe upon individual liberties. Second, the Spending Clause does not empower Congress to overstep established federalism limitations.

The constitutionality of a conditional exercise of the spending power depends upon the propriety of the condition imposed.\textsuperscript{251} Accordingly, although LURE acquisition programs inherently fall within the scope of the spending power, the condition that federal LUREs must be perpetual despite state laws to the contrary also must survive constitutional scrutiny.

In \textit{South Dakota v. Dole},\textsuperscript{252} the Supreme Court set forth a four-part test to determine whether conditions imposed under federal spending programs are constitutional. According to the Court, conditions on an offer of federal funds must be: (1) in pursuit of the general welfare,\textsuperscript{253} (2) unambiguous such that the election to participate is done knowingly;\textsuperscript{254} (3) related to a federal interest in particular national programs;\textsuperscript{255} and (4) unobstructed by any independent Constitutional bar.\textsuperscript{256} The first three prongs of this test relate to whether a condition falls within the scope of the

\textsuperscript{249} See \textit{Buckley}, 424 U.S. at 23-38 (sustaining the grant of public funds for presidential candidates in part because the grant did not impinge on individual liberties).

\textsuperscript{250} See \textit{Dole}, 483 U.S. at 210 (noting that a federal spending program may not condition the receipt of federal monies on terms requiring invidiously discriminatory state action or the infliction of cruel and unusual punishment).

\textsuperscript{251} \textsc{Ronald D. Rotunda & John E. Nowak}, \textsc{Treatise on Constitutional Law} § 20.11 (2d ed. 1992); see also Peter Westen, \textit{Incredible Dilemmas: Conditioning One Constitutional Right on the Forfeiture of Another}, 66 Iowa L. Rev. 741, 742 (1982) (criticizing the doctrine that the Constitution does not tolerate the "Hobson's choice" inherent in conditioning one constitutional right on the forfeiture of another).

\textsuperscript{252} 483 U.S. 203 (1987). The condition analyzed in \textit{Dole} stemmed from a congressional directive to the Secretary of Transportation to withhold a percentage of federal highway funds from states which allowed persons less than 21 years of age to lawfully purchase alcoholic beverages. The condition was challenged as a violation of the Twenty-First Amendment to the U.S. Constitution. \textit{Id.} at 205.

\textsuperscript{253} \textit{Id.} at 207. The Court noted that the concept of the "general welfare" is largely shaped by Congress. \textit{Id.} (citing Helvering v. Davis, 301 U.S. 619, 640-45 (1937)).

\textsuperscript{254} \textit{Id.} at 207 (citing Pennhurst State Sch. and Hosp. v. Halderman, 451 U.S. 1, 17 (1981)).

\textsuperscript{255} \textit{Id.} (citing Massachusetts v. United States, 435 U.S. 444, 461 (1978) (plurality opinion)). It is still uncertain whether furtherance of a mere policy of the federal government will sustain conditional spending unless that policy may be carried out pursuant to one of Congress's enumerated powers. Rosenthal, supra note 242, at 1131.

spending power itself; the fourth prong relates to whether the condition violates any constitutional limitation intended to protect individual liberties or state sovereignty.

The offer of federal funds under the LURE provisions is an expenditure of federal money to ensure the continued viability of environmentally significant ecosystems and their aesthetic and recreational values.\(^{257}\) Congress recognizes the importance of conserving and preserving important land resources for the public interest.\(^{258}\) A condition requiring LUREs under federal conservation programs to be perpetual despite state law limitations on duration promotes the long-term benefits of the spending program. Under the broad construction of the spending power, the condition readily promotes the general welfare. Further, the condition is clearly related to the purpose of federal conservation programs and can be drafted unambiguously. Thus, the condition falls within the scope of Congress' spending power under the first three prongs of the test set forth in \textit{Dole}.

However, it is less obvious that the condition meets the fourth prong of the \textit{Dole} test, at least as to state sovereignty. Certainly, the condition does not infringe on individual liberties. An example of a breach of an independent constitutional bar protecting individual liberties would be a federal program conditioning a grant on a farmer's promise not to criticize the government's agricultural policies; the condition would be unconstitutional as an infringement of the farmer's freedom of speech under the First Amendment.\(^{259}\) Since individual liberties are not at stake when a landowner voluntarily conveys a LURE subject to the condition that the LURE will be perpetual, the condition does not impede individual liberties.

In contrast, because state laws traditionally control the acquisition and transfer of property and define the resulting rights and responsibilities,\(^{260}\) the condition may be perceived as an intrusion on state sovereignty. Although protection of state sovereignty derives primarily from the Tenth Amendment,\(^{261}\) this limit on

\(^{257}\) See discussion supra part IB.
\(^{258}\) See supra note 156 and accompanying text.
\(^{259}\) \textsc{Rotunda} & \textsc{Nowak}, \textit{supra} note 251, § 20.11.
\(^{260}\) See, e.g., \textsc{United States v. Little Lake Misere Land Co.}, 412 U.S. 580, 591 (1973) (noting that most American property law is grounded in state statutory and common law); \textsc{Reconstruction Fin. Corp. v. Beaver Co.}, 328 U.S. 204, 210 (1946) (noting that concepts of real property are deeply rooted in state customs, traditions, habits, and laws).
\(^{261}\) \textsc{U.S. Const. amend. X}. The Tenth Amendment states: "The powers not delegated to the United States by the Constitution, nor prohibited by it to the states, are reserved to
Congress' power is not derived from the text of the amendment itself.\textsuperscript{262} Rather, the Tenth Amendment requires an examination of whether an incident of state sovereignty is protected by a separate and distinct limitation on an enumerated power.\textsuperscript{263} For example, the Spending Clause does not empower Congress to require states to regulate because established Commerce Clause doctrine precludes such action as an infringement on state sovereignty.\textsuperscript{264} Therefore, the inquiry under the fourth prong of the \textit{Dole} test is whether a federal condition that LUREs be perpetual, despite contrary state laws, violates a limitation on the spending power, or any other enumerated power, intended to protect state sovereignty.

In \textit{Dole}, the Court reiterated that the spending power doctrine provides little protection for state sovereignty.\textsuperscript{265} The rationale for the lack of protection in the context of federal spending is that if states accept federal payments, they must also accept the federal conditions: "Requiring States to honor the obligations voluntarily assumed as a condition of federal funding before recognizing their ownership of funds simply does not intrude on their sovereignty."\textsuperscript{266} Thus, essential attributes of state and local government autonomy have received little protection in conditional spending cases. Courts have upheld deep intrusions into traditional state realms through conditional spending, including the redistribution of authority between a state's executive and legislative branches of government,\textsuperscript{267} and the overriding of state laws concerning the use of federal funds.\textsuperscript{268}

\textit{the States respectively, or to the people."

\textsuperscript{262} See id.


\textsuperscript{264} Id. at 2429.

\textsuperscript{265} \textit{Dole}, 483 U.S. at 210 (citing \textit{Oklahoma v. Civil Service Comm'n}, 330 U.S. 127 (1947)). In \textit{Oklahoma}, the Court upheld a provision of the Hatch Act which conditioned receipt of federal funds on the removal of a state official whose employment was financed in part by federal funds due to the state official's political activities. 330 U.S. at 142-44.

\textsuperscript{266} Bell v. New Jersey, 461 U.S. 773, 790 (1983); \textit{see also Pennhurst State Sch. v. Haldemann}, 451 U.S. 1, 17 (1981) (stating that Congress traditionally sets the terms upon which it disburses federal money to the states); King v. Smith, 392 U.S. 309, 333 n.34 (1968) (stating that unless barred by the Constitution, the federal government may impose conditions on disbursements to the states that preempt state law).


\textsuperscript{268} \textit{See Lawrence County v. Lead-Deadwood Sch. Dist.}, 469 U.S. 256, 270 (1985) (up-
Nonetheless, the Court in *Dole* implied that the Tenth Amendment may preclude financial inducements offered by Congress that pass the point of "pressure" and become "compulsion." Although the Court did not indicate where this point occurs, it found that the risk of losing five percent of federal highway funds did not render the condition an unconstitutional intrusion into state autonomy. By analogy, federal conditions on LURE acquisitions cannot reasonably be considered "compulsion" because the state is not at risk of losing significant federal funds. Rather, the programs permit the state or its residents to benefit from a new source of federal funds by accepting federal conditions.

Of course, those spending power cases which address the extent of constitutional protection provided for state sovereignty generally involve conditional offers to states themselves. These conditional offers attempt to achieve state compliance with federal purposes where direct regulation may not be appropriate. Of the LURE acquisition programs outlined in this article, only the Farms Act and Watershed Program involve conditional offers to the states themselves. Yet even these programs are distinguishable because the conditional federal assistance in both programs may be invoked by private nonprofit entities as well. However, because these programs require the holder to prove that LUREs acquired with federal assistance will be valid, perpetual and enforceable, each state may choose whether or not to permit its residents to obtain federal benefits in exchange for perpetual LUREs. Because the state may elect to enact legislation conforming to the condition in the federal spending program, this use of the spending power requires only a minimal extension of *Dole* to be found constitutional.

In contrast, the other federal LURE programs described in this article involve conditional offers to individual landowners who convey LUREs to the federal government. The constitutionality

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holding legislation authorizing units of local government to use their share of federal funds more expansively for more purposes than permitted by state law).  
269. *Dole*, 483 U.S. at 211.  
270. *Id.*  
271. *See, e.g., id.* at 211-12 (upholding the use of the spending power by Congress to coerce states, through the threat of reducing federal highway funds, to raise the minimum drinking age to twenty-one years to reduce automobile-related injuries and death).  
273. *See supra* notes 123, 127 and accompanying text.  
274. I.e., the CRP, WRP, EEP, FLP, RECP and the FmHA debt-restructuring program.
of a conditional offer to an individual which may result in the federal government acquiring a property right not recognized by state property law is less apparent. The *Dole* rationale limiting protection for state sovereignty in spending cases does not apply because a private landowner initiates the intrusive transaction without the state’s knowledge.

States, however, are not politically powerless against federal intrusions initiated by individual landowners. In *Garcia v. San Antonio Metropolitan Transit Authority*, the Court rejected the concept of discrete areas of traditional state sovereignty and concluded that participation in the national political process provides states with sufficient safeguards against federal intrusions. Although the Court in *Dole* did not rely on *Garcia* to explain why state sovereignty receives little protection in spending power cases, federal spending programs will not be invalidated merely because they intrude into discrete areas traditionally reserved to states and thereby influence local activities. This is true even though a state may be unaware of a particular intrusion. The national political process is equally available to moderate the federal legislation enabling such intrusions.

The recent case of *New York v. United States* further bol-

See discussion infra part IV.B. The provision requiring the FHA to place perpetual LUREs on properties in its inventory does not involve conditional spending at all. However, it falls squarely within the scope of the Article IV property power. See supra notes 89-93 and accompanying text and discussion infra part IV.B.2.


276. Id. at 551-56. The concept of discrete areas reserved for states in a Tenth Amendment analysis had been set forth only 9 years earlier. See *National League of Cities v. Usery*, 426 U.S. 833 (1976), overruled by *Garcia*, 469 U.S. at 528.


