2011

Oil and Water: Easements and the Environment

McKay Cunningham

Concordia University School of Law, mccunningham@cu-portland.edu

Follow this and additional works at: <https://digitalcommons.csp.edu/lawfaculty>

Part of the [Environmental Law Commons](#), [Land Use Law Commons](#), and the [Water Law Commons](#)

CU Commons Citation

McKay Cunningham, Oil and Water: Easements and the Environment, 85 St. John's L. Rev. 869, 924 (2011)

This Article is brought to you for free and open access by the Concordia University School of Law at DigitalCommons@CSP. It has been accepted for inclusion in Concordia University School of Law, Faculty Scholarship by an authorized administrator of DigitalCommons@CSP. For more information, please contact digitalcommons@csp.edu.

ARTICLES

OIL AND WATER: EASEMENTS AND THE ENVIRONMENT

MCKAY CUNNINGHAM[†]

INTRODUCTION	870
I. HISTORY OF A PRO-DEVELOPMENT POLICY	872
A. Pro-Development Policy: Colonial Era.....	873
B. Pro-Development Policy: American Sovereignty	874
C. Pro-Development Policy: Culture and Religion.....	876
D. Pro-Development Policy: Today.....	878
E. Pro-Development Policy: Adverse Possession	882
II. EASEMENTS AND THE DRIVE TO USE AND DEVELOP LAND	884
A. The Policy Promoting Use and Development	885
B. Implied Easements.....	890
1. Required Elements.....	890
2. Overbroad and Expanding.....	891
3. Strict Versus Reasonable Necessity.....	894
4. Common Owner Requirement	896
C. Prescriptive Easements	898
1. Required Elements.....	899
2. Doctrinal Origin	899
3. Landowner Diligence/Certainty of Title.....	901
4. Personhood Theory.....	903
D. Express Easements	906
1. Doctrinal Origin	907

[†] Assistant Professor, Phoenix School of Law.

2. Promoting Land Use: Servient Estate.....	907
3. Promoting Land Use: Relocating Easements	910
4. Promoting Land Use: Dominant Estate.....	911
III. CONSERVATION COUNTERWEIGHT	913
A. Restricting Implied Easements	914
B. Abolishing Prescriptive Easements.....	919
C. Balancing Express Easements	921
CONCLUSION.....	923
APPENDIX	924

INTRODUCTION

Environmentalism is increasingly popular. Surveys show widespread public support for preservation policies, open spaces, and natural parks, while reflecting disdain for new development of wild lands.¹ Federal and state governments have reacted to public sentiment by adding acreage to national preserves, increasing the budget for agencies tasked with preservation, and enacting pollution laws and regulations.²

¹ For example, the Nature Conservancy found in 2009 that 65% of Americans support increased investment in federal and state land conservation. See *Public Summary of Key Findings from National Voter Survey on Conservation*, LAND TRUST ALLIANCE, available at <http://www.landtrustalliance.org/policy/TNCpoll> (last visited Dec. 26, 2011). Additionally, a recent survey shows that 57% of Americans are at least somewhat concerned about a decline in open spaces. See Lydia Saad, *Water Issues Worry Americans Most, Global Warming Least*, GALLUP (Mar. 28, 2011), <http://www.gallup.com/poll/146810/water-issues-worry-americans-global-warming-least.aspx>. According to a recent poll commissioned by the National Parks Conservation Association, 80% of Americans believe that national parks should be a centerpiece or an important focus of America's Great Outdoors Initiative, and 75% of Americans believe that state parks should be a centerpiece or an important focus of America's Great Outdoors Initiative. See Press Release, National Parks Conservation Association, *New Poll Finds Overwhelming Support for America's Great Outdoors Initiative and National Parks* (July 1, 2010), available at http://www.npca.org/media_center/press_releases/2010/new-poll-finds-overwhelming.html. A Zogby International poll shows that 87% of Americans support protecting public land currently designated as wilderness. See Press Release, The Pew Center on the States, *Vast Majority of Americans Believe Protecting Wilderness Is Important* (July 21, 2008), available at http://www.pewcenteronthestates.org/news_room_detail.aspx?id=41614.

² See, e.g., *80-Acre Added to the Lassen Volcanic National Park and Lassen Volcanic Wilderness*, THE WILDERNESS LAND TRUST (Apr. 11, 2011), <http://www.wildernesslandtrust.org/news/eighty-acre-added-to-the-lassen-volcanic->

Despite popular support and government-initiated efforts, forty million acres of land—larger than the state of Florida—were newly developed between 1982 and 2007.³ No doubt, complex and nuanced factors contribute to this rampant development. This Article addresses one such factor: the historic and deeply rooted pro-development policy informing American property law.

Many policies motivate American property law but prominent among them is the historical push to use and develop land. The creation and enforcement of easements, for example, favor the development of land while disfavoring parties that allow land to remain “idle.” Modern courts grant easements bisecting a variety of terrains, including national parks,⁴ national forests,⁵ undeveloped lands owned by “absentee landowners,”⁶ and wildlife preserves.⁷ Courts honor or dishonor such

wilderness/ (“The Wilderness Land Trust in partnership with The Nature Conservancy recently transferred the 80-acre private inholding to the National Park Service-Lassen Volcanic National Park for permanent protection as a part of the Lassen Volcanic Wilderness area.”); Dave Flessner, *Tennessee Valley Authority Boosts Conservation Budget Fourfold as Public Reels Before Rate Hike*, TIMES FREE PRESS (Aug. 22, 2008), <http://www.timesfreepress.com/news/2008/aug/22/chattanooga-tva-boosts-conservation-budget-fourfold/?print> (“TVA Vice President Joe Hoagland said the agency will boost its budget for energy conservation and efficiency from \$22 million this year to \$99 million in fiscal 2009.”); Felicity Barringer, *California Approves Stringent Pollution Curbs*, N.Y. TIMES (Dec. 16, 2010), <http://www.nytimes.com/2010/12/17/science/earth/17cap.html?scp=1&sq=California%20Approves%20Stringent%20Pollution%20Curbs&st=cse> (“California regulators on Thursday adopted the nation’s most comprehensive rules to curb emissions of carbon dioxide and other heat-trapping gases, a move that will put the state far ahead of the rest of the country in energy reform. . . . Ten states including New York, New Jersey, Delaware, Maryland and the New England states are participating in a less extensive system known as the Regional Greenhouse Gas Initiative, which covers only electric utilities.”).

³ See Press Release, United States Department of Agriculture, *Latest National Resource Inventory for Non-Federal Lands Shows Significant Reduction in Soil Erosion on Cropland and Dramatic Increase in Developed Acreage* (Apr. 27, 2010), available at http://www.usda.gov/wps/portal/usda/!ut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP0os_gAC9-wMJ8QY0MDpxBDA09nXw9DFxcXw2ALU_2CbEdFAF-soRU!/?printable=true&contentidonly=true&contentid=2010%2F04%2F0211.xml (“About 40 million acres of land were newly developed between 1982 and 2007”).

⁴ See *United States v. Srnsky*, 271 F.3d 595, 605 (4th Cir. 2001).

⁵ See *Skranak v. Castenada*, 425 F.3d 1213, 1221 (9th Cir. 2005); *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 496 F. Supp. 880, 884–86 (D. Mont. 1980), *aff’d*, 655 F.2d 951 (9th Cir. 1981).

⁶ See *Johnson v. Suttles*, 227 P.3d 664, 666, 670 (Okla. Civ. App. 2009).

⁷ See *Berge v. State*, 915 A.2d 189, 189 (Vt. 2006).

easements to enable a variety of developments, including opera houses,⁸ subdivisions in the middle of wildlife preserves,⁹ storage facilities,¹⁰ and fox hunting clubs.¹¹

While critical in the country's infancy, encouraging land use and development through legal constructs is less important and arguably detrimental now. Our need to develop wide swaths of wild land has changed; our common law has not. Part I explores the vast wilderness and open spaces of America's infancy and how state and federal government articulated a clear objective to settle and develop "wild lands." Part II tracks the continuing influence of this objective in implied easements, prescriptive easements, and express easements. Part III recognizes the lack of a conservation counterbalance and details several approaches that might curb pro-development bias in easement law.

I. HISTORY OF A PRO-DEVELOPMENT POLICY

*The country was a wilderness, and the universal policy was to procure its cultivation and improvement.*¹²

—Justice Joseph Story¹³

From 1803 (Louisiana Purchase) to 1853 (Gadsden Purchase), America acquired what many map-makers referred to as the "Great American Desert," and what colloquially became termed the American West.¹⁴ Massive tracts of unimproved land represented largely untapped resources, resources the federal government hoped to exploit.¹⁵

⁸ See *Howley v. Chaffee*, 93 A. 120 (Vt. 1915).

⁹ See *Berge*, 915 A.2d at 189.

¹⁰ See *Vandeleigh Indus., v. Storage Partners of Kirkwood, L.L.C.*, 901 A.2d 91, 93 (Del. 2006).

¹¹ See *Hunker v. Whitacre-Greer Fireproofing Co.*, 801 N.E.2d 469, 469 (Ohio Ct. App. 2003); *Millbrook Hunt, Inc. v. Smith*, 249 A.D.2d 281, 281–83, 670 N.Y.S.2d 907, 908–09 (2d Dep't 1998).

¹² *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 145 (1829).

¹³ Joseph Story (Sept. 18, 1779–Sept. 10, 1845) was an American lawyer and jurist who served on the Supreme Court of the United States from 1811 to 1845. The quote comes from a decision he authored, *Van Ness v. Pacard*, 27 U.S. (2 Pet.) 137, 145 (1829).

¹⁴ See Michael Lewis, *American Wilderness: An Introduction*, in AMERICAN WILDERNESS: A NEW HISTORY 3, 6–7 (Michael Lewis ed., 2007); see also *Leo Sheep Co. v. United States*, 440 U.S. 668, 670 (1979).

