Years ago, if the government wanted to establish a National Park, it simply carved the desired area out of the vast public domain in the West. The parks were protected by their own isolation and by the largely unused federal forest or desert land that surrounded them. While the establishment of major new parks is nearly completed, protection of existing parklands is just beginning to reach an acute stage. Booming recreational development has brought urban influences right to the edge of even our remotest National Parks, and western energy development of a kind never seen before is now underway. Moreover, in the last few decades new parks have been created much nearer to developed areas: the National Seashores along the Atlantic coastline, National Lakeshores on the Great Lakes, and urban national parks in New York and San Francisco, Los Angeles, Cleveland, and New Orleans.

Protection of the parks' natural resources against nearby incompatible private developments presents a number of delicate problems. Federal zoning of private land, even when constitutional obstacles have been overcome, has always been anathema in the Congress. Local communities, understandably, are reluctant to zone themselves to the extent necessary to fulfill the parks' preservation mandate. And traditional land acquisition is both expensive and unsatisfactory; to extend park boundaries by fee purchase of neighboring lands usually just moves the problem of incompatible development a little further down the road.

It is now widely agreed that, for most areas, some kind of developmental controls, such as scenic easements, are the most desirable device. By such means, vulnerable nearby lands can remain in private ownership and on the tax rolls; the federal government will not have to manage them; and compatible private uses, such as agriculture or low density residential use, can buffer sensitive parklands. Yet development controls present many of the same problems that outright acquisition does, and their cost is often nearly as high as acquisition of the land in fee simple.

A dramatic example of the problem is presented by Grand Teton National Park. Most of the land in Teton County, Wyoming is federally owned. The 50,000 acres of private holdings are surrounded on the north by the park and on the other three sides by National Forest land and the National Elk Refuge. Most of the private land is in a large open valley known as Jackson Hole, which had long been primarily a ranching area. The traditional agricultural community was not only compatible with the park, but was an affirmatively desired private neighbor. Western ranching provided an historically attractive foreground and setting for the park, though the Park Service had no interest in managing or using these lands.

In the last decade, however, the situation began to change. The growth of alpine skiing and the development of a ski resort on National Forest land adjacent to the park were important factors, as was the general growth of recreation that brought more and more visitors to the Jackson Hole area. Land values rose rapidly. Ranches were sold and subdivided for hotels and vacation homes. The town of Jackson grew, commercial enterprises started to line the entrance roads, heavy traffic and crowds...
appeared, and homes sprang up on rises visible from the park. Development was also threatening the wintering range of the resident elk herd.

As in many rural communities, there was little land use regulation in Jackson County—certainly too little to control burgeoning growth. Ranch land available for development is valued at about $5,000 per acre, of which only about $500 consists of its value for ranching. Acquisition of just the development rights could cost as much as $250 million. Obviously Congress is reluctant to make such purchases and equally obviously the people in Teton County are reluctant to give up these huge land values, though there is widespread local sentiment that a continuation of recent development trends would be undesirable. Moreover, even if Congress were willing to spend the money, there is a great deal of public sentiment opposed to federal exercise of the eminent domain power. Many people—and particularly those in rural areas—feel that condemnation of their land, even with full value compensation, is an intrusion on their rights. However unwarranted any such sentiment may be as a legal matter, it presents an intense political dilemma for the Congress.

Over the years, in response to problems like that at Jackson Hole, Congress has evolved a political strategy that, on first consideration, seems quite clever. Examined more closely, as we shall see, it is a good deal less attractive than it seems.

The strategy is this. Acquisition by eminent domain of private lands threatening incompatible uses is invoked only as a last resort. Every effort is made either to acquire such lands by purchase, gift or exchange, and by holding out the prospect of eventual condemnation in order to discourage owners from developing their lands incompatibly with the parks. In addition, Park Service officials seek to work with local governments to encourage the adoption of protective zoning ordinances. By these means, the power of the federal government is meant to be imposed on unwilling landowners as little as possible, or as long deferred as possible, and voluntary resolution of conflict is encouraged. In addition, the actual cost to the government is sought to be minimized. That, at least, is the idea.