278. It has been argued that the political process provides a less effective safeguard in the area of conditional spending because continued high levels of federal assistance are generally of great importance to state and local governments. Thus, states may elect to forego campaigning against certain conditions out of fear of hindering later efforts to obtain federal funds. Rosenthal, *supra* note 242, at 1141. That theory assumes that our nation’s political process permits adverse ramifications. The Court in *Garcia* did leave open the possibility that some extraordinary defect in a procedural aspect of the political process may render congressional legislation invalid under the Tenth Amendment. 469 U.S. at 554. In *South Carolina v. Baker*, 485 U.S. 505, 513 (1988), the Court implied that a state’s allegation that it was deprived of any right to participate in the national political process, or that it was singled out in a way that left it politically isolated and powerless, may constitute such a defect. A fear that participating in the process may hinder later efforts to obtain funds does not rise to the level of the procedural defects enunciated in *Baker*.

STERS this conclusion. In that case the Court explained the constitutionally permissible methods of encouraging states to conform to federal policy under the Spending Clause.280 The Court found that the ultimate decision to comply is bestowed upon the residents of the state, rather than the state itself.281 Under our democratic system of government, a state’s residents should determine whether federal policy is sufficiently contrary to local interests to decline participation in a federal program.282

Thus, that the conditional offer at issue may be invoked by individual landowners rather than the state does not violate spending power limitations intended to protect state sovereignty. However, before concluding that a particular condition of a federal spending program is constitutional, it is necessary to examine the established limitations of enumerated powers other than the spending power to determine whether the bounds of federalism have been overstepped.283 As noted, a condition that LUREs acquired by the federal government be perpetual also falls within the enumerated property power.284 Property power doctrine prescribes some limitations intended to protect state sovereignty. Accordingly, the issue becomes whether the property power provides an independent constitutional bar sufficient to render the condition unconstitutional under the fourth prong of the test set forth in Dole.

B. The Property Power Analysis

1. The Article I Property Power

Congressional power over federal property and property interests derives from two sources in the Constitution: the Article I and Article IV Property Clauses. Federal property interests acquired under LURE provisions in the 1990 Farm Bill do not fall within the scope of the Article I Property Clause. This clause provides that Congress shall have the power:

To exercise exclusive Legislation in all Cases whatsoever, over such District . . . as may . . . become the Seat of the Government of the United States, and to exercise like Authority over all Places purchased by the Consent of the

280. Id. at 2424.
281. Id.
282. Id.
283. See supra notes 263-64 and accompanying text.
284. See supra note 239 and accompanying text.
Legislature of the State in which the Same shall be, for the
Erection of Forts, Magazines, Arsenals, dock-yards, and
other needful Buildings. . . . 285

Property covered by Article I is distinguished from other federal
property by its use and by state consent to its acquisition. The
phrase "other needful buildings" is very broad and has been con-
strued to encompass "whatever structures are found to be necessary
in the performance of the functions of the Federal Govern-
ment."286 However, the Supreme Court has stated that the phrase
does not include tracts of federal land "used for forests, parks,
ranges, wild life sanctuaries, flood control, and other purposes
which are not covered by [Article I] Clause 17."287 Accordingly,
even if a state cedes complete governmental jurisdiction over such
property to the United States,288 that property must be regarded
as falling under the Article IV clause alone.289

However, because the central issue is whether a particular
federal condition violates a limitation on the exercise of the property
power intended to protect state sovereignty, the concept of state
consent or cession of state legislative jurisdiction should be consid-
ered. Although a state's cession of legislative jurisdiction is regard-
ed as an integral aspect of the Article I property power,290 a state
may also cede legislative jurisdiction to the United States over

288. Cession of complete governmental jurisdiction is the essence of state consent under
the Article I Property Clause. For example, early cases held that the power conferred on
the United States under Article I to exercise exclusive legislation carries with it the power
of exclusive jurisdiction. See, e.g., Dravo Contracting, 302 U.S. at 141 (the United States
has the power to exercise exclusive jurisdiction over land acquired under Article I); Unit-
ed States v. Cornell, 25 F. Cas. 650, 653 (C.C.D.R.I. 1820) (No. 14,868) (state has no
jurisdiction over grounds of a fort located within its boundaries acquired by the United
States under Article I); cf. Reily v. Lamar, 6 U.S. (2 Cranch) 344, 356-57 (1805) (resi-
dents of District of Columbia ceased to be residents of Maryland after Maryland ceded
the land to the United States). However, later cases found that Article I property does not
cease to be part of the state. See, e.g., Evans v. Corman, 398 U.S. 419, 426 (1970)
(holding that persons residing on Article I property in Maryland could not be denied the
right to vote in Maryland on ground that they were not residents of Maryland); Howard
v. Commissioners of the Sinking Fund, 344 U.S. 624, 627 (1953) (holding that Article I
does not "prevent the state from exercising its power over the federal area within its
boundaries, so long as there is no interference with the jurisdiction asserted by the Feder-
al Government").
290. See supra note 288 and accompanying text.
property that does not fall under Article I.\footnote{Yosemite Park, 304 U.S. at 528-30.} Cession of legislative jurisdiction to the United States would readily permit the federal government to enact legislation that may otherwise exceed limitations intended to protect state sovereignty.

Interestingly, the FLP, which expressly provides that perpetual LUREs shall not be limited in duration by contrary state laws,\footnote{16 U.S.C. \S 2103c(k) (Supp. II 1989).} also contains a provision regarding state consent. The FLP prescribes that if a state has not approved the acquisition of land under section 515, LUREs shall not be acquired on lands outside areas specifically designated as eligible for inclusion in the FLP.\footnote{16 U.S.C. \S 515 (1988).} Section 515 requires state consent before the Secretary acquires lands necessary for timber production or to regulate the flow of navigable waters.\footnote{16 U.S.C. \S 2103c(g) (Supp. II 1990).} The FLP provision thus empowers the Secretary to acquire LUREs under the program on lands approved for acquisition under section 515, as well as on lands eligible for inclusion in the FLP.

Further, the FLP directs that the establishment of eligibility criteria and the subsequent selection of areas which may be enrolled in the FLP are to be performed by the Secretary “in consultation” with state coordinating committees.\footnote{Id. \S 2113(b)(2)(D).} Yet, the responsibilities of state coordinating committees are limited to “making recommendations” to the Secretary concerning forest lands that should be included in the FLP.\footnote{Id. \S 2103c(e) (Supp. II 1990).} Thus, although requiring cooperation between the federal government and the states, LUREs may be acquired under the FLP without state consent or cession of state jurisdiction.

Moreover, requiring state consent or cession of state jurisdiction before acquiring LUREs pursuant to the many federal conservation programs would hinder an important aspect of the programs — the ability of the federal government to enter into voluntary transactions with private landowners efficiently. Accordingly, it is important to determine the constitutionality of a federal condition that all LUREs be perpetual despite state law limitations on duration without reference to state consent.

\footnote{Yosemite Park, 304 U.S. at 528-30.} \footnote{16 U.S.C. \S 2103c(k) (Supp. II 1989).} \footnote{16 U.S.C. \S 2103c(g) (Supp. II 1990).} \footnote{16 U.S.C. \S 515 (1988).} \footnote{Id. \S 2113(b)(2)(D).}
2. The Article IV Property Power

The Article IV Property Clause provides: "Congress shall have Power to dispose of and make all needful Rules and Regulations respecting the Territory or other Property belonging to the United States . . . ."297 Because it is recognized that the general language of the Article IV Property Clause encompasses all property owned by the United States, including personalty and intangible property as well as interests in realty,298 federal property interests acquired under LURE acquisition programs readily fall within the scope of Article IV.

The purpose of the analysis in this subsection is to determine whether any limitations on federal property power provide an independent constitutional bar to a conditional offer of federal funds under the spending power. One aspect of the analysis is whether the legislation is within the enumerated property power: i.e., whether federal legislation authorizing enforceable, perpetual LUREs is a needful rule or regulation respecting a property interest belonging to the United States. The more refined issue for purposes of this article, however, is whether such a conditional offer violates a limitation on the exercise of the property power intended to protect state sovereignty.

Initially, however, because of divergent views regarding the "preemptive capability" of Article IV legislation, it is important to determine the supremacy of legislation enacted pursuant to the Article IV property power for the purpose of overriding contrary state laws. If federal laws enacted under Article IV lack preemptive capability, the federal condition requiring LUREs to be perpetual would be rendered unconstitutional by an independent constitutional bar making further analysis of the property power unnecessary.

a. The Supremacy of Article IV Legislation

The relative powers of the states and the federal government over federal property have generated much controversy through the

297. U.S. CONST. art. IV, § 3, cl. 2.
298. See, e.g., Pacific Coast Dairy v. Department of Agriculture, 318 U.S. 285, 294 (holding that under Article IV Congress may regulate the selling of milk on federal lands acquired under Article I); Ashwander v. TVA, 297 U.S. 288, 331 (explaining that the Article IV property power may be applied to regulate all personal and real property belonging to the United States); Nixon v. Sampson, 389 F. Supp. 107, 137 n.80 (D.D.C. 1975) (stating that under Article IV only Congress can dispose of the President's documents, papers, tapes and other materials belonging to the United States).
years. Scholars have asserted varying theories about the scope of the Article IV property power. The polar views stem from Supreme Court language noting that the power over federal property entrusted to Congress is "without limitations." At the same time, other language implies that the powers of Congress over federal lands are akin to the rights of an ordinary proprietor. Although the theories are diverse, the most relevant aspect of the controversy is whether the legislative power of the federal government over Article IV property is subordinate to state governmental legislation. In other words, does a needful rule respecting federal property preempt state laws?

The divergent theories can be generally categorized as falling into either a restrictive or a broad view of the Article IV property power. Proponents of the restrictive view limit the role of Congress over Article IV properties, with certain exceptions, to that of an ordinary proprietor; accordingly, Article IV legislation can have no

299. In the 1930s, coastal states objected to newly asserted federal jurisdiction over submerged lands over which the states had assumed ownership. Robert E. Hardwicke et al., The Constitution and the Continental Shelf, 26 TEX. L. REV. 398, 400-05 (1948). More recently, western states have sought increased ownership of federal lands within their boundaries. Bruce Babbitt, Federalism and the Environment: An Intergovernmental Perspective of the Sagebrush Rebellion, 12 ENVTL. L. 847, 848-49 (1982).


303. Some scholars espouse an even more restrictive view — that the federal power under Article IV prevents the federal government from retaining property within the boundaries of the states except for Article I purposes. See, e.g., Brodie, supra note 300, at 719-22; C. Perry Patterson, The Relation of the Federal Government to the Territories and the States in Landholdings, 28 TEX. L. REV. 43, 58 (1949).
preemptive capability.\textsuperscript{304} Scholars espousing the broader view do not differentiate the property power from other enumerated powers and therefore advocate that a constitutional exercise of the Article IV property power must preempt inconsistent state laws.\textsuperscript{305}

In the landmark case of \textit{Pollard v. Hagan},\textsuperscript{306} the Supreme Court enunciated the parameters of Congress' power pursuant to the Article IV Property Clause. Advocates of the restrictive view herald \textit{Pollard} as establishing that the United States is precluded from exercising "general governmental jurisdiction" over federal property within the boundaries of a state unless the federal property constitutes Article I property.\textsuperscript{307} However, the broader view of \textit{Pollard} is that the Court did not construe the federal government's powers under the Article IV Property Clause as subordinate.