¹⁵ See *Leo Sheep Co.*, 440 U.S. at 670–71. In deciding whether the Northern Pacific Railroad Company's remote grantee owned an easement across federal land, the court recalled nineteenth-century statutes and the "tremendous desire on behalf

A. *Pro-Development Policy: Colonial Era*

The push to settle and cultivate wild lands began much earlier than 1803; France, Spain, Portugal, England, and the Netherlands all clamored to establish national claims to the "new" lands. Building settlements strengthened such claims.¹⁶ In 1854 the Supreme Court described the typical European land grant process: "The party who desired to form a settlement upon any unoccupied land presented his petition to the officer who had authority to grant, stating the quantity of land he desired, the place where it was situated, and the purposes to which it was to be applied."¹⁷ If a survey showed the land vacant, the "party thereupon received a grant in absolute ownership."¹⁸

Land was virtually free—save one critical condition. "These grants were almost uniformly made upon condition of settlement, or some other improvement."¹⁹ The law did not recognize a grantee's ownership until the grantee built something on it.²⁰ Why? Competing claims among European nations depended in part on colonization and settlement of wild lands.²¹ Even when "hostile Indians" prevented the grantee from making "improvements" on the land, the law held the condition unmet and no title vested in the grantee.²² To hold otherwise would be to "reserv[e] indefinitely . . . large bodies of uncultivated and unoccupied lands," a result repugnant to national claims buoyed

of the federal government that the West be settled." *Mont. Wilderness Ass'n v. U.S. Forest Serv.*, 496 F. Supp. 880, 882 (D. Mont. 1980), *aff'd*, 655 F.2d 951 (9th Cir. 1981).

¹⁶ Cf. David Morris Phillips, *The Unexplored Option: Jewish Settlements in a Palestinian State*, 25 PENN ST. INT'L L. REV. 75, 78–80 (2006) (Israeli settlements are often viewed as critical in land disputes with the Palestinians). See generally HERBERT EUGENE BOLTON & THOMAS MAITLAND MARSHALL, *THE COLONIZATION OF NORTH AMERICA, 1492–1783* (1920);

¹⁷ *Fremont v. United States*, 58 U.S. (17 How.) 542, 554 (1854).

¹⁸ *Id.*

¹⁹ *Id.*

²⁰ See *Glenn v. United States*, 54 U.S. (13 How.) 250, 259 (1851); *United States v. Boisdoré*, 52 U.S. (11 How.) 63, 96 (1850) ("[T]he grantee might have his land surveyed, or he might decline; he might establish himself on the land, or decline: these acts rested wholly in his discretion. But if he failed to take possession and establish himself, he had no claim to a title . . ."); *Buyck v. United States*, 40 U.S. (15 Pet.) 215, 222–23 (1841); *United States v. Wiggins*, 39 U.S. (14 Pet.) 334, 349–52 (1840).

²¹ See *Fremont*, 58 U.S. (17 How.) at 560–61.

²² See *Heirs of de Vilemont v. United States*, 54 U.S. (13 How.) 261, 263–67 (1851); *United States v. Kingsley*, 37 U.S. (12 Pet.) 476, 480, 483–85 (1838).

by colonization.²³ Like the international scramble to colonize wild lands, subsequent American sovereignty embraced colonial land development efforts.

B. Pro-Development Policy: American Sovereignty

Following the Homestead Act of 1862,²⁴ the Land Ordinance of 1785,²⁵ the Union Pacific Act,²⁶ and the 1864 legislation creating the Northern Pacific Railroad Company,²⁷ among others, the nascent American government sold or pledged enormous tracts of land both to raise money and to encourage western settlement.²⁸ The government doled out nearly three million acres alongside a proposed railroad right-of-way, for example, to subsidize the construction of the Illinois Central Railroad.²⁹ Without such government inducement, no private enterprise would confront the huge risk of constructing rail lines over vast open spaces.³⁰ As Horace Greeley depicted it: "The amount is too vast; the enterprise too formidable; the returns too remote and uncertain."³¹

Checkerboard land grants came to characterize the government's effort to induce private railroad development. The Union Pacific Act of 1862 granted public land to the railroad for

²³ See *Fremont*, 58 U.S. (17 How.) at 569–70 (Catron, J., dissenting).

²⁴ 43 U.S.C. § 161 (repealed 1976).

²⁵ CONTINENTAL CONGRESS, AN ORDINANCE FOR ASCERTAINING THE MODE OF DISPOSING OF LANDS IN THE WESTERN TERRITORY (1785), reprinted in 28 JOURNALS OF THE CONTINENTAL CONGRESS 1774–1789, at 375–76 (John C. Fitzpatrick, ed., Gov't Printing Office 1933).

²⁶ See Act of July 1, 1862, ch. 120, § 3, 12 Stat. 489, 492, (1862), amended by Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 (1864).

²⁷ The Northern Pacific Railroad Company was created by an act of Congress. See Act of July 2, 1864, ch. 217, 13 Stat. 365, 365–72 (1864) ("An Act granting Lands to aid in the Construction of a Railroad and Telegraph Line from Lake Superior to Puget's Sound, on the Pacific Coast, by the Northern Route").

²⁸ See DAVID HAWARD BAIN, *EMPIRE EXPRESS: BUILDING THE FIRST TRANSCONTINENTAL RAILROAD* 115, 180 (1999); cf. Lewis, *supra* note 14 ("Some historians have viewed the interaction between settlers and raw wilderness as the central reality of early American history.").

²⁹ See Act of Sept. 20, 1850, ch. 61, 9 Stat. 466 (1850); *Leo Sheep Co. v. United States*, 440 U.S. 668, 673 (1979).

³⁰ HORACE GREELEY, *A Railroad to the Pacific, in AN OVERLAND JOURNEY, FROM NEW YORK TO SAN FRANCISCO, IN THE SUMMER OF 1859*, at 383–86 (C. M. Saxton, Barker & Co. 1860).

³¹ *Id.* at 383–84.

each mile of track that it laid.³² Odd numbered plots were granted to the railroad while the government retained even numbered plots. Similar schemes induced construction of the Northern Pacific Railroad,³³ the Illinois Central Railroad,³⁴ and others. This pervasive³⁵ nineteenth-century “checkerboard[ing]” continues to spur modern easement disputes today.³⁶

But “animating it all was the desire of the Federal Government that the West be settled.”³⁷ Such was the frenzy to conquer and settle wild lands that scandal erupted when at least one member of Congress heavily invested in Union Pacific and was accused of bribery and misappropriating funds.³⁸ “Railroad men traveled to Washington and to state capitals armed with money, shares of stock, free railroad passes. Between 1850 and 1857 they got [twenty-five] million acres of public land, free of charge, and millions of dollars in bonds—loans—from the state legislatures.”³⁹ The steady growth of established agrarian communities coupled with “the feverish accumulation of capitalism” left little room for land conservation.⁴⁰ A Congressional report on United States public land policy states that “[d]uring most of the [nineteenth] century, our public land

³² Act of July 1, 1862, ch. 20 § 3, 12 Stat. 489, 492 (1862), *amended by* Act of July 2, 1864, ch. 216, § 4, 13 Stat. 356, 358 (1864).

³³ Act of July 2, 1864, ch. 216, § 3, 13 Stat. 365, 367–68. For a good summary of the Act’s provisions, see *United States v. N. Pac. Ry. Co.*, 311 U.S. 317, 324–27 (1940).

³⁴ Act of Sept. 20, 1850, ch. 61, 9 Stat. 466 (1850); *Leo Sheep Co.*, 440 U.S. at 673–74.

³⁵ See PAUL W. GATES WITH A CHAPTER BY ROBERT W. SWENSON, HISTORY OF PUBLIC LAND LAW DEVELOPMENT 341–56 (1968).

³⁶ See *Leo Sheep Co.*, 440 U.S. at 671–72; *Mont. Wilderness Ass’n v. U.S. Forest Serv.*, 496 F. Supp. 880, 886–88 (D. Mont. 1980); *Weiser v. Union Pac. R.R. Co.*, 247 P.3d 357, 363–64 (Utah 2010); *Granite Beach Holdings, L.L.C. v. State ex rel. Dep’t. of Natural Res.*, 11 P.3d 847, 851 (Wash. Ct. App. 2000).

³⁷ *Leo Sheep Co.*, 440 U.S. at 671.

³⁸ Oakes Ames, a Massachusetts Congressman, invested heavily in Union Pacific and a company it created, Credit Mobilier. An investigation recommended Ames’s expulsion from Congress following allegations of improper use of funds and bribery. See MARGARET LEECH & HENRY J. BROWN, THE GARFIELD ORBIT 175 (1978); HOWARD ZINN, A PEOPLE’S HISTORY OF THE UNITED STATES 255 (2003) (“[Union Pacific] had been given 12 million acres of free land and \$27 million in government bonds. It created the Credit Mobilier company and gave them \$94 million for construction when the actual cost was \$44 million.”).

³⁹ ZINN, *supra* note 38, at 220.

⁴⁰ Steven Stoll, *Farm Against Forest*, in AMERICAN WILDERNESS: A NEW HISTORY, *supra* note 14, at 56–57.

policy was basically one of disposal [of lands owned by the United States] into non-Federal ownership to encourage settlement and development of the country."⁴¹

C. *Pro-Development Policy: Culture and Religion*

The nineteenth-century American mentality likely paralleled government policy. Americans valued land exploitation and disdained uncultivated and unimproved land. One commentator describes a "historic American view that forests, wetlands, grasslands, deserts and other lands in natural condition contribute *nothing* to the social welfare until they are converted to economic use."⁴² Forests, wetlands, deserts, hill country, and other undeveloped land were seen as worthless until cleared, drained, cultivated, or otherwise converted into useful product.⁴³

Visiting from France in the early nineteenth century, Alexis de Tocqueville observed that Americans

are insensible to the wonders of inanimate nature, and they may be said not to perceive the mighty forests which surround them till they fall beneath the hatchet. Their eyes are fixed upon another sight: . . . [the] march across these wilds—drying swamps, turning the course of rivers, peopling solitudes, and subduing nature.⁴⁴

Preservation of wild lands and conservation of undeveloped open spaces have no place under this articulation of America's historic development model.⁴⁵

⁴¹ U.S. PUB. LAND LAW REVIEW COMM'N, ONE THIRD OF THE NATION'S LAND: A REPORT TO THE PRESIDENT AND TO THE CONGRESS 28 (1970); see also GREGORY YALE, LEGAL TITLES TO MINING CLAIMS AND WATER RIGHTS, IN CALIFORNIA, UNDER THE MINING LAW OF CONGRESS OF JULY, 1866, at iv-v, 10–13 (1867).

⁴² John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 840 (1994) (emphasis added).