In practice, things work out quite differently. The effort to get landowners to sell development interests in their land works least well—just as one might expect—where the lands are rising rapidly in value. Of course the most rapidly rising land values occur in those places where the prospect of development is greatest, and thus where the threats to the parks are greatest. But it is in precisely such cases that owners are most unwilling to sell out voluntari-
Service officials give to local communities to zone themselves. While there is no hard, statistical evidence of the success of this policy, a review of survey evidence from park superintendents suggests just what one might expect. Where the community itself benefits from zoning, and where the benefits to it correspond closely to the benefits the Park Service seeks, local zoning is likely to occur. Thus, for example, where a park is part of an historic area, and where private land values are enhanced by maintaining the historic character of the neighborhood, the community is willing to zone in ways that by and large also meet the needs of the park. The same is true where there is an established residential community, with a strong self-interest in restraining unguided development, as at Cape Cod National Seashore. Where the demands of park protection far outstrip the economic interest of the residents in limiting development, however, as at Jackson Hole, Wyoming, there is no reason to believe the residents will voluntarily strip themselves of thousands of dollars of value per acre of land simply to contribute to the amenities of park users, or to preserve park resources.

Another element of present congressional strategy is the most troublesome of all. By adopting a policy of deferred acquisition, Congress hopes to discourage owners from making incompatible developments. The disincentive used is the threat of fee simple acquisition. Since many owners of land near National Parks want to remain where they are, the desire not to be displaced does deter further development. For example, there may be a community of low density rural residences near a park. Though there is considerable opportunity for developing a more urban, higher density recreational community on some of the land, the owners do not want to be removed; so they knuckle under to the government's demand that they eschew any further development. In fact, they may have no choice. The threat of acquisition hanging over them may itself discourage potential buyers and may deter financial institutions from financing development.

To the extent that this approach succeeds, it gives the government the benefits of federal zoning without any formal act of zoning and without any procedural or financial protections for the landowner. He is effectively compelled to manage his land as the government wants simply because the threat of condemnation destroys his market. Unhappily, this policy works quite differentially, disadvantaging the smallest and least powerful landowners, but operating as a bonanza for others.

The threat of condemnation, as just described, works to the government's advantage only if the owner has a personal interest in remaining in his community, or if the threat undermines the market for his land. The long-established small residential owner is most likely to be affected. But there are some landowners in or near the parks for whom such threats are quite ineffective. They, in fact, have the ability to turn such a policy greatly to their advantage. For example, near the southern boundary of Lassen Volcanic National Park in California, a large tract of undeveloped forested land was in private ownership. For many years, the land was wholly unused, but in 1960 it was leased to the Phillips Petroleum Company for geothermal development. It was clear from the outset that such mining development would be an incompatible use, and would, if it went forward, ultimately lead to condemnation. But following its policy of eminent domain as a last resort, the government did not immediately acquire the tract. It sought to get Phillips to sell or to exchange the tract for other, less sensitive lands. But Phillips was not interested. And why should it have been? Like the lands at Jackson Hole described above, the Phillips tract was rising rapidly in value. The government made clear that if mining went forward, it would condemn. But Phillips was not deterred. It was perfectly capable of obtaining the financing it needed for mining exploration, and it had nothing to lose and everything to gain from pursuing its own interests. If it went forward with mining, and the government did not make good its threat to condemn, Phillips would profit from the mine. If the government did condemn, it would wait until the threat of development was imminent—which is to say, until the time that Phillips thought mining was most profitable—and in that case, Phillips would obtain as a condemnation award the full value of the land at its peak price. This is precisely what occurred. Survey data from Lassen estimates that the land has risen in value ten-fold in the last ten years, and is one hundred times more valuable than when the park was first established.

While there are obviously some situations in which Congress will properly decide not to acquire incompatible private interests at all and to permit the parks to suffer some degradation in order to serve other public interests, such as energy development or community growth, there seems no reason to permit owners to reap the investment value of rising land prices over a period of years and then to condemn at the top of the market. In such a case, the society gets none of the benefit of the development and yet pays the highest possible price to the owner when he is condemned. This is what happened at Lassen. Certainly, no wrong, legal or moral, would have been done to the owners at Lassen if
they had been condemned in 1960 or even in 1916 when the park was first established. Nor is there any reason to think that the taxpayers save money by deferring acquisition until threats of development are imminent; indeed, insofar as it is possible to estimate the economic effects, it appears clear that the cost of deferral is enormous. And to the extent that some money is saved in some cases, by deterring development, it seems that the savings are made at the expense of the most sympathetically situated landowners—such as the small residential homeowner.

Neither does the deferral policy markedly reduce the use of condemnation by the government. It simply changes the time of its implementation. To the extent that it does affect the use of eminent domain, the deferral policy is self-defeating. By holding out the threat of condemnation, but leaving a good deal of uncertainty as to when (or whether) it will be implemented, it actually encourages the very development the government would like to discourage. At Jackson Hole, for example, many new purchasers have come into the community in recent years because it appeared to be a developing area. It has never been clear over the last ten years (and it is not clear today) when, or whether, or under what circumstances, the government will control development or acquire property in order to protect Grand Teton National Park.