Close analysis of \textit{Pollard} reveals that the broader interpretation is superior. That conclusion hinges on the Court's clarification of its intent in rendering the decision: the Court stated that it was "called upon to draw the line that separates the sovereignty and jurisdiction of the government of the union, and the state governments, over the subject in controversy."\textsuperscript{308} The subject in controversy was land below the usual high water mark of a navigable river in Alabama, shortly after Alabama had been admitted to the Union.\textsuperscript{309} The Court noted that the language of the Georgia deed ceding the land to the United States was based on the doctrine of equal footing\textsuperscript{310} — that the new state formed from the ceded lands would be admitted to the Union with the same rights of sovereignty, jurisdiction, and eminent domain as the original states.\textsuperscript{311} The \textit{Pollard} case focused on the right of eminent do-

\textsuperscript{304} See, e.g., Engdahl, \textit{supra} note 300, at 309-10.

\textsuperscript{305} See, e.g., Gaetke, \textit{supra} note 300, at 656.

\textsuperscript{306} 44 U.S. (3 How.) 212 (1845).

\textsuperscript{307} In other words, the United States is treated as having only limited power akin to that of an ordinary property owner. See Engdahl, \textit{supra} note 300, at 293-96.

\textsuperscript{308} \textit{Pollard}, 44 U.S. (3 How.) at 220.

\textsuperscript{309} A central issue in \textit{Pollard} was whether the land belonged to the state or the federal government. If deemed "public land," the property would constitute Article IV property. \textit{Id.} at 224.

\textsuperscript{310} The doctrine of equal footing derives from the Ordinance of 1787, which provided that the new states "shall be admitted by its delegates into the Congress of the United States, on an equal footing with the original states in all respects whatever." \textit{Id.} at 222. Virginia and Georgia enacted legislation ceding lands to the federal government which contained language to the same effect. \textit{Id.} at 221-22.

\textsuperscript{311} \textit{Id.} at 221-23. The doctrine of equal footing is an integral aspect of the restrictive Property Clause theories. See \textit{supra} note 300.
The precise issue was whether the United States had the right to transfer the land in controversy to the plaintiff through its right of eminent domain.

The Court stated that, pursuant to agreements between the ceding states and the United States, the United States had temporarily held "both national and municipal" right of eminent domain over the lands ceded. The Court explained, however, that the "municipal" right of eminent domain was held in trust only for the new states. Even if a stipulation had been inserted in the agreements which granted

the municipal right of sovereignty and eminent domain to the United States, such stipulation would have been void and inoperative: because the United States have no constitutional capacity to exercise municipal jurisdiction, sovereignty, or eminent domain, within the limits of a state or elsewhere, except in the cases in which it is expressly granted.

Thus, Pollard stands for the proposition that the United States has no power to exercise "municipal" sovereignty over lands once those lands are transferred to the new states. However, the Court recognized that not all lands ceded to the United States would necessarily be transferred to new states. The Court expressly stated that the new state, Alabama, succeeded to all the rights of sovereignty, jurisdiction, and eminent domain which Georgia possessed at the date of the cession, "except so far as this right was diminished by the public lands remaining in the possession and under the control of the United States."

As to

312. The Court defined eminent domain as the "right which belongs to the society, or to the sovereign, of disposing, in case of necessity, and for the public safety, of all the wealth contained in the state." Pollard, 44 U.S. (3 How.) at 223.

313. Id. at 222. The municipal right of eminent domain includes the power to dispose of state lands for municipal purposes. Id. at 230. The national right of eminent domain only extends to territories or properties of the federal government. Id. at 224.

314. Id.

315. Id. at 223.

316. Pollard distinguishes cases involving Article I property as "the only cases . . . in which all the powers of government are united in a single government, except in the cases already mentioned of the temporary territorial governments, and there a local government exists." Id. at 223-24. Thus, it is reasonable to conclude that the United States can exercise "municipal" sovereignty only over Article I property or over lands ceded to the United States before those lands become new states.

317. Id. at 223 (emphasis added).
such "public lands" within the boundaries of the new state, the Court expressly stated that the United States did not hold any "municipal" sovereignty; rather, the United States possessed the full power given to Congress "to make all needful rules and regulations respecting the territory or other property of the United States." In other words, the United States continued to hold the power of "national" sovereignty.

Specifically, the Court held Alabama was entitled to sovereignty and jurisdiction over all the territory within her limits to the same extent that Georgia possessed it before it was ceded to the United States. Under the common law at that time, each state held the absolute right to all navigable waters and the soils under them within the boundaries of the state, subject only to the rights surrendered by the Constitution. Thus, the land in controversy was not "public land," but belonged to Alabama. Accordingly, a clause in the agreement between Georgia and the United States which declared that "all navigable waters within the state shall for ever [sic] remain public highways was deemed inoperative to the extent that the clause attempted to create a right of eminent domain in the United States for municipal purposes. Because the challenged federal action was an attempt to transfer the property to an individual citizen, it was deemed an exercise of eminent domain for municipal purposes and was therefore void.

318. Id. at 224 (quoting U.S. Const. art. IV, § 3)
319. Id. at 228-29.
320. Id. at 229.
321. Because the land was not "public land," the Court held that "the right of the United States to the public lands, and the power of Congress to make all needful rules and regulations for the sale and disposition thereof [pursuant to Article IV], conferred no power to grant to the plaintiffs the land in controversy." Id. at 230. It is this aspect of Pollard's holding which may be misunderstood by advocates of the restrictive view. For example, Professor Engdahl's view can be construed as indicating that he believes that the land in controversy in Pollard was "public land." See Engdahl, supra note 300, at 296.
322. Pollard, 44 U.S. (3 How.) at 229.
323. The Court held that the transfer was void even though the United States could have transferred the property via the commerce power. Id. at 229-30.
324. The Court aptly noted:

To give to the United States the right to transfer to a citizen the title to the shores and the soils under the navigable waters, would be placing in their hands a weapon which might be wielded greatly to the injury of state sovereignty, and deprive the States of the power to exercise a numerous and important class of police powers. But in the hands of the States this power can never be used so as to affect the exercise of any national right of eminent domain or jurisdiction with which the United States have been invested by the Constitution. For, although the territorial limits of Alabama have extended all
Thus, Pollard does not support the restrictive theory that federal legislation under the Article IV Property Clause is subordinate to state laws. Rather, the case distinguishes federal power over lands which become state property when new states are formed from federal power over retained public lands within the boundaries of new states: the federal government may not exercise "municipal sovereignty" over lands which become state property, but may exercise its Article IV property power over public lands within the boundaries of new states.

Furthermore, later Supreme Court cases, especially the Court's holding in the case of Kleppe v. New Mexico,\(^3\) seriously erode the restrictive view. In Kleppe, the Court stated that the "presence or absence of [legislative] jurisdiction has nothing to do with Congress' powers under the Property Clause."\(^3\) Rather, absent consent or cession a State undoubtedly retains jurisdiction over federal lands within its territory, but Congress equally surely retains the power to enact legislation respecting those lands pursuant to the Property Clause. And when Congress so acts, the federal legislation necessarily overrides conflicting state laws under the Supremacy Clause.\(^3\)

Therefore, the broader view of congressional authority under the Article IV property power is more meritorious. Importantly, however, this article does not attempt to resolve the conflicting property power theories. Even proponents of the restrictive view recognize certain exercises of the Article IV property power as valid and capable of preemption. Since this article is concerned with whether the property power is an independent constitutional

\(^2\) Pollard, 426 U.S. at 542-43. Proponents of the restrictive view see Kleppe as an erroneous decision. For instance, Professor Engdahl asserts the Supreme Court failed to recognize that the cases supporting the statement that the Property Clause power is a complete power involved the "creation of rights in federal land by transfer of title, lease, or license, or the validity of terms imposed by Congress as conditions of such grants." Engdahl, supra note 300, at 352. However, the Court's express statement that the presence or absence of legislative jurisdiction has nothing to do with the property power undermines the classic Property Clause theory, and indicates that the distinction would have been irrelevant to the Court's holding.

\(^3\) Kleppe, 426 U.S. at 543 (citations omitted).
bar to an offer of federal funds subject to the condition that LUREs be perpetual, it is sufficient to determine that: (i) the federal condition falls within the sphere of recognized preemptive Article IV power; and (ii) the federal condition does not overstep limitations intended to protect state sovereignty.

b. The Preemptive Exercises of Article IV Property Power

The Article IV Property Clause empowers Congress to regulate without limitation the disposition of interests in federal property.\(^{328}\) Congress has an absolute right to prescribe the times, conditions, and mode of transferring interests in federal property, and to designate to whom the transfer shall be made.\(^{329}\) This power is largely attributable to the express language of Article IV which contains no limitations regarding Congress' power to "dispose of" federal property.\(^{330}\) Such power is akin to that held by any proprietor.\(^{331}\)

However, congressional power also goes beyond that of an ordinary proprietor. Cases have held that state statutes of limitation, as well as state laws creating or disregarding equitable or inchoate rights, may be vitiated to the extent necessary to validate a conveyance by the federal government.\(^{332}\) In addition, Congress may subject a conveyance of Article IV property to terms or conditions not otherwise permitted under state law.\(^{333}\) Thus, Congress may readily promote policies not related to the federal property itself by

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329. Id.; see also Eugene R. Gaetke, Congressional Discretion Under the Property Clause, 33 Hastings L.J. 381, 384 (1981) (explaining that "[l]ike other proprietors, Congress may decide whether, when and on what terms to dispose of [federal] lands").
330. See supra note 297 and accompanying text.
331. Judicial deference to congressional judgment regarding the disposition of federal property is a necessary consequence of the proprietary nature of such decisions. Gaetke, supra note 329, at 391.
332. See, e.g., Gibson, 80 U.S. (13 Wall.) at 103-04 (holding that occupation of land for period of time established by state law is not sufficient to defeat legal title subsequently conveyed to others by the United States); Wilcox v. Jackson, 38 U.S. (13 Pet.) 498, 516 (1839) (asserting that state law deeming inchoate or imperfect title denied "perfect title as if a patent had issued" cannot defeat later conveyance by United States). However, the cases indicate that state laws may be vitiated only to the extent necessary to validate the conveyance.
333. See, e.g., ASARCO, Inc. v. Kadish, 490 U.S. 605, 633 (1989) (when a state receives title to land previously held by the federal government, the state must use or transfer the land subject to any conditions attached to the transfer by the federal government); Broder v. Water Co., 101 U.S. 274, 276-77 (1879) (once title to public lands passes under federal laws, it is subject to state legislation only so far as that legislation is consistent with the vesting of title provided by federal laws).
inserting conditions in grants or other dispositions of the property.\textsuperscript{334} Congress also may enact preemptive Article IV legislation to regulate conduct on both federal and non-federal property in order to protect federal property from harm.\textsuperscript{335} This represents an enlargement of the federal government’s proprietary power.\textsuperscript{336} All owners may invoke available remedies to protect their land, but the federal government can go further by legislatively creating remedies from potential harms. For example, the Court has upheld federal legislation that permitted killing deer threatening federal property even though state game laws prohibited such killings.\textsuperscript{337}

Additionally, Article IV legislation is recognized as supreme where federal property is used to effectuate an enumerated power.\textsuperscript{338} Even proponents of the restrictive view acknowledge this as a necessary consequence of federal authority conferred by the Necessary and Proper Clause.\textsuperscript{339} The Necessary and Proper Clause justifies the federal government’s right of eminent domain, which may be invoked to acquire property necessary to further the government’s delegated powers.\textsuperscript{340}

Finally, Congress may enact preemptive Article IV legislation to promote its policies regarding the use of the federal property.\textsuperscript{341} Under Article IV, Congress may designate federal proper-

\textsuperscript{334} See, e.g., United States \textit{v.} City \& County of San Francisco, 310 U.S. 16, 29-30 (upholding a federal land grant to a city for water supply and for generating electricity conditioned on the requirement that all energy be sold to consumers rather than private utility companies) (1940).