⁴³ See RODERICK FRAZIER NASH, WILDERNESS AND THE AMERICAN MIND, at xiii (4th ed. 2001) ("Nature lost its significance as something to which people belonged and became an adversary, a target, merely an object for exploitation."); Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 292–95 (2006).

⁴⁴ ALEXIS DE TOCQUEVILLE, 2 DEMOCRACY IN AMERICA, 105–106 (Henry Reeve trans., 2008).

⁴⁵ See NASH, *supra* note 43, at xii ("The largest portion of the energy of early [American] civilization was directed at conquering wildness in nature and eliminating it in human nature.").

Religious context arguably complements the development model. According to some historians, nineteenth-century Judeo-Christians harbored animus toward the wilderness.⁴⁶ The book of Genesis confers dominion to mankind over all birds and beasts; believers are admonished to "fill the earth and subdue it."⁴⁷ Early settlers took these provisions to heart, viewing uncultivated wild land as dangerous and ungodly.⁴⁸ The controversial 1967 article by historian Lynn White decried the Judeo-Christian worldview of dominion as incompatible to environmentalism.⁴⁹ It should be noted, of course, that Judeo-Christian theology on environmental issues is hardly one-sided; several approaches to stewardship and sustainability reflect current conservationist sentiment.⁵⁰

All these factors: (1) international seventeenth- and eighteenth-century competition to claim land through settlement; (2) America's early pro-development policy; (3) the nineteenth-century American attitude disfavoring idle lands, and (4) religious support for dominion and subjugation of wild lands forged the common law.

It is not surprising that these factors helped stamp pro-development bias into American property law. Our British legal progenitors, as early as 1658, decried the very existence of undeveloped land: "[I]t is not only a private inconvenience, but it is also to the prejudice of the public weal, that land should lie fresh and unoccupied."⁵¹

⁴⁶ See Lewis, *supra* note 14, at 7-8.

⁴⁷ *Genesis* 1:26 (English Standard) ("Then God said, 'Let us make man in our image, after our likeness. And let them have dominion over the fish of the sea and over the birds of the heavens and over the livestock and over all the earth and over every creeping thing that creeps on the earth.'"); *id.* at 1:28 ("And God said to them, 'Be fruitful and multiply and fill the earth and subdue it and have dominion over the fish of the sea and over the birds of the heavens and over every living thing that moves on the earth.'").

⁴⁸ See NASH, *supra* note 43, at 13.

⁴⁹ Lynn White, Jr., *The Historical Roots of Our Ecologic Crisis*, 155 *SCIENCE* 1203, 1205-07 (1967).

⁵⁰ See WESLEY GRANBERG-MICHAELSON, *Renewing the Whole Creation: Constructing a Theology of Relationship*, *SOJOURNERS MAGAZINE*, Feb.-Mar. 1990, at 1, 2-4 (describing the Christian theology of stewardship and the sacred relationship between God, humans, and creation as an essential element of the environmental movement).

⁵¹ A. J. Bradbrook, *Access to Landlocked Land: A Comparative Study of Legal Solutions*, 10 *SYDNEY L. REV.* 39, 57, (1983) (quoting *Packer v. Welsted*, 82 Eng. Rep. 1244 (K.B. 1658) (a 1658 decision of the King's Bench)).

D. Pro-Development Policy: Today

Americans today do not share their ancestor's drive to develop "idle" land.⁵² Surveys show that a large "majority of Americans believe there should be stronger policies protecting open space, that it is everyone's obligation to protect open space, . . . and that more lands should be set aside for rare or endangered species, national parks, and protection of historical landscapes."⁵³ There is a growing acknowledgement that supply of wild lands is limited,⁵⁴ and "that access to areas of natural, undeveloped land benefits society."⁵⁵ Eroding plant and animal diversity through land development and destruction of natural habitats increases popular anxiety.⁵⁶

⁵² See Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 455-56 (1984) ("Today, however, American society has generally rejected full development in favor of conservation."). See generally CHARLES F. WILKINSON, *CROSSING THE NEXT MERIDIAN: LAND, WATER, AND THE FUTURE OF THE WEST* (1992).

⁵³ See Klass, *supra* note 43, at 284, 296 & n.69 ("citing 1996 survey mailed to random sampling of 2,000 individuals across the U.S. with equal distribution by gender, location, and socioeconomic profiles indicating 77.7% agreed or strongly agreed that policies protecting open space could be stronger, 86.5% agreed or strongly agreed that everyone should look after open space, 81.7% agreed or strongly agreed that everyone should have access to outdoor recreational areas, 71.2% agreed or strongly agreed that policies protecting farmland from development should be stronger, 54.4% agreed or strongly agreed that lands providing habitat for rare or endangered species are the most important lands to protect, 70.7% agreed or strongly agreed that more areas should be set aside as national parks so they are protected from development, and 57.1% agreed or strongly agreed that more emphasis should be placed on protecting historical landscapes"); Karlyn Bowman, *Revisiting Attitudes About Global Warming as Summer Heats up*, AM. ENTER. INST. (July 1, 1999), <http://www.aei.org/article/10525>.

⁵⁴ See William E. Cooper & Raymond D. Vlasen, *Ecological Concepts and Applications to Planning*, in NAT'L SCI. FOUND, *ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING*, 183, 203 (Donald M. McAllister ed., 1973).

⁵⁵ Korngold, *supra* note 52, at 443.

⁵⁶ See generally Ike C. Sugg, *Caught in the Act: Evaluating the Endangered Species Act, Its Effects on Man and Prospects for Reform*, 24 CUMB. L. REV. 1 (1993).

In response, federal and state governments⁵⁷ have added land and funding to national parks and other conservation efforts.⁵⁸ Park base funding increased from nine-hundred million dollars in 2001 to over one billion dollars by 2006.⁵⁹ Park acreage in the lower forty-eight states increased incrementally from seven million acres in 1930 to nineteen million acres in 2000.⁶⁰ While most insist that government play a large role in wild land conservation,⁶¹ many are dissatisfied with the results.

One commentator characterizes government efforts as “regulatory patches” that “operate in the shadows of [] the superdominance of private control of land.”⁶² Others distrust government with such an important task, citing bureaucratic delay, ineptitude, and fickleness.⁶³ In economic downturns legislatures target parks and conservation programs for budget

⁵⁷ Congress determines who runs federal public lands under two Constitutional provisions. U.S. CONST. art. I, § 8, cl. 17 (granting Congress power “to exercise like Authority over all Places purchased by the Consent of the Legislature of the State in which the Same shall be, for the Erection of Forts, Magazines, Arsenals, dock-Yards, and other needful Buildings”); U.S. CONST. art. IV, § 3, cl. 2 (“The 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; and nothing in this Constitution shall be so construed as to Prejudice any Claims of the United States, or of any particular State.”).

⁵⁸ See generally California Desert Protection Act of 1994, 16 U.S.C. § 410aaa (2006); Tongass Timber Reform Act, 16 U.S.C. § 539d (2006); National Wildlife Refuge System Improvement Act of 1997, 16 U.S.C. § 668dd (2006); Wilderness Act, 16 U.S.C. § 1131 (2006); National Trails System Act, 16 U.S.C. § 1241 (2006); Wild and Scenic Rivers Act, 16 U.S.C. § 1271 (2006); National Forest Management Act of 1976, 16 U.S.C. § 1600 (2006); Alaska National Interest Lands Conservation Act, 16 U.S.C.A. § 3101 (2006).

⁵⁹ FISCAL YEAR 2006 PRESIDENT’S BUDGET EXECUTIVE SUMMARY, NAT’L PARK SERV. 8 (Feb. 7, 2005), available at <http://home.nps.gov/applications/budget2/fy06gbk.htm>.

⁶⁰ William A. Wines, *A Proposal to Greatly Expand National Parks in the Lower Forty-Eight States: An Investment in Our Planet’s Future*, 12 MO. ENVTL. L. & POL’Y REV. 130, 146 (2005).

⁶¹ Council of Excellence in Government, *America Unplugged: Citizens and their Government*, (July 1999). Nearly two-thirds of all adults surveyed in a Council for Excellence in Government poll stated that the government must have a part in cleaning up the environment. Of adult age groups, the 18–34 year old group had the highest percentage with 71%. *Id.*

⁶² Craig Anthony (Tony) Arnold, *The Structure of the Land Use Regulatory System in the United States*, 22 J. LAND USE & ENVTL. L. 441, 446–47 (2007).

⁶³ See generally Federico Cheever, *The United States Forest Service and National Park Service: Paradoxical Mandates, Powerful Founders, and the Rise and Fall of Agency Discretion*, 74 DENV. U. L. REV. 625 (1997) (tracing public mistrust of governmental agencies entrusted with environmental goals).

cuts.⁶⁴ The distrust amplifies when, for example, the National Forest Service authorizes oil and gas development, mining, logging, and hunting in national forests.⁶⁵ This oxymoronic quest, to simultaneously conserve and exploit, is not a new one. The 1897 "Organic Act"⁶⁶ authorized management and protection of what were to become the national forests while at the same time requiring "a continuous supply of timber for the use and necessities of citizens of the United States."⁶⁷ None of these government efforts, however misguided or successful, confronts the ongoing common law policy favoring land development.⁶⁸

Frustration with government efforts may, in part, explain the relatively recent surge in *private* conservation efforts.⁶⁹ Private landowners have dedicated over five million acres of land

⁶⁴ See, e.g., Klass, *supra* note 43, at 296–97; Associated Press, *Arizona: Parks Are Casualties of Budget Cuts*, N.Y. TIMES, Jan. 16, 2010, at A12, available at http://www.nytimes.com/2010/01/16/us/16brfs-PARKSARECASU_BRF.html; Jenny Brundin, *State Parks Juggle More Visitors With Budget Cuts* (National Public Radio broadcast Oct. 30, 2009), available at <http://www.npr.org/templates/story/story.php?storyId=114308714> ("Because of the down economy, state and local government have put the squeeze on spending. Some of the first items on the chopping block were parks and after-school recreation programs.").

⁶⁵ 7 C.F.R. § 2.60 (2009) (delegating authority to the Chief of the Forest Service to manage the National Forest System); *National Park Versus National Forest?: What's in a Name?*, NATIONAL PARK SERVICE, <http://www.nps.gov/grsm/planyourvisit/np-versus-nf.htm> (last visited Dec. 19, 2011) (Regulation of National Forest Service includes "not only resource preservation, but other kinds of use as well. Under this concept of 'multiple use,' national forests are managed to provide Americans with a wide variety of services and commodities, including lumber, cattle grazing, mineral products and recreation with and without vehicles.").