The preceding observations suggest the desirability of a policy of early acquisition, at least during periods of rapidly rising land prices. But they do not suggest that the federal government should acquire and pay for all the needed restrictions, with no burden whatever on the local community. I have already indicated why local communities often will not zone themselves, but I have said nothing about the proper allocation of burden between the federal taxpayer and the local community, and how it might be effectuated. While the community will not, and should not, bear the entire burden of protecting the parks, in fact a peculiar problem arises when a National Park is a community’s neighbor. The very presence of potential federal acquisition distorts the evolution of ordinary local or state land use regulation.

Once the local community perceives the prospect of acquisition, with full compensation by the federal government, it may be deterred from imposing even the degree of zoning that its citizens would tolerate. Why should the community restrict itself, absorbing the economic loss of self-regulation, when it can wait for Congress, because of its concern for the park, to bail the community out? This is precisely the situation of the citizens in Jackson Hole. At the same time, Congress asks itself why taxpayers should pay for what the community should impose on itself by way of uncompensated zoning. This, surely, is one reason that Congress has so far hesitated to enact a Jackson Hole Scenic Area bill, under which the federal taxpayers would buy all the development rights in Jackson Hole.

In theory, the solution to the problem is obvious, but its practical application is far less evident. Congress should acquire and pay for all the development controls it needs,* minus the value of the controls that the local community would be willing to impose on itself in the absence of federal acquisition. It is easy to construct this value in theory, but not obvious how to measure it in fact, or how to effectuate it.

The question is how much the existing landowners value the maintenance of the community as it is. They ought to bear the cost of preserving that value. Congress should pay only for the additional amount of protection that represents the distinctive protective needs of the park. The situation can be illustrated in relation to Jackson Hole. Assume that the current market value of an acre of land is $5,000, of which $500 represents its value for grazing land (its present use), and $4,500 its development value. Let us assume further that the federal government has bought the full fee interest in that acre, paying $5,000 and removing the landowner. It has then imposed restrictions on the land to prevent all development that would be incompatible with the park. The next step would be to auction off that acre as restricted. It is possible that no one would bid more than $500 (the value solely as grazing land), but it is much more likely that a number of people would put a considerably higher value on the right to continue ranching on land at the foot of the Teton mountains, in a community protected against urbanizing influences. If, for example, the former owner would be willing to bid $1,500 an acre to stay on his land—with the restrictions—we would have an exact measure of the value to him of the right to live in such a restricted community, and we would also know the additional value ($3,500 per acre) that accrued solely to National Park protection. The $1,500 represents what people in the community are willing (absent the prospect of purchase by the federal government) to impose on themselves. It is the value to them of the land with restrictions. The federal taxpayer should only have to pay the differ-

*Excepting those cases where federal regulatory controls are appropriate. See Sax, “Helpless Giants,” op. cit. supra.
ence between the $1,500 and the full value of $5,000. Such an arrangement would permit the landowner who puts no particular value on staying in a restricted community to take his full $5,000 an acre and leave. It would also permit him to stay, if he wishes, but only if he were willing to match or outbid others who also valued staying in such a community.

At first glance, such an arrangement might seem unfair to the landowner, who is forced to pay in order to stay on his own land. After the auction he would be in precisely the same situation that he was before it, but he would be (in this example) $1,500 poorer. Yet the situation is neither unfair nor unprecedented. Landowners in a community routinely “pay” to stay on their own land, to keep both it and surrounding land from development. This is exactly what happens when a local community zones its lands for anything less than the highest possible economic development. The justification for such self-imposed zoning is that the restrictions benefit landowners in the community as a whole. Indeed, that is the only reason why a community ever obtains majority support for zoning.

This scheme has an additional value: auctioning off the right to remain on the land encourages the entry into the community of those people who would like to live in a place like Jackson Hole and who are willing to have the community remain as ranch or residential land. If Congress believes that keeping Jackson Hole in its rural state is necessary to park protection, it should seek to encourage such people whose life-style is consistent with preservation of the park to enter the area. Such a policy would reverse the present undesirable policy, which mutely encourages developers and speculators into the community.