\textsuperscript{335} See, e.g., \textit{Hunt v. United States}, 278 U.S. 96, 100 (1928) (upholding a federal statute authorizing killing of deer on federal property when the deer population threatened the federal property notwithstanding state game laws restricting the killing of deer); \textit{United States v. Alford}, 274 U.S. 264, 267 (1927) (upholding a federal law punishing one who built and failed to extinguish a fire on private land which endangered federal lands); \textit{McKelvey v. United States}, 260 U.S. 353, 359 (1922) (holding that Congress may prohibit conduct on federal land); \textit{Camfield v. United States}, 167 U.S. 518, 528 (1897) (upholding a federal law forbidding enclosure of public land as a valid prohibition against building fences on non-federal land).

\textsuperscript{336} \textit{Engdahl, supra} note 300, at 308-09.

\textsuperscript{337} \textit{Hunt}, 278 U.S. at 100.

\textsuperscript{338} \textit{See Fort Leavenworth R.R. \textit{v. Lowe}}, 114 U.S. 525, 539 (1885) (Federal properties, "as instrumentalities for the execution of [federal] power, will be free from any such interference and jurisdiction of the State as would destroy or impair their effective use for the purposes designed.").

\textsuperscript{339} \textit{Engdahl, supra} note 300, at 299-300.

\textsuperscript{340} \textit{See Kohl \textit{v. United States}}, 91 U.S. 367, 372-73 (1875).

\textsuperscript{341} \textit{Gaetke, supra} note 329, at 387. The Supreme Court has upheld legislation regulating conduct on federal and non-federal property as a means of promoting federal land
ties as national forests or parks, wilderness areas and wildlife refuges, and Congress may enact legislation to effectuate these land use policies. For instance, in the case of *Minnesota v. United States*, federal legislation prohibiting the use of motorboats and snowmobiles on certain lands and waters not owned by the federal government was upheld because the legislation reasonably related to protecting federal land reserved for wilderness.

The breadth of the property power is illustrated by *Kleppe v. New Mexico*. In *Kleppe*, the Court upheld legislation authorizing federal agencies to protect and manage wild horses and burros on federal lands. The Court sustained Congress' determination that the legislation was a "needful" regulation "respecting" federal property without finding that the animals themselves were federal property or that the legislation was necessary to protect the federal land from harm. Rather, the Court reiterated the view that Congress' power under Article IV, at least as to "public lands," is without limitations. The Court held that Congress' power under the Article IV Property Clause necessarily includes the power to regulate and protect wildlife living on the property.

On the other hand, there are potential limits on the federal property power that protect state sovereignty. In *United States v. City & County of San Francisco*, the Court indicated that the


342. See *Collins v. Yosemite Park & Curry Co.*, 304 U.S. 518, 529-30 (1938) (holding the federal government may acquire state land for national parks and exercise exclusive jurisdiction over such lands, except as reserved to the state by the terms of the conveyance); *Silas Mason Co. v. Tax Comm'n of Washington*, 302 U.S. 186, 206-09 (1937) (holding the federal government may acquire property to reclaim arid and semi-arid lands, provided the property is subject to state jurisdiction in accordance with agreement between the state and federal governments); see also *Gaetke*, supra note 329, at 387 (reviewing legislation enacted to protect federal land designated as national forests, parks, wilderness areas or wildlife refuges).


344. Id. at 1250-51.


346. Id. at 546 (upholding the Wild Free-Roaming Horses and Burros Act §§ 1-10, 16 U.S.C. §§ 1331-1340 (1988)).

347. 426 U.S. at 536-37.

348. Id. at 539.

349. Id. at 541.

350. 310 U.S. 16 (1940) (quoted with approval in *Kleppe*, 426 U.S. at 540).
property power does not authorize "an exercise of a general control over public policy in a State." 351 In that case, California challenged the constitutionality of a land grant and certain rights of way which included a condition prohibiting the state from selling to private utilities hydroelectric power generated on the land. 352 The condition was challenged as an attempt to regulate the disposition of electricity in San Francisco. 353

The Court found that the congressional policy underlying the legislation — the avoidance of monopolies to help keep power rates low for consumers — did not represent an exercise of general control over public policy in a state. Instead, the Court found the legislation was an exercise of the complete power which Congress has over particular federal property. 354 The case thus sheds light on the possible parameters of the property power. The avoidance of monopolies for the benefit of consumers is an area in which the federal government has long been active. Congressional policies underlying such legislation are national in scope and do not affect a state's general public policy; they only affect a particular aspect of a state's public policy as reflected in its laws.

An additional limitation on the federal government's power under the Article IV Property Clause was noted by the Supreme Court in Ashwander v. TVA. 355 The Court in Ashwander stated that the federal government's power to dispose of federal property "must be consistent with the foundational principles of the dual system of government and must not be contrived to govern the concerns reserved to the States." 356 As this article has noted, the Supreme Court subsequently rejected the notions of dual federalism and discrete areas reserved for state control. 357 Nevertheless, the case supports the premise that incidents of state sovereignty are accorded protection through limitations on the federal property power.

351. Id. at 30.
352. Id. at 18-19.
353. Id. at 28.
354. Id. at 30.
356. Id. at 338. Disposal of federal property must also be appropriate to the nature of the property and in the public interest. Id.
357. See supra notes 245, 275-76 and accompanying text.
c. Analysis of LURE Programs Under Preemptive Property Power

This article will now determine whether a federal condition requiring LUREs acquired under federal conservation programs to be perpetual is capable of preemption. Further, this section will determine whether such a federal rule oversteps limitations intended to protect state sovereignty, succumbing to the “independent constitutional bar” prong of the Dole test.358

Conservation programs using LUREs capture the essence of the Article IV power which the federal government would have over the land if it acquired the lands in fee. Conditions restricting certain land uses and requiring restorations or conservation plans would readily fall within the scope of the property power because they constitute regulations of conduct to protect the federal property from harm. However, for the Property Clause analysis it is crucial to note that the federal property interest in a LURE is the right to enforce the terms of the LURE. In particular, it is the right to enforce a perpetual LURE despite state law limitations on duration.

The FmHA provision mandating establishment of perpetual LUREs on wetlands in FmHA inventories359 falls within the category of Article IV property power capable of preemption. Because the federal government holds fee title, encumbering such lands with a perpetual LURE constitutes a regulation of conduct on the land to protect the federal property. Moreover, any disposition of a LURE360 created pursuant to the provision falls within Congress’ broad power to choose the terms and conditions in disposing of federal property.

The other federal agriculture programs using LUREs — the CRP, WRP, EEP, FLP, RECP, and the FmHA debt-restructuring program — authorize the federal government to acquire LUREs from individual landowners.361 It is not readily clear that the use

358. See supra notes 256, 259-70 and accompanying text.
360. Id. § 1985(c)(1). The FmHA provisions expressly authorize the government to transfer perpetual LUREs to state or private non-profit entities. Id.; see supra note 83 and accompanying text.
361. See discussion supra part I.B.2. The Farms Act and the Watershed program, through which approved state or private non-profit entities acquire the LUREs and the federal government merely offers assistance, do not readily fall within the scope of the property power. Because these programs require the entities acquiring the LUREs to prove that the LUREs will be valid and enforceable perpetual LUREs, these programs are limit-
of the federal condition in these programs would be capable of 
preemption. The issue is whether Congress can legislate that the 
federal government, as an ordinary proprietor in a voluntary 
transaction with an individual landowner, may acquire a property right 
that is not a cognizable aspect of the landowner’s “bundle of 
rights” under state law.

Federal legislation requiring LUREs to be perpetual despite 
state law limitations on duration effectuates the specific congressio-
nal policy of attaining long-term conservation goals. Assuring long-
term enforceability of LUREs held by the federal government pro-
tects the federal property interest and effectuates the land use poli-
cies underlying the LURE acquisition programs. However, the 
exercise of preemptive property power relating to the protection of 
federal property derives from cases where conduct affecting federal 
property was regulated. Preemptive property power relating to the 
effectuation of congressional policies generally derives from federal 
rules affecting the use of federal property.

A federal condition that LUREs acquired under conservation 
programs be perpetual is not a regulation of conduct, nor a rule 
affecting the use of federal property. Furthermore, federal legisla-
tion allowing the federal government to acquire enforceable perpet-
ual LUREs does not fall within the authority to dispose of federal 
property. Nevertheless, close examination of case law reveals that 
federal acquisition of enforceable, perpetual LUREs from individual 
landowners is capable of preemption.

In United States v. Albrecht, a federal LURE acquired 
from a landowner in North Dakota pursuant to a federal conser-
vation program was valid despite state law which presumably did 
not recognize that type of property interest. Because the LURE 
effectuated an important national concern, the court held that it 
should not be defeated by state law. The court noted that to 
hold otherwise would permit states to rely on local laws to defeat 
the acquisition of reasonable property rights and to destroy an 
important national program. However, since the court did not

ed to states which do not have laws precluding perpetual LUREs. Therefore, these pro-
grams do not raise property power issues. See supra notes 116-27 and accompanying text.
362. 496 F.2d 906 (8th Cir. 1974). See infra notes 430-37 and accompanying text for a 
more detailed analysis of Albrecht.
363. Id. at 911.
364. Id.
365. Id. The program authorized the United States to acquire interests in wetlands and 
potholes to aid the breeding of migratory birds. See supra notes 58-59 and accompanying.
engage in a property power analysis, the case only provides implicit support for the proposition that the federal acquisition was a constitutional exercise of Article IV property power.

Explicit support can be gleaned from case law, but only via a meandering avenue beginning with the case of North Dakota v. United States. In North Dakota, the federal government had acquired LUREs over wetlands for protection of migratory waterfowl. The Supreme Court stated that the United States is authorized to incorporate into such LURE agreements rules and regulations that the Secretary of the Interior deems necessary to protect wildlife, including restrictions on land outside the legal description of the LURE itself. The Court noted that as long as North Dakota landowners were willing to negotiate agreements, the agreements could not be abrogated by state law. As discussed in the next section, the holding in North Dakota is expressly limited to LURE agreements entered into by the federal government before enactment of state laws which could defeat the purpose of the federal program. Thus, the case is not authority for the notion that the federal government may negotiate terms and thereby acquire a property right not recognized or precluded by existing state law.