⁶⁶ 16 U.S.C. §§ 473–82, 551 (2006).

⁶⁷ *Id.* § 475.

⁶⁸ Sprankling, *supra* note 42, at 819–20, 849 ("Despite increasing concern for preservation, the momentum of the development model continues as the twenty-first century approaches.").

⁶⁹ See Nancy A. McLaughlin & Mark Benjamin Machlis, *Protecting the Public Interest and Investment in Conservation: A Response to Professor Korngold's Critique of Conservation Easements*, 2008 UTAH L. REV. 1561, 1561–65. See generally ALLISON DUNHAM, PRESERVATION OF OPEN SPACE AREAS: A STUDY OF THE NON-GOVERNMENTAL ROLE (1966) (addressing private land rights for use by organizations interested preserving open space); LAND SAVING ACTION: A WRITTEN SYMPOSIUM BY 29 EXPERTS ON PRIVATE LAND CONSERVATION IN THE 1980S (Russell L. Brenneman & Sarah M. Bates eds., 1984) (written symposium on conservation issues and land preservation management); MONT. LAND RELIANCE & LAND TRUST EXCH., PRIVATE OPTIONS: TOOLS AND CONCEPTS FOR LAND CONSERVATION (Barbara Rushmore et al. ed., 1982) (collection of articles discussing private conservation techniques).

to conservation through conservation easements.⁷⁰ Conservation easements are not like traditional right-of-way easements; instead, they confer a non-possessory interest in land to a third party with a concomitant obligation to “use” the land by preserving its “natural, scenic, or open space values” and protecting it against development.⁷¹ Much has been said about the benefits and detriments inherent in conservation easements.⁷²

Regardless of both private and public efforts, wild land continues to yield to development. According to government statistics, about forty million acres of land—larger than the state of Florida—were newly developed between 1982 and 2007.⁷³ The government’s own summary says that “[t]his means that more than one-third of all land that has ever been developed in the lower 48 states was developed during the last quarter century.”⁷⁴ This development “sprawl” consumed 2.2 million acres of land in the United States each year between 1997 and 2001, up from 1.4 million acres per year between 1982 and 1992.⁷⁵

How can development of wild lands exponentially increase when public opinion favors land and resource conservation? The answer is larger than this Article, but a substantial piece of the answer is rooted deep in historic property law, deep in the nineteenth-century formation of policies that viewed land as worthless until developed. As one professor put it, “[t]oday, despite a fundamentally different national landscape, the property-law system still actively facilitates the despoliation of

⁷⁰ Klass, *supra* note 43, at 283–84.

⁷¹ See UNIF. CONSERVATION EASEMENT ACT § 1(1) (1981).

⁷² Compare Korngold, *supra* note 52, at 443, with McLaughlin & Machlis, *supra* note 69, at 1572–81.

⁷³ NATURAL RESOURCES CONSERVATION SERV., U.S. DEP’T OF AGRIC., SUMMARY REPORT: 2007 NATIONAL RESOURCES INVENTORY 7 (2009), available at http://www.nrcs.usda.gov/Internet/FSE_DOCUMENTS/stelprdb1041379.pdf; *Florida Facts*, FLORIDA HIGHWAY PATROL, <http://www.flhsmv.gov/fhp/html/floridafacts.html> (last visited July 30, 2011).

⁷⁴ NATURAL RESOURCES CONSERVATION SERV., *supra* note 73.

⁷⁵ U.S. DEP’T OF AGRIC. 2007 FARM BILL THEME PAPERS: RURAL DEVELOPMENT JULY 2006 7 (2007), available at <http://www.usda.gov/documents/Farmbill07ruraldevelopment.pdf>; see also chart at App. A.

our scattered wilderness remnants.”⁷⁶ The doctrine of adverse possession illustrates the law’s preference for development over conservation.

E. Pro-Development Policy: Adverse Possession

The doctrine of adverse possession takes title from the original owner and awards it to an interloper based on *use* of the property.⁷⁷ The transfer occurs without the consent and over the objection of the title owner.⁷⁸ Use is valued over non-use, a concept nineteenth-century jurists sharpened by measuring the actions required for adverse possession by the character of the land involved.⁷⁹ If the land was already developed (with a residence, for example), the adverse possessor must have done *more* to claim title; he must have engaged in frequent and conspicuous use.⁸⁰ Conversely, if the land was undeveloped, minor and sporadic use qualified as actual possession. It became markedly easier to adversely possess wilderness than developed land.⁸¹ In the name of progress courts took title from the title owner and awarded it to the interloper on such limited grounds as digging of sand and gravel and allowing others to do so,⁸² berry picking and timber storing,⁸³ gathering firewood,⁸⁴ hunting and hiking,⁸⁵ and culling and taking natural hay.⁸⁶

⁷⁶ John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 557 (1996).

⁷⁷ Scott Andrew Shepard, *Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests*, 44 U. MICH. J.L. REFORM 557, 569 (2011).

⁷⁸ See 3 AM. JUR. 2d *Adverse Possession* § 246 (2011).

⁷⁹ See, e.g., *Bell v. Denson*, 56 Ala. 444, 449 (1876) (specifically accounting for the “character of the land”); *Mooney v. Cooledge*, 30 Ark. 640, 655 (1875); *Worthley v. Burbanks*, 45 N.E. 779, 781 (Ind. 1897) (quoting *Ewing’s Lessee v. Burnet*, 36 U.S. (11 Pet.) 41, 53 (1837)) (stating that “much depends on the nature and situation of the property, the uses to which it can be applied”).

⁸⁰ Cf. *Worthley*, 45 N.E. at 781–82 (holding that, unlike cultivated land or land containing a residence, uncultivated land could be obtained by adverse possession through “slight acts of dominion”).

⁸¹ See, e.g., *id.* at 783 (holding that “fruitless efforts . . . year to year to make some beneficial use of the land” were sufficient to establish adverse possession over uncultivated, wild land).

⁸² See *Ewing’s Lessee*, 36 U.S. (11 Pet.) at 49, 51–54.

⁸³ See *Marshall v. Epps*, No. 38792, 1990 WL 10092038, at *8 (Mass. Land Ct. Feb. 6, 1990), *aff’d*, 575 N.E.2d 781 (Mass. App. Ct. 1991).

⁸⁴ See *Stowell v. Swift*, 576 A.2d 204, 205–06 (Me. 1990); *Johnson v. Town of Dedham*, 490 A.2d 1187, 1190 (Me. 1985); *Gurwit v. Kannatzer*, 788 S.W.2d 293, 296

How could owners of undeveloped land protect against adverse possession when adverse possession could be awarded on such limited use? One solution was to develop the land. In other words, America's adverse possession doctrine incentivized owners to protect against adverse claims by themselves developing their land. "The structure of adverse possession doctrine encourages both the owner and the adverse claimant to develop wild lands, and thus to despoil them, in the interest of either retaining or obtaining title."⁸⁷

Several states, recognizing the inequity inherent in adverse possession, statutorily limited its reach.⁸⁸ Few, however, looked deeper into the genesis of the public policy motivating adverse possession. The Florida Supreme Court, however, alluded to the doctrine's historical roots:

The concept of adverse possession is an ancient and, perhaps, somewhat outdated one. It stems from a time when an ever-increasing use of land was to be, and was, encouraged. Today, however, faced, as we are, with problems of unchecked over-development, depletion of precious natural resources, and pollution of our environment, the policy reasons that once supported the idea of adverse possession may well be succumbing to new priorities.⁸⁹

Adverse possession is but one example of common law property jurisprudence that integrates the nineteenth-century premium on land development.⁹⁰ Significantly, courts employ the same philosophy when deciding easement disputes.

(Mo. Ct. App. 1990); *Sleboda v. Heirs at Law of Harris*, 508 A.2d 652, 653, 659 (R.I. 1986); *Derryberry v. Ledford*, 506 S.W.2d 152, 155, 158 (Tenn. Ct. App. 1973).

⁸⁵ See *Kline v. Bourbon Woods, Inc.*, 684 S.W.2d 938, 940 (Mo. Ct. App. 1985).

⁸⁶ See *Weiss v. Meyer*, 303 N.W.2d 765, 769-70 (Neb. 1981); *Thompson v. Hayslip*, 600 N.E.2d 756, 760 (Ohio 1991). The true owner lost property in both cases due to an adverse claimant's harvesting of hay.

⁸⁷ Sprankling, *supra* note 42, at 817.

⁸⁸ 39 AM. JUR. PROOF OF FACTS 2d 261 § 2 (2010).

⁸⁹ *Meyer v. Law*, 287 So. 2d 37, 41 (Fla. 1973), *superseded by statute on other grounds*, FLA. STAT. § 95.16 (1974), *as recognized in* *Seton v. Swann*, 650 So. 2d 35, 37 (Fla. 1995).

⁹⁰ Professor John Sprankling details five more property law doctrines infused with pro-development, anti-wilderness policy, including the doctrines of waste, possession as notice to a bona fide purchaser, good faith improver, trespass, and nuisance. In each instance, early American courts molded the common law to vest title in the industrious user over the idle claimant. Sprankling, *supra* note 76, at 530-56.

II. EASEMENTS AND THE DRIVE TO USE AND DEVELOP LAND

*"[T]he easement is based on social considerations encouraging land use"*⁹¹

Generally speaking, an easement is an interest in real estate that gives one person the right to use another's land for a specific purpose.⁹² Easements hinge on use rather than ownership, entitling the easement holder to use the burdened property only to the extent necessary to realize the rights conferred by the easement.⁹³ Easements are especially powerful because they often "run with the land" and can therefore bind successive owners generation after generation.⁹⁴ Unlike a license, which also grants the use of one person's property to another for a specific use, easements are not revocable.⁹⁵

These broad characterizations, however, quickly give rise to what has been called "a Byzantine tangle of doctrine with sources in the law of property and contract and in courts of equity."⁹⁶ Needless rules and obsolete policy justifications create a convoluted field of law.⁹⁷ Hoping to clarify otherwise complex and archaic land use law, the Restatement (Third) of Property integrates the law of easements, profits, and covenants and unifies the diverse legal constructs of each into a single streamlined field labeled "servitudes."⁹⁸ Distinctions between negative and restrictive easements, as well as real covenants and

⁹¹ *Berge v. State*, 915 A.2d 189, 192 (Vt. 2006) (quoting *Traders, Inc. v. Bartholomew*, 459 A.2d 974, 979 (Vt. 1983)).