At the same time, the new policy would not force any existing resident out of the community. It would only require residents to decide how much they value remaining in such a community, and would force them—not the federal taxpayer—to bear that cost. The policy would also give them the alternative of leaving with the full market value of their land. It would make clear to them that speculating on future development is inconsistent with Congress’ policy for the park.

One potential problem with this arrangement can easily be avoided. Wealthy nonresidents, who like Jackson Hole as it is, may be willing to bid a very high price, even above the $5,000 present market value of the land. A present resident should not have to compete with an outsider, paying $10,000 or more for the right to remain, and under the proposed scheme he need not. At the most, Congress need only demand that the present resident yield up all his future incompatible development rights to the federal government. Thus the present resident would have a choice: bid for the right to stay, paying the maximum amount bid up to, but not exceeding, $4,500 (the full present value of the fee, minus the present use value); or donate to the federal government a covenant restricting his development rights according to the government’s plan. He would then take the course least costly to him. Of course, he would also have the choice of selling out the fee for $5,000.

There is, obviously, a serious practical and political problem with this proposal. It would be extremely costly and disruptive for an existing community to put all its land up for auction. It would also be difficult to sustain an active market for any large amounts of land all at once, or over a short period of time. It would also doubtless appear extremely intrusive to local landowners, generating increased hostility toward the federal government.

Therefore I suggest a modest alternative plan. Rather than forcing all land into an auction, the federal government could make an estimate of the value to the landowners of the right to remain where they are without development rights. Let us say that a panel of objective and knowledgeable appraisers estimated the fee value at $5,000, and the value to landowners of the right to remain with present uses in a nondeveloping community at $1,500. Congress would then offer to each landowner the alternative of accepting $5,000 in exchange for his fee interest or $3,500 for his development rights (fee value of $5,000 reduced by $1,500).

If landowners think the estimate is too low, they can take their $5,000 and leave. Since the government obviously has an interest in encouraging them to stay (the alternative is for the government to manage a lot of land it really does not want or to find new purchasers) there will be a considerable incentive for the government to make an offer that the landowners will find attractive. And as long as the alternative of full condemnation is credible, landowners will have an incentive to accept a reasonable offer. To give even further assurances, the government could offer a third alternative at the option of the landowner. If a landowner is suspicious of the government’s estimate, the government can offer him the choice of putting his land up to auction. If no one offers more than the $1,000 for the right to remain, for example, the landowner will be allowed to stay by matching the $1,000 bid. If, on the other hand, someone offers $2,000, he will have to pay
of course, cannot be resolved simply by fee acquisitions, expanding park boundaries, and adding new lands to existing parks. To a significant extent the problem centers on the existence of adjacent lands, and there will always be new lands adjacent to any new boundary. The goal should be to insulate parks with compatible private uses (such as ranching at Jackson Hole) through less-than-fee acquisitions, use of local zoning, or regulation or litigation of illegal conduct, leaving private owners to serve as buffers.

In pursuing these plans, Congress should stand ready to recognize that parkland acquisitions are a capital cost, and that a dollar saved this year, but expended as six dollars ten years hence, is surely no saving at all. The policy of prompt acquisition should be implemented only as long as it is reasonably likely that land values will continue to rise more rapidly than the interest rate.

Finally, a word should be said about the political implications of the strategy proposed here. Deferring acquisitions until threats are imminent, and treating each problem individually when it arises, enhances the ability of influential landowners in each community, and of individual members of Congress in each district, to influence park policy. Obviously, certain individuals are greatly benefited if an exception is made in their case and they are allowed to go forward with incompatible developments, or if their lands are ultimately condemned at the highest possible price. But to recognize these political implications is hardly to suggest that they make sense as an element of National Park policy, or that they should be tolerated by federal taxpayers and park users.

The National Park Service also has an interest in maintaining friendly relations with neighboring landowners. Park superintendents do not readily argue that the investment opportunities of their private neighbors should be cut off, or that desired local development should be foreclosed. Only the Congress, by adopting policies of general application, can insulate the Park Service from the intense pressure it feels from private landowners. The Park Service has sometimes worsened the problem itself by indicating a desire to buy in fee more land than it actually needs, and by getting rid of even quite compatible private uses, when acquisition of the lesser interest of a development right would serve its needs effectively. It has thus helped to create an undesirable and unnecessary alliance between existing residents whose presence is frequently compatible with a park and mere investors. No such alliance is appropriate, and the policies proposed here would help sever it.

The real losers from the inadequacies of present policy are small landowners, park users, and federal taxpayers. The time is right for them to urge Congress to take a fresh, long, and hard look at current land acquisition practices.