However, in a footnote, the Court cited the earlier case of United States v. Burnison. The Burnison Court held that a state may control and prohibit the testamentary transfer of property to the United States but clarified that its holding would “not affect the right of the United States to acquire property by purchase or eminent domain in the face of a prohibitory statute of the state.” The Burnison Court justified its distinction by explain-

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367. Id. at 305.
368. Id. at 319 (citing Kleppe, 426 U.S. at 546; Camfield v. United States, 167 U.S. 518, 525-26 (1897)). The non-federal lands involved in the case were after-expanded wetlands. Id.
369. Id.
370. See infra notes 417-29 and accompanying text.
371. North Dakota, 460 U.S. at 319 n.22.
373. Id. at 93 n.14 (citing Kohl v. United States, 91 U.S. 367 (1875)) (emphasis added). The Burnison Court expressly declined the opportunity to overrule United States v. Fox, 94 U.S. 315 (1876). 339 U.S. at 93. In Fox, the Court held that the disposition of immovable property, whether by deed, descent or any other means is subject to the exclusive control of the government of the state where the property is situated. Fox, 94 U.S.
ing that the legal concept of a transfer of property may be separated into a series of steps, including the acts of giving, receiving, and purchasing, and that a party's particular role in the transaction may determine its legal consequences.\textsuperscript{374} 

\textit{Burnison} discusses a state's ability to control its domiciliaries' power to give and the United States' corresponding power to receive.\textsuperscript{375} The case held that state laws may preclude a transfer of property to the United States where the United States is merely receiving the property.\textsuperscript{376} Furthermore, citing \textit{Kohl v. United States},\textsuperscript{377} \textit{Burnison} expressly distinguished the situation where the federal government exercises its power to acquire by purchase or eminent domain.\textsuperscript{378} In \textit{Kohl}, the Supreme Court held that the powers vested by the Constitution in the federal government necessarily entail the ability to acquire lands in the United States, explaining that:

If the right to acquire property for such uses may be made a barren right by the unwillingness of property-holders to sell, or by the action of a State prohibiting a sale to the Federal government, the constitutional grants of power may be rendered nugatory, and the government is dependent for its practical existence upon the will of a State, or even upon that of a private citizen.\textsuperscript{379}

Thus, the Court upheld the federal government's right of eminent domain as a necessary and proper means to effectuate the powers conferred by the Constitution.\textsuperscript{380}

Similarly, as recognized by the Court in \textit{Burnison} and \textit{North Dakota}, the right of the federal government to acquire a real property interest by negotiated purchase may also constitute a necessary and proper means to effectuate an enumerated power. Thus, because an exercise of Article IV property power in conjunction with the Necessary and Proper Clause is within the sphere of property

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\textsuperscript{374} \textit{Burnison}, 339 U.S. at 91.
\textsuperscript{375} Id.
\textsuperscript{376} Id. at 93. It is noteworthy, however, that \textit{Burnison} and \textit{Fox} involved testamentary dispositions of property. The Supreme Court's positions in the cases may have been influenced by the fact that the states would have been unable to collect inheritance taxes from the United States if the devises had been upheld.
\textsuperscript{377} 91 U.S. 367.
\textsuperscript{378} \textit{Burnison}, 339 U.S. at 93 n.14; \textit{Fox}, 94 U.S. at 320.
\textsuperscript{379} \textit{Kohl}, 91 U.S. at 371.
\textsuperscript{380} Id. at 372.
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power legislation that has preemptive capability, the question becomes whether federal acquisition of an enforceable, perpetual LURE is a proper exercise of the Necessary and Proper Clause.

The Necessary and Proper Clause\(^{381}\) confers upon Congress: (1) the power to legislate through a means outside the scope of any of the other enumerated powers to effectuate an enumerated power; or (2) the power to attain an extraneous end so long as the means bears a relationship to the effectuation of an enumerated power.\(^{382}\) However, Congress' election to use the necessary and proper power must have a rational basis\(^{383}\) and the effectuation of the enumerated power must be substantial.\(^{384}\)

The primary end achieved by a condition requiring LUREs acquired under federal conservation programs to be perpetual is long-term protection of environmentally significant aspects of the land resource. Environmentally sensitive lands directly, or at least indirectly, affect interstate commerce by virtue of their maintenance of the ecosystems which generate marketable products and hence interstate movement.\(^{385}\) Long-term protection of environmentally important lands, such as highly erodible lands, farmland and non-federal forest lands, is crucial to the ability of the agricultural and forestry industries to meet the long-term demands of future markets. Thus, a condition that LUREs be perpetual substantially effectuates congressional Commerce Clause policies.\(^{386}\)

Although a modest standard, the rational basis test requires the government to choose means reasonably related to its ends.\(^{387}\) Given our country's experience with the consequences of environmental degradation, including degradation of the land resource, it is rational to conclude that long-term protection of environmentally sensitive lands is critical to the ability of the agricultural and forestry industries to meet the demands of future markets. Further, much of the testimony in congressional hearings on the conservation provisions of the 1990 Farm Bill advocated using perpetual

\(^{381}\) U.S. Const. art. I, § 8, cl. 18.
\(^{382}\) E.g., McCulloch v. Maryland, 17 U.S. (4 Wheat) 316, 421 (1819).
\(^{384}\) United States v. Darby, 312 U.S. 100, 119-20 (1941).
\(^{385}\) See supra note 240.
\(^{386}\) Furthermore, the ends clearly promote the general welfare of our country, which may be deemed an extraneous end. However, because the means also bear a relationship to the effectuation of the commerce power, the Necessary and Proper Clause may be used to attain the extraneous end.
\(^{387}\) Heart of Atlanta, 379 U.S. at 261-62.
LUREs to attain federal conservation and preservation objectives.\textsuperscript{388} Thus, Congress has a rational basis to condition LURE acquisitions on a perpetuity requirement.

Because conditional LURE acquisition has a rational basis, it is a proper exercise of the Necessary and Proper Clause. Therefore, federal legislation authorizing the federal government to acquire a property right that is not a cognizable aspect of the landowner's bundle of rights under state law in a voluntary transaction with an individual landowner falls within the category of Article IV property power capable of preemption.

The second level of inquiry is whether the federal condition oversteps limitations intended to protect state sovereignty. As explained, property power doctrine does not authorize "an exercise of general control over public policy in a state."\textsuperscript{389} Because a state's property law reflects its public policy, a condition in a federal conservation program requiring LUREs to be enforceable in perpetuity may be contrary to state public policy — especially where the federal government has conveyed the right to enforce the LURE to private, nonprofit entities. However, congressional policies underlying federal conservation legislation are national in scope and potentially affect only a particular aspect of a state's public policy. Applying the rationale set forth in \textit{United States v. City and County of San Francisco},\textsuperscript{390} such a federal condition does not sufficiently affect a state's public policy to cast it into a potential limitation on the property power.

\textit{ASARCO, Inc. v. Kadish}\textsuperscript{391} supports this conclusion. In \textit{ASARCO}, the Supreme Court enforced conditions imposed through the disposition of a federal land grant to a state.\textsuperscript{392} The case involved the grant of federal land to Arizona to be held in trust for public schools.\textsuperscript{393} The federal enabling legislation directed that the lands could only be sold or leased in accordance with federal advertising, bidding and appraisal conditions.\textsuperscript{394} Nevertheless, Arizona granted mineral leases in violation of the federal directive. Individual taxpayers and the Arizona Education Association brought

\begin{itemize}
\item \textsuperscript{388} See \textit{supra} notes 74-77 and accompanying text.
\item \textsuperscript{389} \textit{United States v. City & County of San Francisco}, 310 U.S. 16, 30 (1940).
\item \textsuperscript{390} Id.; see \textit{supra} notes 350-54 and accompanying text.
\item \textsuperscript{391} 490 U.S. 605 (1989).
\item \textsuperscript{392} Id. at 625-33.
\item \textsuperscript{393} Id. at 626.
\item \textsuperscript{394} Id. at 627.
\end{itemize}
suit. The Supreme Court held the state statute void, enforcing the rights created by the conditional grant against the grantees even though state laws directed otherwise.

*ASARCO* is instructive because the Arizona law reflected state public policy in an area of property law — mineral leases. The Court upheld federal legislation which imposed a more restrictive public policy to protect the purpose of the federal land grant, even though the federal law hindered the alienability of interests in real property. By analogy, state laws precluding perpetuity or assignability of LUREs reflect a state's public policy in an area of property law. A federal condition that LUREs be perpetual even when conveyed to third parties would impose a less restrictive policy to protect the conservation purpose of the LURE. Although the federal legislation arguably hinders free transferability of an interest in real property, both *ASARCO* and *United States v. City & County of San Francisco* indicate that the enforceability of LUREs in perpetuity would not overstep property power limitations protecting state sovereignty.

C. Application to the Spending Power Analysis

A federal condition requiring LUREs acquired under federal conservation programs to be perpetual and preemptive of contrary state law limitations on duration is within the scope of the Article IV property power. Further, this exercise of preemptive power under Article IV does not violate constitutional limitations intended to protect state sovereignty. Accordingly, a federal conservation program which subjects the offer of federal funds in exchange for a LURE to a condition requiring the LURE to be perpetual is a constitutional exercise of the federal property power. Therefore, federal property power doctrine does not provide an independent constitutional bar sufficient to render the condition an unconstitutional exercise of the spending power under the fourth prong of the Dole test.

IV. FEDERAL LEGISLATION PERMITTING PERPETUAL LUREs WILL RESULT IN BETTER CONSERVATION POLICY

Federal legislation authorizing enforceable, perpetual LUREs

395. *Id.* at 610. *ASARCO* and other mineral lessees of the state school lands intervened in the action as defendants. *Id.*

396. *Id.* at 633.
despite state law limitations on duration raises important public policy concerns. Because a federal directive to acquire perpetual LUREs is a proper exercise of congressional powers, and because the incorporation of state law may hinder federal conservation policies, Congress could easily conclude that a federal directive is the better policy choice. However, even if authorizing enforceable, perpetual LUREs does not intrude on state sovereignty, Congress should engage in a thoughtful decisionmaking process before enacting legislation which preempts traditional areas of state control. Under the Supreme Court’s holding in *Garcia v. San Antonio Metropolitan Transit Authority*, a deliberate process of federal decisionmaking is a critical aspect of Tenth Amendment protection. Accordingly, by identifying the relevant policy factors, this article develops and applies a framework for the policy decision.

Whether federal or state law should govern LURE duration is analogous to the question a federal court would address if asked to interpret LUREs under federal programs which do not specify the governing law. Such programs include the MBCA, the RECP, and the FmHA LURE provisions of the CRP. Thus, this article reviews analogous federal cases to glean the relevant policy considerations and to provide a guide for courts in considering LUREs under federal programs that do not specify the governing law. A framework founded upon the judicial process should ensure that policy questions are fairly and reasonably considered.

**A. The Judicial Framework for the Policy Decision**

Before the 1990 Farm Bill, LURE provisions in federal conservation legislation did not dictate whether state or federal law should determine the permissible duration of LUREs held by the federal government. Scholars have noted the presence and significance of the resulting choice-of-law issue. These scholars

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398. See supra notes 275-78 and accompanying text.
399. See supra notes 58-59, 67-73, 83-93 and accompanying text.
have generally concluded that the federal common law of real property should govern the interpretation of LUREs because an "aberrant or hostile" state law will generally not defeat a federal land acquisition program. While adhering to the "aberrant or hostile" rule, federal courts also engage in a more refined analysis to determine whether to incorporate state law.

Where Congress has appropriately exercised its power but failed to specify whether federal or state law should apply, the resulting choice-of-law question may be properly resolved by the federal courts. In effect, there is an exception to the *Erie* doctrine when the issue involves the operation of a congressional program. Because issues relating to the operation of a federal program are within the competence of the federal judiciary, state law is not necessarily controlling. Rather, in exercising the

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402. See, e.g., Neil D. Hamilton, Legal Authority for Federal Acquisition of Conservation Easements to Provide Agricultural Credit Relief, 35 Drake L. Rev. 477, 510 (1985-86) (arguing that federal law should override state law governing easements under the Agricultural Land Trust due to the strong federal policy to promote soil conservation and land preservation).

403. See, e.g., United States v. Little Lake Misere Land Co., 412 U.S. 580, 590-93 (1973) (when the United States is party to a land acquisition that arises from or bears heavily upon a federal program, the federal courts may decide the choice-of-law question); Clearfield Trust Co. v. United States, 318 U.S. 363, 367 (1943) (stating that when there is no applicable act of Congress, the federal courts must decide the governing rule of law).