⁹² JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 1:1 (2011) ("An easement is commonly defined as a nonpossessory interest in land of another."); *RESTATEMENT (FIRST) OF PROPERTY: EASEMENT* § 450 (2011); see, e.g., *Fruth Farms, Ltd. v. Vill. of Holgate*, 442 F. Supp. 2d 470, 475 (N.D. Ohio 2006); *Hanna v. Robinson*, 167 S.W.3d 166, 170 (Ark. Ct. App. 2004) (citing BRUCE & ELY, *supra*); *Martin Drive Corp. v. Thorsen*, 786 A.2d 484, 489 (Conn. App. Ct. 2001); *Silacci v. Abramson*, 53 Cal. Rptr. 2d 37, 39 (Ct. App. 1996) ("[A]n easement is merely a right to use the land of another.").

⁹³ See, e.g., *Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp.*, 552 N.E.2d 66, 71 (Mass. 1990); *Russakoff v. Scruggs*, 400 S.E.2d 529, 531–32 (Va. 1991).

⁹⁴ BRUCE & ELY, *supra* note 92, § 9:1.

⁹⁵ *Id.* § 1:4.

⁹⁶ Antony Dnes & Dean Lueck, *Asymmetric Information and the Law of Servitudes Governing Land*, 38 J. LEGAL STUD. 89, 89 (2009).

⁹⁷ See *Morning Call, Inc. v. Bell Atl.-Pa., Inc.*, 761 A.2d 139, 142 (Pa. Super. Ct. 2000) ("The classification of interests in property which confer the right to use another's land is a complex subject framed by arcane historical rules.").

⁹⁸ *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 1.1 cmt. a (2000); see *Lobato v. Taylor*, 71 P.3d 938, 953 n.11 (Colo. 2002) (en banc).

equitable servitudes, are largely abolished.⁹⁹ Antiquated limitations like horizontal privity requirements are also abolished.¹⁰⁰ The Restatement is a step in the right direction.¹⁰¹ It even accounts—in a few instances—for land conservation.¹⁰² But it is a small step. The Restatement continues to recognize land use and development as a motivating policy in property law and courts continue to rely on common law precepts rooted in nineteenth-century anti-conservation bias.

A. *The Policy Promoting Use and Development*

At the heart of a great deal of easement law is a policy that promotes land use and development. In 2006, for example, the Vermont Supreme Court in *Berge v. State* implied the existence of an easement even though the original parties did not create one.¹⁰³ In doing so, the court relied heavily on nineteenth-century pro-development philosophy geared to provide claimants as much use and enjoyment of land as possible.¹⁰⁴

In *Berge*, a landowner conveyed 7,001 acres to the State of Vermont by a deed in 1959.¹⁰⁵ The State then designated most of the property as a wildlife management area, which included two celebrated wetland habitats that support a variety of species.¹⁰⁶

⁹⁹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.3 cmt. c (2000) (dropping negative easements); *id.* § 1.4 (dropping the terms “Real Covenant” and “Equitable Servitude”).

¹⁰⁰ *Id.* § 1.4 cmt. a.

¹⁰¹ *But see* Dnes & Lueck, *supra* note 96, at 91 (describing servitude doctrine as a “quagmire of principles possessing little apparent coherence”) (internal quotation omitted).

¹⁰² Lance Liebman, *Foreword* to RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000) (“The new work is also attentive to our growing interest in conserving and preserving our natural, historical, and cultural resources and to the increasing use of conservation and preservation servitudes as an important means to that end.”).

¹⁰³ *Berge v. State*, 915 A.2d 189, 190 (Vt. 2006).

¹⁰⁴ *See id.* at 192.

¹⁰⁵ *See id.* at 190.

¹⁰⁶ *See Bill Sladyk Wildlife Management Area*, VTFISHANDWILDLIFE.COM, <http://www.vtfishandwildlife.com/library/maps/Wildlife%20Management%20Areas/St%20Johnsbury%20District/Bill%20Sladyk%20WMA.pdf> (last visited Dec. 31, 2011) (“[The] Bill Sladyk Wildlife Management Area (WMA) is a 9,493-acre parcel of land owned and managed by the Vermont Fish & Wildlife Department. . . . In 1970 the Department was able to purchase the timber rights to the property from the Fillemore Lumber Company of Stanstead, Quebec. . . . A diversity of excellent wetland habitats can be found throughout the WMA. Two wetlands of ecological significance include Cranberry Bog and Halfway Pond. Cranberry Bog is a 26-acre peatland bog with stunted tamaracks, black spruce, and the carnivorous pitcher

Notably, the grantor did not convey all her property by the 1959 deed.¹⁰⁷ She reserved thirty-eight acres that bordered a pond.¹⁰⁸ Although she did not retain an express easement for automobile access to the thirty-eight acres, she could access the land by water.¹⁰⁹

Two years later, the grantor conveyed the thirty-eight acres to developers.¹¹⁰ That conveyance again omitted any reference to any easement across the State's wildlife preserve.¹¹¹ The developers demonstrated their knowledge of easements when they divided the thirty-eight acres into eighteen lots and expressly reserved a right-of-way for each lot over every other lot in the subdivision.¹¹²

Thirty-six years later, after a succession of various owners, the claimant bought two of the eighteen lots.¹¹³ The claimant accessed the lots by car over a gravel road running across the State's wildlife preserve.¹¹⁴ Although the claimant owned a boat and could access the property via public boat launch, the claimant demanded vehicle access.¹¹⁵ When the State put a gate across its road, the claimant sued seeking a permanent interest in the use of the State's land bisecting the wildlife preserve.¹¹⁶

The claimant argued that the 1959 deed created an implied easement over the State's land because otherwise the grantor's retained property would not have vehicular access.¹¹⁷ In granting the easement, the court looked to a nineteenth century case that justified implied easements when essential to the "enjoyment of the principal thing conveyed."¹¹⁸ In fact, the court's description of the policy motivating its ruling stemmed from three nineteenth

plant. Halfway Pond is one of the most pristine spruce-lined ponds in Essex County.").

¹⁰⁷ See *Berge*, 915 A.2d at 190.

¹⁰⁸ See *id.*

¹⁰⁹ See *id.*

¹¹⁰ See *id.*

¹¹¹ See *id.*

¹¹² See *id.*

¹¹³ See *id.*

¹¹⁴ See *id.*

¹¹⁵ See *id.*

¹¹⁶ See *id.*

¹¹⁷ See *id.* at 191.

¹¹⁸ *Id.* (quoting *Smith v. Higbee*, 12 Vt. 113, 123 (1840)).

century cases.¹¹⁹ “The real lesson of these cases, however, lies in the nature of the property interest protected. . . . ‘[S]ince the easement is based on social considerations encouraging land use, its scope ought to be sufficient for the dominant owner to have the reasonable enjoyment of his land for all lawful purposes.’ ”¹²⁰

It did not matter that the original parties did not create an easement thirty-six years earlier in 1959. It did not matter that the claimant bought the property knowing it lacked vehicular access. It did not matter: (1) that the claimant paid nothing and the State received no compensation for a valuable and irrevocable real property interest; (2) that the claimant could access his property by water; and, most importantly, (3) that the servient estate was a wildlife preserve. The court blithely mentions in a footnote that “some seventeen contractors” had cut across the wildlife preserve to develop the claimant’s parcel.¹²¹

And what of the remaining sixteen lots? The owners of those lots were not parties to the litigation, but presumably their lots also lacked automobile access. Would each be entitled to his or her own easement over the wildlife preserve?¹²²

Hundreds of “modern” easement decisions rest, at least in part, on nineteenth-century pro-development policy. *Berge* is but one example. In *Johnson v. Suttles*, another example, the court relied on “Oklahoma’s express policy of land utilization” to award an easement to the claimant where the claimant could easily access his property but could not easily access *all* of his property.¹²³ A creek winding through his land made the upper

¹¹⁹ See *id.* at 192 (citing *Willey v. Thwing*, 34 A. 428, 428–29 (1896) (acknowledging existence of easement where “necessary to the enjoyment of the land”); *Wiswell v. Minogue*, 57 Vt. 616, 621 (1885) (holding that easement arises from the “necessity of a right of way to the reasonable use and enjoyment of land”); *Higbee*, 12 Vt. at 123).

¹²⁰ *Berge*, 915 A.2d at 192 (quoting *Traders, Inc. v. Bartholomew*, 459 A.2d 979, 979–80 (Vt. 1983)).

¹²¹ *Id.* at 193 n.3.

¹²² Ironically, the Court insists that it not be constrained by antiquated common law precepts. See *id.* at 194–95. Older cases held that access to property by water affords owners sufficient use and enjoyment of their land. See *id.* at 191. Rejecting this precedent “in light of current modes of transportation,” the court pontificated that “[w]e should not freeze the common law in time.” *Id.* at 194–95. But the policy itself, the justification for court’s creation of an easement where it otherwise did not exist, is clearly founded upon outdated maxim. *Id.*

¹²³ *Johnson v. Suttles*, 227 P.3d 664, 666, 669 (Okla. Civ. App. 2009).

portion of the tract "difficult" to access.¹²⁴ Pointing out that the defendants were "absentee landowners," the claimant sued for a permanent easement across the defendants' land to ease the difficulty of reaching the upper portion of his land.¹²⁵ In granting an easement across the "absentee landowner's" property, the court admitted that it was "influenced largely by considerations of public policy in favor of land utilization."¹²⁶ "If the necessity of an easement is such that without it the land *cannot be effectively used*, nothing less than explicit language in the conveyance negating the creation of the easement will prevent its implication."¹²⁷

In *Lobato v. Taylor*, the Colorado Supreme Court sitting en banc cited nineteenth-century case law to "imply a grant of such easement where it is especially necessary to the enjoyment of the dominant estate."¹²⁸ In *Lobato*, successors in title to an 1844 Mexican land grant demanded access to the Taylor Ranch for hunting, fishing, recreation, grazing, and timber.¹²⁹ In granting a prescriptive easement, an easement by estoppel, and an easement by implied grant, the court reiterated that the law serves to facilitate the *use* of land, not its preservation.¹³⁰

In *Hunker v. Whitacre-Greer Fireproofing Co.*, the owner of 2,000 acres granted a recreational easement to a hunting club for the sole purpose of fox hunting.¹³¹ When the land owner—a member of the hunting club—joined a faction that split from the club, both entities claimed the right to hunt foxes on the 2,000 acres.¹³² Could the easement holder exclude the landowner from also hunting foxes? The trial court said yes, citing evidence that two clubs hunting on 2,000 acres "would diminish, or totally eliminate, the quarry being hunted."¹³³ The appellate court reversed.¹³⁴ The issue of whether the easement holder could

¹²⁴ *Id.* at 666.