404. The *Erie* doctrine derives from the Supreme Court decision in *Erie R.R. v. Tompkins*, 304 U.S. 64 (1938). *Erie* stands for the proposition that federal courts must apply state law where the subject matter involved is beyond the federal courts' law-making competence. Id. at 78.

405. See Paul J. Mishkin, The Variousness of "Federal Law": Competence and Discretion in the Choice of National and State Rules for Decision, 105 U. Pa. L. Rev. 797, 799 (1957) ("[T]hus far as *Erie* represents authority for the required application of state law by federal courts, it is not controlling on problems implicated in the operation of a congressional program.").

406. Id. at 799; see also Martha A. Field, Sources of Law: The Scope of Federal Common Law, 99 Harv. L. Rev. 883, 883 (1986) (arguing that the power to create federal common law is very broad and that state law is rarely applied of its own force); Alfred Hill, The Law-Making Power of the Federal Courts: Constitutional Preemption, 67 Colum. L. Rev. 1024, 1038 (1967) (stating that in cases where the United States has a proprietary interest, there is a constitutional basis for federal preemption). Due to inherent defects in the legislative process, "effective Constitutionalism requires recognition of power in the federal courts to declare, as a matter of common law or 'judicial legislation,' rules which may be necessary to fill in interstitially or otherwise effectuate statutory patterns enacted in the large by Congress." Mishkin, supra note 405, at 800; see also Clearfield Trust, 318 U.S. at 366-67 (stating that law-making competence of federal courts is implic-
choice-of-law task, a federal court may choose a federally created substantive rule as the governing law. Alternatively, the court may adopt state law as the governing rule by incorporating state law into the federal law.

In *United States v. Little Lake Misere Land Company*, the Supreme Court applied this choice-of-law process to a federal land acquisition program. The Court stated that the law controlling the acquisition and transfer of property, and defining the rights of its owners, is generally the law of the state where the property is located. However, where local transactions involve the federal government and raise serious questions of national sovereignty, a federal court must decide whether to "borrow" state law. To resolve the question, a court must examine "a variety of considerations always relevant to the nature of the specific governmental interests and to the effects upon them of applying state law." Yet the Court noted that "specific aberrant or hostile" state laws should not be applied. Determining whether a state law is aberrant or hostile to the federal program is thus a component of the analysis to determine whether state law should be incorporated. Since an affirmative answer to this sub-question averts the need to continue the analysis, determining whether state law is aberrant or hostile is an appropriate point of departure. Because federal LUREs...

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407. See, e.g., *Clearfield Trust*, 318 U.S. at 366-67 (finding a federal rule appropriate to determine the rights of the United States against the endorser of a federal check); *Deitrick v. Greaney*, 309 U.S. 190, 200-01 (1940) (creating a federal rule for determining the availability of defenses under the National Bank Act).

408. See, e.g., *De Sylva v. Ballentine*, 351 U.S. 570, 580-81 (1956) (incorporating state law to determine whether illegitimate children qualify as "children" under the Copyright Act); *Reconstruction Fin. Corp. v. Beaver County*, 328 U.S. 204, 209-10 (1946) (incorporating state definition of "real property" to interpret provision of the Reconstruction Finance Corporation Act subjecting government property to local taxes). The "discretionary" incorporation of state law is distinguishable from an application of state law pursuant to the *Erie* doctrine. The decision to incorporate state law permits the federal court to control the extent of the state law which will be incorporated; in this manner, the court may limit the application of state law to a single narrow issue. *Mishkin, supra* note 405, at 805. More importantly, in contrast to application of the *Erie* doctrine, the substance of the applicable state rule is a relevant fact. *Id.; see also United States v. Standard Oil Co.*, 332 U.S. 301, 309-10 (1947) (recognizing that state law is either governed by *Erie* or chosen to fulfill federal policy).


410. *Id.* at 591.

411. *Id.* at 592-93.

412. *Id.* at 595.

413. *Id.* at 595-96.
promote an important national concern, the analysis must focus on the state law's effects on federal conservation programs.

Several cases have analyzed whether a particular state law is aberrant or hostile to a federal land program. In *Little Lake Misere*, the government acquired fee title to lands pursuant to the Migratory Bird Conservation Act. The terms of the acquisition permitted the United States to extinguish certain mineral reservations encumbering the acquired lands after ten years. However, after the transfer but before the ten years had expired, the state enacted a statute which would prevent the United States from extinguishing the mineral rights. Since retroactive application of the state law would deprive the United States of its contractual interests, the Court found the state law "plainly hostile" to the federal program.

In *North Dakota v. United States*, the federal government acquired easements pursuant to the Migratory Bird, Hunting, and Stamp Act ("MBHSA") on wetlands used for waterfowl breeding and nesting. The MBHSA requires such acquisitions to be approved by the governor of the state or an appropriate state agency. Although the Governor of North Dakota had given his consent, the state later enacted legislation requiring the Governor to submit MBHSA land acquisition proposals for approval by local county commissioners. The legislation also authorized landowners to drain after-expanded wetlands exceeding the legal descriptions in the easement agreements and limited all easements to ninety-nine years.

The Supreme Court upheld the requirement that proposals be submitted to county commissioners. This requirement was not

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414. *Id.* at 582-84.
415. *Id.* at 582-83.
416. *Id.* at 597. Although the United States urged the Court to decide that land acquisition programs should be governed by federal law without qualification, the Court declined to resolve the question on such broad terms. *Id.* at 595. The Court noted that its decision might change if the Louisiana statute served legitimate and important state interests which Congress might have contemplated. *Id.* at 599.
418. *Id.* at 304-305.
419. *Id.* at 303.
420. *Id.* at 306-308.
421. *Id.*
422. Although not considering the question of consent to future acquisitions, the Court noted that state conditions on consent to federal jurisdiction over land are constitutionally permitted. See *id.* at 316 n.20 (citing *James v. Dravo Contracting Co.*, 302 U.S. 134,
hostile to the federal legislation because the MBHSA expressly required state approval and because the state law did not apply retroactively to the consent granted by North Dakota’s governor.423 However, because the easement agreements previously executed by the United States prohibited draining after-expanded wetlands, the Court deemed the state’s new provision authorizing draining an attempt to abrogate terms already expressly negotiated by the United States.424 Following Little Lake Misere, the Court found the provision hostile to the federal program.425

Finally, the Court held that the provision limiting easements to ninety-nine years could not retroactively abrogate easement terms previously negotiated by the United States.426 However, the Court did not consider whether the limitation could be applied to future agreements.427 Thus, the Court did not address whether prospective application of the law would be deemed hostile to the federal program.428 Nonetheless, the Court did acknowledge that the federal commitment to protect migratory birds would not terminate in ninety-nine years.429

The holdings of the Supreme Court decisions are necessarily limited. The cases indicate that state law should not be incorporated where it would function retroactively to abrogate agreements negotiated by the United States which were valid when executed. The Court’s holdings do not indicate whether state law limitations on duration with prospective operation will also be circumscribed.

Lower federal court decisions, on the other hand, have expanded the concept of what constitutes a hostile state law. In United States v. Albrecht,430 a landowner disputed the validity of a federal LURE granted by the previous owner under a small wetlands acquisition program.431 The landowner argued that North Dakota

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423. Id. at 316-17.
424. Id. at 319.
425. Id.
426. Id. at 320.
427. Id. at 320 n.24.
428. Id.
429. Id. at 320. "To ensure that essential habitats will remain protected, the United States has adopted the practice of acquiring permanent easements whenever possible." Id. In addition, the Court noted that the state law was enacted in response to discontent over the amount of lands encumbered by permanent easements. Id. at 320 n.23.
430. 496 F.2d 906 (8th Cir. 1974).
431. Id. at 909-10; see supra note 59 and accompanying text (describing the federal program).
law only recognized interests in realty created by statute and that no state statute authorized a LURE of the type conveyed to the United States.\textsuperscript{432} Thus the federal government could not have acquired the disputed LURE.\textsuperscript{433} For purposes of the analysis, the court assumed that state law did not recognize LURES.\textsuperscript{434} However, because the LURE effectuated an important national concern, the court held that, despite its label, the agreement should not be defeated.\textsuperscript{435} To hold otherwise would have permitted states to use local laws to defeat federal property rights and destroy important national programs.\textsuperscript{436} Thus, the \textit{Albrecht} court expanded the concept of hostile state laws to include laws in existence at the time of conveyance if they would invalidate the conveyance itself.\textsuperscript{437}

In \textit{Sierra Club v. Marsh},\textsuperscript{438} a private developer agreed to convey land to the United States as mitigation for a public works project by the Army Corps of Engineers.\textsuperscript{439} The land was adjacent to Chula Vista, California.\textsuperscript{440} Chula Vista impeded the proposed conveyance by requiring the developer to reserve seven easements in favor of Chula Vista across the mitigation land.\textsuperscript{441} The Army Corps and the Fish and Wildlife Service contended that the conditions substantially diminished the use of the acreage as mitigation land.\textsuperscript{442} Characterizing Chula Vista’s efforts as “an attempt to stymie any transfer of the property which . . . does not serve the City’s interests,” the court held the state law was hostile to a federal program of national scope and did not require the United States to comply with the local permit process.\textsuperscript{443} Thus, \textit{Sierra Club} expanded the concept of a hostile state law to include prospective application of local laws affecting conveyances not yet consummated. This expansion applies to local laws which abrogate

\begin{footnotesize}
\begin{enumerate}
\item[432.] \textit{Albrecht}, 496 F.2d at 909.
\item[433.] \textit{Id.}
\item[434.] \textit{Id.} at 911.
\item[435.] \textit{Id.}
\item[436.] \textit{Id.}
\item[437.] \textit{Id.} (“\textit{W}e, therefore, specifically hold that the property right conveyed to the United States in this case, whether or not deemed a valid easement or other property right under North Dakota law, was a valid conveyance under federal law and vested in the United States the rights as stated therein.”).
\item[438.] 692 F. Supp. 1210 (S.D. Cal. 1988).
\item[439.] \textit{Id.} at 1212-13.
\item[440.] \textit{Id.} at 1212.
\item[441.] \textit{Id.} at 1213.
\item[442.] \textit{Id.}
\item[443.] \textit{Id.} at 1214-15.
\end{enumerate}
\end{footnotesize}
or invalidate the conveyance, as well as laws which impede a federal program by imposing conditions limiting the usefulness of the acquisition.\textsuperscript{444}

The lower court holdings do not conclusively resolve whether a state law precluding perpetual LUREs is hostile or aberrant to federal conservation programs. Under the Supreme Court cases, a court should not incorporate a state law which would result in retroactive abrogation of the LURE itself or which would eliminate an expressly negotiated term requiring the LURE to be perpetual. However, even under the expanded view expressed by the Eighth Circuit in \textit{Albrecht}, a state law precluding the enforcement of perpetual LUREs is not clearly hostile. \textit{Albrecht}'s holding only encompasses state laws existing at the time of the acquisition which would invalidate the conveyance. A law which limits the duration of a LURE does not invalidate or abrogate the conveyance itself; rather, it only affects the period of time over which the LURE may be enforced.

This distinction was recognized in \textit{Cortese v. United States}.\textsuperscript{445} In \textit{Cortese}, the federal government had acquired restrictions limiting the commercial and residential development of land. Under state law, the interest constituted a restrictive covenant, but the federal government argued that the restrictions created an easement and were thus permanent. However, the court found the state law was not hostile\textsuperscript{446} even though characterizing the interest as a covenant threatened its permanency through possible application of the equitable doctrine of changed circumstances.\textsuperscript{447}

Only the holding of \textit{Sierra Club} can be construed as fully supporting the proposition that state laws precluding perpetual LUREs are hostile and should not be incorporated. State laws preventing the enforcement of LUREs in perpetuity clearly impede or limit the usefulness of the government's acquisition. Since a district court's analysis is not controlling, however, it cannot be concluded definitively that a state law limitation on the duration of

\textsuperscript{444.} \textit{See id.} at 1215 ("[I]t is clear that the City would not grant the United States the permit it seeks, or if it did do so, would condition its issuance on terms which would render the acquisition meaningless.").

\textsuperscript{445.} 782 F.2d 845 (9th Cir. 1986).

\textsuperscript{446.} \textit{Id.} at 849. The court expressly distinguished \textit{Little Lake Misere} and \textit{Albrecht} because \textit{Cortese} did not involve a program of national scope. \textit{Id.}

\textsuperscript{447.} "The doctrine of changed circumstances . . . stays enforcement of unreasonably burdensome restrictions on land use, notwithstanding an agreement between the parties specifying the intended duration of the restrictions." \textit{Id.} at 851.
LUREs acquired under federal conservation programs is aberrant or hostile.

As established by the Supreme Court in *Little Lake Misere*, where a state law is not aberrant or hostile, the analysis of whether to incorporate state law must include the "variety of considerations" relevant to the specific governmental interests and to the effects upon them of applying state law. An assessment of the factors contemplated by the Supreme Court can be gleaned from case law and scholarly articles. The most relevant policy considerations for a determination of whether federal or state laws should govern the maximum permissible duration of LUREs include the following:

1. the effect of applying state law on federal legislative goals;
2. the possible gains from applying federal law;
3. the balance of losses and gains at the local level from non-integration of the national program with normal state activities; and
4. the distribution of powers between federal and state governments, not only in its constitutional aspect, but in its daily operation as well.

In addition to providing a framework for courts examining existing federal programs which do not specify the governing law, these factors provide an appropriate analysis for Congress to consider in crafting legislation requiring the same type of policy decision. The following section of this article applies these policy factors to resolve the question whether federal or state laws should govern the maximum possible duration of LUREs under federal conservation programs.

449. See, e.g., Wallis v. Pan Am. Petroleum Corp., 384 U.S. 63 (1966) (applying state law because it did not threaten an identifiable federal interest); Banco Nacional de Cuba v. Sabbatino, 376 U.S. 398 (1964) (applying federal rule due to great need for uniformity); De Sylva v. Ballentine, 351 U.S. 570 (1956) (applying state law in areas of highly developed state law, such as domestic relations); United States v. Standard Oil Co. of Cal., 332 U.S. 301 (1947) (applying federal law to protect proprietary interests of the United States).
450. See generally Field, supra note 406; Hill, supra note 406; Mishkin, supra note 405.
451. The factors set forth in the Congressional framework outlined above are considerably intertwined. Although this analysis addresses the factors separately, many of the considerations are relevant to more than one factor. For example, many of the considerations
B. Application of the Policy-Making Framework

1. The Effect of State Law on Federal Legislative Goals

In making the policy decision, it is important to consider the effect of state law incorporation on federal legislative goals. There is no need to displace state law unless it poses a significant threat to an identifiable federal goal or policy interest.452 The primary goal of federal conservation legislation authorizing LUREs is to protect environmentally significant lands through restrictions in the LURE agreements.453 Furthermore, the legislative history of the 1990 Farm Bill indicates that a distinct goal of the conservation programs is the attainment of long-term protection.454

Incorporation of state law to govern the maximum possible duration of LUREs hinders long-term protection by precluding enforcement of perpetual LUREs in some states. Traditional common law doctrines in some states could impede perpetuity, assignability, and alienation of restrictive easements in gross.455 Further, even in states which have legislatively authorized the use of conservation easements the federal government may still encounter difficulties enforcing perpetual LUREs due to statutory limitations. While state statutes authorizing LUREs are designed to simplify and clarify common law doctrines so that enforceable property rights may be created, the statutes are diverse.456 In particular, the duration of statutory LUREs is an area of divergence among the states.457 Although some statutes explicitly allow LUREs to be held in perpetuity,458 others do not459 or have complicated provisions regarding duration. For example, under California’s stat-

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454. See supra notes 74-78 and accompanying text.
455. See supra notes 28-34 and accompanying text.
456. See Atherton, supra note 34, at 62-63 (noting that state conservation statutes have been drafted to meet the individual needs of each state).
458. See, e.g., CAL. GOV'T CODE § 51075(d) (West 1983); MONT. CODE ANN. § 76-6-202 (1991); WASH. REV. CODE ANN. § 84.34.220 (West 1991).
ute, LUREs may not run for terms of less than ten years; furthermore, LUREs running for a term of years must provide that on the anniversary of the date of acceptance, one year will be added automatically to the initial term unless written notice of non-renewal is given. The resulting duration is a "perpetual ten-year term."

More significantly, most state statutes authorize LUREs only for specified purposes and prescribe qualified holders. Although some state statutes use language encompassing the federal government, many exclude the federal government from the list of qualified LURE holders. In states where the federal government is not explicitly authorized to hold LUREs, state common law presumably controls. Thus, the federal government may experience difficulty enforcing the terms of its LUREs, especially a term requiring perpetual duration. For example, a subsequent landowner may challenge the validity of a LURE held by the federal government under a program providing that duration is the maximum term permitted under applicable state law. Because the state statute does not authorize the federal government to hold LUREs, the applicable state law is the state's common law. The common law of the state may render the LURE unenforceable by the federal government either because it is a negative easement or because it is an easement in gross.

Incorporation of state law also subjects the LURE to potential

460. CAL. GOVT CODE § 51081 (West 1983).
461. Atherton, supra note 34, at 65 n.29.
462. Katz, supra note 30, at 386-87. The legislative restraints stem from the traditional reluctance to encourage the use of negative easements in gross. See id.
463. See, e.g., MICH. COMP. LAWS ANN. § 399.253 (West 1988) (authorizing any "governmental entity" to acquire conservation easements); WASH. REV. CODE ANN. § 64.04.130 (West Supp. 1992) (authorizing any "federal agency" to acquire conservation easements); MONT. CODE ANN. § 76-6-106 (1991) (authorizing any "public body" to acquire interests in real property for the purpose of preservation).
464. For example, California's LURE provisions state that only the following entities or organizations may acquire the authorized LUREs: (1) tax-exempt nonprofit organizations qualified under section 501(c)(3) of the Internal Revenue Code, qualified to do business in the state, and organized for the primary purpose of preservation, protection or enhancement of land; and (2) the state or any city, county, city or county, district, or other state or local governmental entity. CAL. CIV. CODE § 815.3(a)-(b) (West 1982). Similarly, Illinois' conservation rights statute authorizes an owner of realty to convey a LURE to "an agency of the State, to a unit of local government, or to a not-for-profit corporation or trust." ILL. ANN. STAT. ch. 30, para. 402 (Smith-Hurd 1992).
465. Cf. Katz, supra note 30, at 389 (noting that when statutes fail to mention duration, LUREs are presumably governed by applicable state law).
conflicts between perpetual duration and a state’s marketable title laws. Marketable title acts generally render non-possessory interests in realty invalid unless the holder of the interest re-records notice of the interest within a designated number of years. Even in those states which have statutorily authorized perpetual LUREs, a LURE may be unenforceable if the state has not expressly resolved inconsistencies with its marketable title laws in the event that the LURE holder inadvertently fails to re-record. In contrast, federal legislation authorizing LUREs to be perpetual despite state law limitations on duration can preempt limitations stemming from marketable title acts.

Moreover, failure to designate the appropriate governing law for federal LURE programs generates inefficiency and uncertainty. When federal legislation does not address whether state or federal law governs LURE duration, valid arguments can be made for either outcome. Thus, enforceability often requires judicial interpretation. Reliance on judicial enforcement, however, is an inefficient, unpredictable means to attain conservation goals. A court analyzing the “variety of considerations” under a federal program that does not state whether federal or state law applies could conceivably choose either option.

In sum, even though state laws limiting the duration of LUREs may not be definitively characterized as aberrant or hostile, incorporation of state law could readily hinder federal legislative goals by preventing long-term protection of environmentally significant lands.

2. The Possible Gains from Prescribing a Federal Rule

The most significant gain from the use of an express federal directive is the achievement of lasting conservation goals. As not-

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466. See, e.g., FLA. STA. ANN. § 712.05 (West 1988); VT. STAT. ANN. tit. 27 § 605 (1989). Katz has suggested LUREs could be exempted from the effect of marketable title acts if they were recorded in a separate index. Katz, supra note 30, at 395.

467. See Dana & Ramsey, supra note 26, at 20 (quoting Charles Boetsch, Conservation Restrictions: A Survey, 8 CONN. L. REV. 383, 407 (1975-76)). Although the drafters of the Uniform Conservation Easement Act pointed out the conflict between marketable title acts and perpetual duration of non-possessory interests, they did not suggest a resolution. Katz, supra note 30, at 395.

468. See 16 U.S.C.A. § 2103c(k)(2)(C) (West Supp. 1992) (providing that no conservation easement held by the federal government “shall be limited in duration or scope or be defeasible by . . . any requirement under State law for re-recording or renewal of the easement”).

469. See supra notes 400-08 and accompanying text.
ed, a federal directive yields readily enforceable rights that are not impaired by common law or statutory limitations. Linked with the achievement of lasting conservation is the significant gain from protecting the investment of public funds. That is, ensuring enforceability protects the proprietary interests of the United States.

In addition, given the potential for successful takings arguments, a federal directive will allow LURE acquisition programs to continue to proliferate. Federal legislation governing the maximum duration of LUREs will enable the federal government to continue conservation programs despite potential roadblocks created by states. For example, as acquisitions of federal LUREs increase, states may become concerned about the quantity of acreage controlled by the federal government. Alternatively, once the monetary payments end, state residents may become dissatisfied with LURE restrictions, or subsequent owners who did not negotiate the LUREs may seek to have them invalidated. Responding to these concerns, state legislatures may attempt to limit the federal government's ability to acquire LUREs or the duration of such agreements, undermining the continued success of LURE acquisition programs for conservation purposes.

Although states may not enact and retroactively apply adverse laws to deprive the federal government of negotiated terms in LURE agreements, statutory incorporation of state law governing LURE duration permits states to prospectively impose limitations. Cases examining prospective applications of hostile state law are overruled by express incorporation of state law and


472. Cf. Incentive Programs Can Help You Meet Conservation Compliance Requirements, NEWSLETTER (Center for Rural Affairs, Walthill, Neb.) June 1990, at 3 (noting the LURE requirement for partial field enrollments in the CRP may discourage farmers from participating because, although the LUREs themselves may last longer, the annual installment payments may not exceed ten years).

473. See, e.g., United States v. Albrecht, 496 F.2d 906 (8th Cir. 1974) (subsequent landowner attempted to defeat validity of LURE which restricted the draining of surface water to preserve a waterfowl production area).


475. E.g., Sierra Club v. Marsh, 692 F. Supp. 1210 (S.D. Cal. 1988); see also supra
thus do not protect federal programs. Federal legislation expressly permitting perpetual LUREs despite state law limitations will therefore provide critical protection for the continued viability of federal conservation programs.