¹²⁵ *See id.*

¹²⁶ *Id.* at 669 (quoting RESTATEMENT (FIRST) OF PROP. § 476 cmt. g (1944)).

¹²⁷ *Id.* (citation omitted).

¹²⁸ *Lobato v. Taylor*, 71 P.3d 938, 953 (Colo. 2002) (en banc) (quoting *Yunker v. Nichols*, 1 Colo. 551, 554 (Colo. 1872)).

¹²⁹ *See id.* at 942–43.

¹³⁰ *See id.* at 953.

¹³¹ *Hunker v. Whitacre-Greer Fireproofing Co.*, 801 N.E.2d 469, 469 (Ohio Ct. App. 2003).

¹³² *See id.* at 470.

¹³³ *Id.* at 472.

¹³⁴ *See id.*

exclude the landowners could not be resolved, the court said, by the fact that too much fox hunting would likely eliminate the quarry because the question “ha[d] not yet arisen.”¹³⁵ In short, one had to wait until all the foxes had been killed before bringing a claim.¹³⁶ Again, the court relied on the policy that land is meant to be used; the law must allow all parties “to fully utilize their property.”¹³⁷

Different courts articulate this pro-development policy in different ways. With regard to implied easements, some courts use economic terms, stating that land without reasonable access is “practically valueless.”¹³⁸ Others point to an owner’s inherent right to enjoy the land, asking whether an easement is “‘reasonably necessary for the enjoyment’ of the land.”¹³⁹ Several courts employ a utilitarian trope to create easements where necessary: “[T]he long-standing public policy of this state . . . favors utilization of land.”¹⁴⁰ The utilitarian approach facilitates whichever result leads to the “beneficial use of [the] property,”¹⁴¹ or the “use and development” of the land.¹⁴²

No approach includes a counterbalance for land conservation. Although the pro-development policy is stated in varying ways, the focus always promotes land use, a phenomena clearly illustrated by implied easements.

¹³⁵ *Id.*

¹³⁶ *Id.* In response to the trial court’s concern that two groups hunting foxes on 2,000 acres would wipe out the foxes, and therefore the purpose of the easement, Justice Waite said that “[a]ppellants did not agree to supply live foxes or well-rested foxes or, for that matter, any foxes at all. The easement agreement merely allows appellees the right to hunt for any foxes that happen to be on the appellant’s property.” *Id.* at 474 (Waite, P.J., concurring).

¹³⁷ *Id.*

¹³⁸ See, e.g., *Cobb v. Daugherty*, 693 S.E.2d 800, 809 (W. Va. 2010) (quoting *Crotty v. New River & Pocahontas Consol. Coal Co.*, 78 S.E. 233, 234 (W. Va. 1913)).

¹³⁹ See, e.g., *Helms v. Tullis*, 398 So. 2d 253, 255 (Ala. 1981).

¹⁴⁰ *McCormick v. Schubring*, 672 N.W.2d 63, 69 (Wis. 2003) (citing *Dillman v. Hoffman*, 38 Wis. 559, 874 (1875)); see also *United States v. Jenks*, 129 F.3d 1348, 1353 (10th Cir. 1997) (stating that easements of necessity are “founded in a public policy favoring utilization of land”).

¹⁴¹ *Carroll v. Meredith*, 59 S.W.3d 484, 490–91 (Ky. Ct. App. 2001); see also *Murphy v. Burch*, 205 P.3d 289, 292–93 (Cal. 2009).

¹⁴² *Hewitt v. Meaney*, 226 Cal. Rptr. 349, 351 (Ct. App. 1986); see also *Murphy*, 205 P.3d at 298; *Reese v. Borghi*, 30 Cal. Rptr. 868, 872 (Dist. Ct. App. 1963).

B. Implied Easements

Contracting parties do not agree to create implied easements; the law fabricates the easement.¹⁴³ Traditionally, courts are loath to "rewrite" private agreements,¹⁴⁴ especially those involving the transfer of land.¹⁴⁵ Thus, the rewriting of a land conveyance to create an inheritable interest in real property that materially burdens one party while awarding a windfall to the other is remarkable in itself. To reach this result, courts imply that the contracting parties intended to create an easement when they in fact did not.¹⁴⁶ What enables courts to do this? Courts rely on a "presumption [that] has been characterized as somewhat of a fiction employed to serve the public policy to promote land use."¹⁴⁷

1. Required Elements

Implied easements—easements created by operation of law—generally fall into two categories:¹⁴⁸ easements by necessity and easements by implied grant.¹⁴⁹ Some courts have muddled the distinctions because both types require the creation of two or

¹⁴³ See generally *Wolf v. Owens*, 172 P.3d 124, 128 (Mont. 2007) (quoting *Hoyem Trust v. Galt*, 968 P.2d 1135, 1139 (Mont. 1998)) ("The way of necessity arises when the strong public policy against shutting off a tract of land and thus rendering it unusable gives rise to a fictional intent defeating any such restraint."); *BRUCE & ELY*, *supra* note 92, § 4:5 (describing the policy justifying the law's implication of an easement as a "legal fiction").

¹⁴⁴ *Marshall v. Murray Oldsmobile Co.*, 154 S.E.2d 140, 144 (Va. 1967) ("We are loathe . . . to declare invalid the formal undertakings of parties for . . . vague reasons of public policy."); see also *Gen. Aviation, Inc. v. Cessna Aircraft Co.*, 703 F. Supp. 637, 649 (W.D. Mich. 1988) ("[T]he Court is loath to rewrite a contract term expressly agreed to."), *rev'd on other grounds*, 915 F.2d 1038 (6th Cir. 1990); *Fortis Benefits v. Cantu*, 234 S.W.3d 642, 649 (Tex. 2007).

¹⁴⁵ See *Jones v. John S. Stubbs & Assocs., Inc.*, 221 A.2d 361, 364 (Md. 1966); *O'Connor v. Meskill*, 39 A. 1061, 1062 (N.J. Ch. 1898); *Hal Taylor Assocs. v. Unionamerica, Inc.*, 657 P.2d 743, 749 (Utah 1982); *Panos v. Olsen & Assocs. Const., Inc.*, 123 P.3d 816, 821 (Utah App. 2005).

¹⁴⁶ *Wolf*, 172 P.3d at 128.

¹⁴⁷ *Hewitt*, 226 Cal. Rptr. at 351; *Wolf*, 172 P.3d at 128 (quoting *Hoyem Trust*, 968 P.2d at 1139) ("The way of necessity arises when the strong public policy against shutting off a tract of land and thus rendering it unusable gives rise to a fictional intent defeating any such restraint.").

¹⁴⁸ See *BRUCE & ELY*, *supra* note 92, § 4:2.

¹⁴⁹ Easements by implied grant are also called easements by implied reservation, easements by prior existing use and easements implied from quasi easements. See *id.*; Note, *The Creation of Easements by Implication*, 13 IOWA L. REV. 74, 75 (1927).

more tracts from what was once a single tract.¹⁵⁰ However, the similarities end there. Easements by necessity require a “need” at severance for an easement to benefit either the parcel transferred or the parcel retained.¹⁵¹ Easements by implied grant require that the common owner, before severance, exercise apparent and continuous use of part of the land to benefit another part (quasi-easement), and a need at severance for the preexisting use to continue for the benefit of either the parcel transferred or the parcel retained.¹⁵²

Implied easements are not, per se, bad law. While overutilized due to an outmoded pro-development policy, a few arguments buttress the continued use of implied easements. Easements by necessity, for example, protect landowners from the specter of valueless property.¹⁵³ If the property is landlocked, if it is wholly inaccessible, what good is it? As our English progenitors put it, “[A]nyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist.”¹⁵⁴ If the parties to a land conveyance expressly envision a use that requires ready access, *and* the purchase price reflects the value of a fully accessible tract, it seems fair to imply an otherwise undocumented easement. It seems fair, because it reflects the intent of the contracting parties.

2. Overbroad and Expanding

Conversely, a host of arguments suggest that the current law of implied easements is too simplistic and far-reaching. First, modern public sentiment underscores that un-used land is not valueless, but is in fact more and more valuable.¹⁵⁵ As mentioned

¹⁵⁰ *Canali v. Satre*, 688 N.E.2d 351, 353 (Ill. App. Ct. 1997) (“Defendants, however, confuse the requirements for easements created by necessity with those created by prior use.”); *Howley v. Chaffee*, 93 A. 120, 122 (Vt. 1915) (“Much confusion of judicial thought has resulted from a failure to distinguish between ways of necessity and ways arising under this latter doctrine—a confusion, it must be admitted, from which our own cases have not wholly escaped.”); *Cobb v. Daugherty*, 693 S.E.2d 800, 807 (W. Va. 2010) (“The attorneys for the Cobbs and Daughertys, as well as the circuit court, appear to have confused and intermingled the standards for both easement types in the jury instructions.”).

¹⁵¹ *See Cobb*, 693 S.E.2d at 808.

¹⁵² *See BRUCE & ELY*, *supra* note 92, § 4:2.

¹⁵³ James W. Simonton, *Ways by Necessity*, 25 COLUM. L. REV. 571, 581 (1925).

¹⁵⁴ *See id.* at 572 (citing *Lord Darcy v. Askwith*, (1617) 80 Eng. Rep. 380 (K.B.) 381 (tracing the common law history of easements by necessity).