The express preemption of state laws governing duration will also enable the federal government to continue protecting environmentally sensitive lands without raising federal land use control controversies. Although LURE acquisition programs are a more appropriate means for attaining federal conservation goals than direct regulation, this is true only if LURE programs achieve long-term conservation goals. If LUREs run a significant risk of not being perpetually enforceable, their use may cease to be the more appropriate federal means. The alternative of direct land use regulation raises takings challenges which may render conserving the land resource fiscally impractical. Accordingly, express federal preemption of state limits on duration will maintain the effectiveness of LURE acquisition programs and avoid the necessity of finding alternative means to achieve conservation goals.

Along similar lines, a federal directive will permit Congress to continue its working partnership with the agricultural industry. Attaining a lasting conservation legacy by protecting social rights in environmentally significant land held by private individuals is an important federal goal. Notably, because much of the land resource requiring protection is on agricultural land, that goal may be politically feasible only within the context of voluntary incentive programs. Yet Congress will continue using voluntary incentive programs only if it can guarantee enforceability. And Congress can assure protection in perpetuity only with express language preempting state law limitations on the duration of LUREs.

Therefore, many significant gains at the federal level accrue from the policy decision to enact federal legislation requiring perpetual duration of LUREs acquired through federal conservation programs.

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text accompanying notes 377-80.
476. See supra part II.
477. See supra part II.B.
478. See supra notes 199-201 and accompanying text.
479. See supra notes 156-57 and accompanying text.
480. See discussion supra part II.A.1.
3. The Balance of Losses and Gains at the Local Level

Federal legislation authorizing perpetual LUREs and preempting state laws may result in losses from non-integration with normal state activities. States have well developed bodies of law governing the acquisition and transfer of property and defining the resulting rights and responsibilities.481 These laws reflect each state's public policy choices.482 Allowing the federal government to acquire or convey rights in real property beyond those recognized by a state alters the normal conduct or real estate transactions within the state. Losses include encumbering land essential for development with perpetual LUREs, perceived infringements on the notion that land use decisions rest with state or local governments,483 and the potential effect on local land values caused by perpetual LUREs.484

Upon closer examination, these perceived losses are not compelling. Concerns regarding the loss of local control over land use and development decisions can be mitigated by provisions in federal conservation programs expressly allowing the federal government to modify or terminate LUREs.485 For example, the WRP permits modification of LUREs acquired under the program if needed to facilitate the administration of the program or to achieve other appropriate or consistent goals.486 LUREs may be terminated if the landowner agrees and termination is in the public interest.487 Although states will be required to seek modification or termination of LUREs and to demonstrate a sufficient public need, important state or local development will not be precluded by the presence of LUREs created under federal conservation programs.

Concerns regarding land values are misplaced because the
Owners who agree to encumber their lands with a LURE derive adequate compensation from the transaction, and subsequent landowners purchase the property at a value determined in light the LURE. Moreover, LURE agreements can be drafted so that property values are maintained. The provisions in the 1990 Farm Bill requiring the FmHA to place perpetual LUREs on wetlands which come into the federal inventory are an excellent model for designing LUREs to maintain the productive capabilities of land. These steps should go far to preserving the marketability of land. Furthermore, because encumbered lands remain on state property tax rolls, LUREs do not adversely affect state revenues. Potential losses are therefore more perceived than real.

Conversely, significant gains occur at the local level from federal conservation programs permitting enforceable, perpetual LUREs. First, local gains flow from avoiding Fifth Amendment takings controversies. Although probable, it is not definitively clear that direct regulation of uses of agricultural lands for conservation purposes would in fact constitute a taking. Thus, if the Supreme Court decides that a particular regulation is not a taking, Congress could control land use decisions without compensating the landowner, resulting in a direct loss of income to the farmer. Further, farmers would also lose income indirectly because they cannot readily absorb the cost of direct regulation. By contrast, LURE acquisition programs guarantee the landowner fair compensation for voluntary land use restrictions. However, LURE acquisition programs will only be used if Congress can assure the enforceability of LUREs in perpetuity. Hence, the use of a federal directive assures that agricultural landowners will be fairly compensated for the imposition of land use restrictions.

On the other hand, if direct regulations are consistently deemed takings, Congress may find the potential for costly ad hoc inverse condemnation proceedings fiscally impractical. Congress may then simply forego affirmative conservation of our diverse land

488. See supra notes 80-81 and accompanying text.
489. See 7 U.S.C.A. § 1985(g)(2)-(3) (West Supp. 1992); see also supra notes 89-93 and accompanying text (discussing same).
490. See supra notes 48-49 and accompanying text.
491. See discussion supra part II.A.2.
492. See discussion supra part II.A.3.
493. See supra notes 80-81 and accompanying text.
494. See supra notes 199-201 and accompanying text.
resource. Yet an agricultural landowner’s stewardship often encompasses managed land use for the future. These landowners may voluntarily restrict their use of the land without any affirmative conservation initiatives. Without affirmative federal conservation programs, farmers might forego the opportunity to derive a fair income for restricting their use of the land. Fair compensation accrues gains at the local level because farmers are able to contribute more readily to the local economy.

Furthermore, a number of other less significant gains result from federal legislation authorizing the acquisition and enforceability of perpetual LUREs. The terms of LURE agreements often allow landowners to use the land for fishing, hunting, or wildlife habitats. Because these uses may draw people for recreational or scientific purposes, local commerce may benefit over the years. Additionally, conservation of significant aspects of the land typically enhances aesthetic quality, ultimately increasing property values in the long run. Finally, most states recognize the importance of long-term conservation or preservation of the land resource in order to maintain the viability and productive capabilities of land within their boundaries, yet lack the requisite funds to operate effective state acquisition programs. Thus, states benefit from federal LURE programs that achieve conservation and preservation goals on their behalf. Balancing the gains and losses at the local level, the gains from federal legislation ensuring long-term and effective conservation outweigh the losses from non-integration with normal state activities.

4. The Distribution of Power

The distribution of power between the federal and state govern-

495. See supra notes 167-70 and accompanying text.
496. See, e.g., 16 U.S.C. §§ 3837a(d), 3839(b)(4) (Supp. 1990) (detailing land uses compatible with LUREs acquired under the WRP and the EEP).
497. See Utah v. Marsh, 740 F.2d 799, 803-04 (10th Cir. 1984) (allowing Congress to regulate the discharge of dredged fill material into Lake Utah because as an outlet for recreational activities, the lake benefited local and interstate commerce).
498. See Konrad J. Liegel, Note, The Impact of the Tax Reform Act of 1986 on Lifetime Transfers of Appreciated Property for Conservation Purposes, 74 CORNELL L. REV. 742, 768 (1989) (noting that restrictions may enhance the value of land for recreational or residential purposes if neighboring properties are subject to similar restrictions).
ments is an important congressional consideration. Federal legislation requiring LUREs under federal conservation programs to be perpetual despite contrary state laws does not overstep fundamental federalism principles.\textsuperscript{500} Nevertheless, it is still important to consider perceived infringements on the proper distribution of power.\textsuperscript{501}

Federal legislation authorizing enforceable, perpetual LUREs may be viewed as a form of federal land use regulation.\textsuperscript{502} Land use controls are historically considered within the sphere of state and local authorities.\textsuperscript{503} Yet many aspects of land and resource management have necessarily shifted to the federal government over the years. Indeed, the “quiet federalization” of land use controls has been commonly noted.\textsuperscript{504} Quiet federalization began in the 1960s when the federal government took steps to address environmental problems attracting sufficient public concern.\textsuperscript{505} In present times, federal regulation of land use is pervasive.\textsuperscript{506} Thus, historical deference to the traditional notion of land use control is an insufficient reason to inhibit legitimate federal policies promoting conservation and preservation of the land resource.\textsuperscript{507}

In addition to the constitutional aspect of the relative powers between the federal and state governments, it is important to consider the effect of federal legislation on the daily operation or administration of governmental programs.\textsuperscript{508} In this context, the appropriate distribution of powers between federal and state governments should be governed by practicality. A federal directive requiring LUREs to be perpetual is practical because it enables the government to acquire LUREs throughout the country more efficiently. Incorporation of state laws will require the federal govern-

\begin{footnotes}
\item[500.] See discussion supra part III.
\item[501.] \textit{See generally} Henry M. Hart, Jr., \textit{The Relations Between State and Federal Law}, 54 COLUM. L. REV. 489 (1954) (discussing respective roles of federal and state law in the “affirmative governance of private activities”).
\item[502.] \textit{Cf.} Caldwell, \textit{supra} note 157, at 330-34 (discussing the tension between social environmental interests and individual ownership interests); Torres, \textit{supra} note 209 at 204-05 (discussing the problems uniform federal groundwater regulations create for heterogeneous state farms).
\item[503.] See supra notes 225, 408-10 and accompanying text.
\item[504.] \textit{See, e.g.,} Fred P. Bosseman et al., \textit{Federal Land Use Regulation} 1 (1977).
\item[505.] \textit{Id.}
\item[506.] \textit{Id.}
\item[507.] MacDonnell, \textit{supra} note 483, at 408 (citing A. Dan Tarlock, \textit{The Endangered Species Act & Western Water Rights}, 20 LAND & WATER L. REV. 1, 29 (1985)).
\item[508.] See Hart, \textit{supra} note 501, at 490-91; Mishkin, \textit{supra} note 405, at 812.
\end{footnotes}
ment to continually monitor state laws regarding the permissible duration of LUREs, to adjust negotiations accordingly, and to draft LURE agreements in compliance with the multitude of diverse state statutes authorizing LUREs. Further, the difficult problem of valuation is exacerbated by incorporation of state law. Placing a monetary value on a perpetual LURE is difficult, yet it is even more difficult to assess distinct, appropriate values for LUREs that will only endure for a certain term of years. Such considerations suggest that incorporation of state law will necessitate additional time and money to implement LURE acquisition programs, resulting in a less efficient expenditure of public funds.

In the agricultural arena, federal agencies often work directly with local advisory committees. The 1990 Farm Bill called for the establishment of technical advisory committees in each state to assist in the implementation of the conservation provisions. Although the committees do not accord the state any authority in administering the conservation programs, they provide an opportunity for input at the local level regarding which lands to protect. Thus, even if federal legislation dictates the acquisition of perpetual LUREs despite contrary state laws, conservation programs will be implemented with a healthy degree of federal-state cooperation.

V. CONCLUSION

Consideration of the policy factors indicates that federal law should require LUREs acquired through federal conservation programs to be perpetual despite state laws limiting duration. Federal preemption of state laws limiting LURE duration constitutes a stronger conservation policy than wholesale incorporation of state law. A federal directive will yield enforceable, perpetual rights protecting the land resource, will assure the continued viability of LURE acquisition programs, will enhance efficient implementation of conservation programs, and will not preclude important state or local development.

Federal LURE acquisition programs for conservation and preservation purposes are likely to proliferate as recent developments render it more feasible for courts to find direct regulation of land use to be a taking, and fiscal constraints on both states and the federal government continue. Thus, formulating effective and effi-

509. See supra notes 204-08 and accompanying text.
cient legislation authorizing the use of perpetual LUREs is imperative. Federal legislation authorizing the acquisition of enforceable, perpetual LUREs despite state law limitations on duration will go a long way toward achieving federal conservation goals and assuring desired long-term protection of our nation's land resource.