¹⁵⁵ *See Klass*, *supra* note 43, at 284.

above, several surveys reflect popular support for preserving undeveloped land.¹⁵⁶ A recent California decision calls attention to a distinct market for landlocked parcels.¹⁵⁷ That court argued that courts ought not "intrude into even a 'market' as distinctive as this one."¹⁵⁸ The fact that a landowner has no access or restricted access does not condemn the property as worthless.

And what about instances where tract isolation is intended? If the parties to a deed want to keep a tract landlocked, will the court honor that intention? Several cases illustrate that such transactions are not as rare as perhaps expected.¹⁵⁹ Curiously, the strong policy promoting land development often trumps even the parties' clear intent to keep property landlocked.¹⁶⁰

Others criticize modern implied easement law because of its breadth. Courts routinely award an easement to a grantee who lacks access to his or her land.¹⁶¹ But to what access is he or she entitled? Early courts held foot and horseback access

¹⁵⁶ See *supra* note 53 and accompanying text.

¹⁵⁷ See *Murphy v. Burch*, 68 Cal. Rptr. 3d 200, 206 (Ct. App. 2007), *aff'd*, 205 P.3d 289 (Cal. 2009).

¹⁵⁸ *Id.*

¹⁵⁹ See, e.g., *Galvin v. Gaffney*, 24 F. Supp. 2d 223, 232-33 (D. Conn. 1998); *Hewitt v. Meaney*, 226 Cal. Rptr. 349, 367 (Ct. App. 1986); *Daywalt v. Walker*, 31 Cal. Rptr. 899, 902-03 (Dist. Ct. App. 1963); *B & J Dev. & Inv., Inc. v. Parsons*, 887 P.2d 49, 52-53 (Idaho Ct. App. 1994); *Bob Daniels & Sons v. Weaver*, 681 P.2d 1010, 1017-18 (Idaho Ct. App. 1984); *Luthy v. Keehner*, 412 N.E.2d 1091, 1093 (Ill. App. Ct. 1980); *O'Connell v. Larkin*, 532 A.2d 1039, 1043 (Me. 1987); *Shpak v. Oletsky*, 373 A.2d 1234, 1240-41 (Md. 1977); *Orpin v. Morrison*, 120 N.E. 183, 183 (Mass. 1918); *White v. Landerdahl*, 625 P.2d 1145, 1147 (Mont. 1981); *Bradley v. Patterson*, 435 A.2d 129, 132 (N.H. 1981); *Mountain View, Inc. v. Bryson*, 336 S.E.2d 432, 433 (N.C. Ct. App. 1985); *Mougey Farms v. Kaspari*, 579 N.W.2d 583, 587 (N.D. 1998); *Traders, Inc. v. Bartholomew*, 459 A.2d 974, 977 (Vt. 1983).

¹⁶⁰ See, e.g., *Galvin*, 24 F. Supp. 2d at 233 (holding that the implication of an easement by necessity could not be defeated by a showing of contrary actual intent where the parcel was effectively landlocked); *B & J Dev. & Inv., Inc.*, 887 P.2d at 52 (holding that the expectations of one party will not defeat the implication of an easement on public policy grounds); *Bob Daniels & Sons*, 681 P.2d at 1018 ("[A]n easement arises independently from any contract and may even thwart the intent of the sellers or purchasers."); *Mountain View, Inc.*, 336 S.E.2d at 433 (holding that the Statute of Frauds bars parol evidence offered to override the implication of an easement by necessity); *Traders, Inc.*, 459 A.2d at 978 (holding that public policy overrides any evidence showing the parties' contrary intent).

¹⁶¹ See, e.g., *Riggs v. Bert*, 432 S.W.2d 852, 852 (Ark. 1968); *Bob Daniels & Sons*, 681 P.2d at 1013 ("Few things are as certain as death, taxes and the legal entanglement that follows a sale of landlocked real estate."); *Miller v. Schmitz*, 400 N.E.2d 488, 490-91 (Ill. App. Ct. 1980); *Davis v. Sikes*, 151 N.E. 291, 295 (Mass. 1926).

sufficient.¹⁶² However, contemporary courts reflect contemporary transportation.¹⁶³ Courts even reject access by boat as unreasonable,¹⁶⁴ awarding easements most often for automobile access.¹⁶⁵

Although some courts have held that access to a piece of property by navigable waters negates the “necessity” required for a way of necessity, the trend since the 1920s has been toward a more liberal attitude in allowing easements despite access by water, reflecting a recognition that most people today think in terms of “driving” rather than “rowing” to work or home.¹⁶⁶

The scope of the implied easement can also grow with the easement holder’s use. In the nineteenth-century case, *Whittier v. Winkley*, the court said that an easement by necessity is “necessary for all purposes to which the land is adapted” and that the “necessity is originally coextensive with all the lawful uses of which the . . . lot is capable.”¹⁶⁷ If the servient land is a wildlife preserve, as in *Berge*, can an easement holder run eighteen

¹⁶² *Smith v. Worn*, 28 P. 944 (Cal. 1892); *Roush v. Roush*, 55 N.E. 1017, 1019 (Ind. 1900); *Va. Hot Springs Co. v. Lowman*, 101 S.E. 326, 328 (Va. 1919).

¹⁶³ See *Ashby v. Maechling*, 229 P.3d 1210, 1218 (Mont. 2010) (stating that implied easements are “not limited to the precise uses and prevailing technology at the time of severance”).

¹⁶⁴ See *Stansbury v. MDR Dev., L.L.C.*, 889 A.2d 403, 415–16 (Md. 2006) (concluding easement of necessity arose notwithstanding access via water); *Cale v. Wanamaker*, 296 A.2d 329, 333 (N.J. Super. Ct. Ch. Div. 1972); *Berge v. State*, 915 A.2d 189, 192–95 (Vt. 2006) (determining that “access to navigable water is generally not legally sufficient, standing alone, to defeat a finding of necessity”). But see *Welch v. State*, 908 A.2d 1207, 1212 (Me. 2006) (reiterating “our rule . . . that land accessible by navigable water is not entitled to an easement by necessity”); *Murch v. Nash*, 861 A.2d 645, 651–52 (Me. 2004). See generally E.L. Kellett, Annotation, *Easements: Way by Necessity Where Property Is Accessible by Navigable Water*, 9 A.L.R.3d 600, 602 (1966).

¹⁶⁵ *Carr v. Barnett*, 580 S.W.2d 237, 240 (Ky. Ct. App. 1979); *Ashby*, 229 P.3d at 1218 (“[M]odern vehicle access and utility services may be allowed as part of an easement by necessity even though the easement arose as a legal matter before the general use of such improvements.”); *Berge*, 915 A.2d at 192 (“We depend on roads and automobiles for transporting not only our family and friends, but all our basic necessities to and from our homes . . .”).

¹⁶⁶ See *Cale*, 296 A.2d at 333.

¹⁶⁷ *Whittier v. Winkley* 62 N.H. 338 (1882); see *Myers v. Dunn*, 49 Conn. 71 (1881) (“The owner of land has a right to the most profitable use, the most beneficial enjoyment thereof He may erect buildings and raise grain upon, and dig ores beneath it; and when, by their conveyance to the defendant’s grantor the administrators imposed, in favor of the land granted, a way of necessity over the *locus in quo*, they are to be presumed to have intentionally done it for any or all of these purposes”).

wheelers, dump trucks, and cement trucks over the easement (and through the wildlife preserve) day and night? If the dominant holder's land supports such use, the answer is yes.¹⁶⁸

3. Strict Versus Reasonable Necessity

If the traditional law of implied easements sweeps too broadly, the current trend only extends its breadth. In other words, many courts award easements by necessity for a merely *reasonable* rather than a strict need.¹⁶⁹ "The more modern rule seems to be that the rule of a strict necessity applicable to an implied reservation or grant of an easement is not limited to one of absolute necessity, but to reasonable necessity"¹⁷⁰ This distinction between strict necessity and reasonable necessity is important because it illustrates the competing policies informing each approach.

Strict necessity more closely tracks the contracting parties' intent. The parties' presumed intent to create an easement should be inferred in only the most compelling circumstances.¹⁷¹ As a court in 1906 put it:

[Strict necessity] will not exist when a man can get to his property over his own land. That the way over his own land is too steep or too narrow or that other and like difficulties exist does not alter the case, and it is only when there is no way through his own land that a grantee can claim a right over that of his grantor.¹⁷²

¹⁶⁸ See *McFadden v. Sein*, 88 P.3d 740, 743 (Idaho 2004) ("[U]se of a general easement may be enlarged beyond the purposes originally required at the time the easement was created, so long as that use is reasonable and necessary and is consistent with the normal development of the land."); *Skow v. Goforth*, 618 N.W.2d 275, 276, 278 (Iowa 2000) (interpreting express easement "to drive teams" as allowing "ingress and egress for modern vehicular traffic, including farm tractors and implements"); *Berge*, 915 A.2d at 192. See generally Hunter C. Carroll, *Property—Easements by Necessity: What Level of Necessity Is Required?*, 19 AM. J. TRIAL ADVOC. 475, 477 (1995) (noting that "the property owner is entitled as a matter of public policy to its use for all lawful purposes").

¹⁶⁹ See Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 80 & n.21 (2005); ELY & BRUCE, *supra* note 92, § 4:6.

¹⁷⁰ *Cobb v. Daugherty*, 693 S.E.2d 800, 810 n.10 (W. Va. 2010).

¹⁷¹ See *Simonton*, *supra* note 153, at 580.

¹⁷² *Bully Hill Copper Mining & Smelting Co. v. Bruson*, 87 P. 237, 238 (Cal. Dist. Ct. App. 1906).

Only when a tract is wholly inaccessible is it more palatable to presume that the contracting parties *intended* to include an easement in the transaction because the property would be significantly devalued otherwise.¹⁷³

By contrast, most modern courts grant easements when an owner already has access, but the access is deemed too difficult or unreasonable.¹⁷⁴ This standard reflects the public policy theory.¹⁷⁵ "Under the public policy theory, an easement should be implied in any situation in which limited access to one of the parcels prevents the owner from making full and productive use of the land."¹⁷⁶ As a result, the policy favoring land development and therefore favoring an owner's reasonable access justifies creation of implied easements even when a parcel is already accessible. If a landowner's pre-existing access is too narrow,¹⁷⁷ too steep,¹⁷⁸ too marshy,¹⁷⁹ or if it requires a longer distance,¹⁸⁰ a

¹⁷³ See, e.g., *Burdess v. United States*, 553 F. Supp. 646, 653 (E.D. Ark. 1982); *Applegate v. Ota*, 194 Cal. Rptr. 331, 338 (Dist. Ct. App. 1983); *Carroll v. Meredith*, 59 S.W.3d 484, 492–93 (Ky. Ct. App. 2001). Courts also justify the strict-necessity rule as promoting certainty and stability of titles. See *Burling v. Leiter*, 262 N.W. 388, 391 (Mich. 1935); *Duff v. Matthews*, 311 S.W.2d 637, 641 (Tex. 1958).

¹⁷⁴ See, e.g., *Nunes v. Meadowbrook Dev. Co.*, 824 A.2d 421, 425–26 (R.I. 2003); *Cellco P'ship v. Shelby Cnty.*, 172 S.W.3d 574, 592–93 (Tenn. Ct. App. 2005); *Tschaggeny v. Union Pac. Land Res. Corp.*, 555 P.2d 277, 280 (Utah 1976); *Davis v. Henning*, 462 S.E.2d 106, 109 (Va. 1995); *Carstensen v. Chrisland Corp.*, 442 S.E.2d 660, 663–64 (Va. 1994).

¹⁷⁵ *ELY & BRUCE*, *supra* note 92, § 4:10 ("This test is more closely aligned with the public policy theory of easements of necessity.").

¹⁷⁶ *Id.*; see *Simonton*, *supra* note 153, at 580.

¹⁷⁷ See, e.g., *Anderson v. Lee*, 182 N.W. 380, 381–82 (Iowa 1921) (holding that landowner's strip ten feet wide and eighty rods in length from his property to the public highway was not sufficient access to his property to bar condemnation of a private road over a neighbor's land); *Hart v. Deering*, 111 N.E. 37, 39 (Mass. 1916) (finding five feet and nine inches as too narrow); *Henderson v. La Capra*, 307 S.W.2d 59, 65 (Mo. Ct. App. 1957) (too narrow for access by truck); *Lobdell v. Leichtenberger*, 658 A.2d 399, 403 (Pa. Super. Ct. 1995).

¹⁷⁸ See, e.g., *Bean v. Nelson*, 817 S.W.2d 415, 417 (Ark. 1991); *Wagner v. Fairlamb*, 379 P.2d 165, 168–69 (Colo. 1963) (en banc); *Beeson v. Phillips*, 702 P.2d 1244, 1247 (Wash. Ct. App. 1985) (no access barring "necessity" finding when lower portions of lot were separated by steep bluff 125 to 175 feet high).

¹⁷⁹ See, e.g., *Franklin v. Boatright*, 399 So. 2d 1132, 1133 (Fla. Dist. Ct. App. 1981); *Stuckey v. Collins*, 464 So. 2d 346, 348–49 (La. Ct. App. 1985); *Beck v. Mangels*, 640 A.2d 236, 242, 246–47 (Md. Ct. Spec. App. 1993).

¹⁸⁰ See, e.g., *McGowin Inv. Co. v. Johnstone*, 306 So. 2d 286, 288 (Ala. Civ. App. 1974); *Houston v. Hanby*, 232 S.W. 930, 932 (Ark. 1921) (although landowner had access to a public road by traveling 2 1/2 miles, the court found it impractical for the landowner to get timber from his land over this alternate route); *Wagstaff v. Sublette Cnty. Bd. of Cnty. Comm'rs*, 53 P.3d 79, 84 (Wyo. 2002).

difficult route,¹⁸¹ or considerable expense,¹⁸² courts will create easements by operation of law—all under the mantra of land development.

4. Common Owner Requirement

Those defending the modern approach to implied easements claim that the doctrine is not overbroad because both easements by necessity and easements by implied grant are limited by the requirement that the land must originally be held by a common owner.¹⁸³ The common ownership requirement, they argue, limits the implication of easements “to cases where it is most equitable to imply such servitudes.”¹⁸⁴ Courts will not create, for example, implied easements over a third party's land.¹⁸⁵

But common ownership, itself, is an obscure requirement. Courts diverge on whether the element is met when the common owner: leased part of the land,¹⁸⁶ did not own it in fee simple,¹⁸⁷

¹⁸¹ See *Custom Warehouse, Inc. v. Lenertz*, 975 F. Supp. 1240, 1250–51 (E.D. Mo. 1997). See generally Michael A. DiSabatino, Annotation, *Way of Necessity over Another's Land, Where a Means of Access Does Exist, but Is Claimed To Be Inadequate, Inconvenient, Difficult, or Costly*, 10 A.L.R. 4th 447 (1981).

¹⁸² See, e.g., *Daley v. Hughes*, 4 So. 3d 364, 370 (Miss. Ct. App. 2008) (stating that “the easement was reasonably necessary because the . . . only alternative route was by constructing a bridge across the creek at a cost of at least \$10,000”); *Daniel v. Fox*, 917 S.W.2d 106, 113 (Tex. Ct. App. 1996) (citing cases where “easements of necessity were sustained upon a showing that the cost of construction of a way over one's land as a means of access to a highway would require expense out of proportion to the value of the land”).

¹⁸³ *Hurlocker v. Medina*, 878 P.2d 348, 351 (N.M. Ct. App. 1994); *Koonce v. Brite Estate*, 663 S.W.2d 451, 452 (Tex. 1984); *Tschaggeny v. Union Pac. Land Res. Corp.*, 555 P.2d 277, 280 (Utah 1976); *Traders, Inc. v. Bartholomew*, 459 A.2d 974, 979 (Vt. 1983); see *ELY & BRUCE*, *supra* note 92, § 4:7 (“Because the public policy theory applies to all landlocked property, the common ownership requirement may be seen as a means to limit the implication of easements of necessity . . .”).

¹⁸⁴ *BRUCE & ELY*, *supra* note 92, § 4:7).

¹⁸⁵ See *Burlison v. United States*, 533 F.3d 419, 426–28 (6th Cir. 2008); *Teague v. Raines*, 605 S.W.2d 485, 488 (Ark. Ct. App. 1980) (quoting *Boullioun v. Constantine*, 54 S.W.2d 986, 987 (Ark. 1932)) (noting that easement of necessity cannot be established over land that was not in common ownership with landlocked parcel); *Roy v. Euro-Holland Vastgoed*, 404 So. 2d 410, 412 (Fla. Dist. Ct. App. 1981).

¹⁸⁶ See *First Nat'l Bank of Amarillo v. Amarillo Nat'l Bank*, 531 S.W.2d 905, 906 (Tex. Civ. App. 1975) (stating that ownership standard is not satisfied when a party owned one parcel in fee and held a leasehold interest or a life estate in the other parcel).

¹⁸⁷ See *Kennedy v. Bedenbaugh*, 572 S.E.2d 452, 454–55 (S.C. 2002).

owned the land concurrently with another,¹⁸⁸ and when the common owner is a governmental entity.¹⁸⁹ Moreover, how far back down the chain of title can a claimant go to find a common owner sufficient to support an implied easement? If the common owner can be the government, every landowner in the United States can arguably trace ownership back to a common owner, thus eviscerating the requirement altogether.¹⁹⁰ This, of course, presupposes that the common owner need not be the *immediate* grantor, “but is any common source in the chain of title to the two estates.”¹⁹¹

To illustrate, several claimants have successfully traced common ownership of their particular lot to government ownership—well over 100 years prior to the dispute.¹⁹² In *Montana Wilderness Ass’n v. United States Forest Service*,¹⁹³ the claimant traced common ownership back to the “checkerboard” grants offered by the government as inducement to build railroads.¹⁹⁴ The court dispenses with the common ownership requirement in one sentence: “Prior to the Northern Pacific Railroad land grant in 1864 the United States held title to all of the land.”¹⁹⁵ In *Moore v. Walsh*, a 1995 case, the court looked 118 years up the chain of title to find common ownership in the federal government.¹⁹⁶ In *Kellogg v. Garcia*, a 2002 case, the court backpedals to 1878 in order to find a common owner—again, the federal government.¹⁹⁷

¹⁸⁸ See *Riffle v. Worthen*, 939 S.W.2d 294, 298 (Ark. 1997) (“The joint ownership of one of the two tracts of land does not meet this requirement.”); *Lee v. Sch. Dist. No. R-1 of Jefferson Cnty.*, 435 P.2d 232, 236 (Colo. 1967); *Swieton v. Landoch*, 435 N.E.2d 1153, 1159–60 (Ill. App. Ct. 1982); *Garvin v. State*, 116 Misc. 408, 415–16, 190 N.Y.S. 143, 147–48 (Ct. Cl. 1921) (“[O]ne cannot have a right of way of necessity over land which the grantor never owned[,] except as tenant in common.”).

¹⁸⁹ See generally *ELY & BRUCE*, *supra* note 92, § 4:7 (“Controversy exists as to whether governmental ownership of both tracts fulfills the unity-of-title standard.”).

¹⁹⁰ See *Kinscherff v. United States*, 586 F.2d 159, 161 (10th Cir. 1978); *Utah v. Andrus*, 486 F. Supp. 995, 1002 (D. Utah 1979); *Kellogg v. Garcia*, 125 Cal. Rptr. 2d 817, 826 n.5 (Ct. App. 2002); *Moore v. Walsh*, 45 Cal. Rptr. 2d 389, 391 (Ct. App. 1995).

¹⁹¹ *Roy v. Euro-Holland Vastgoed*, 404 So. 2d 410, 413 (Fla. Dist. Ct. App. 1981).

¹⁹² *Kinscherff*, 586 F.2d at 161; *Andrus*, 486 F. Supp. at 1000; *Moore*, 45 Cal. Rptr. 2d at 390.

¹⁹³ 496 F. Supp. 880 (D. Mont. 1980).

¹⁹⁴ *Id.* at 885.

¹⁹⁵ *Id.*

¹⁹⁶ *Moore*, 45 Cal. Rptr. 2d at 391.

¹⁹⁷ *Kellogg v. Garcia*, 125 Cal. Rptr. 2d 817, 820–21 (Ct. App. 2002).

Why allow a claimant to dig back 124 years to the government's original ownership and through a series of previous owners who themselves did not assert this claim? Unsurprisingly, the *Kellogg* court relied on the government's nineteenth-century land use policy.¹⁹⁸ "During most of the 19th century, our public land policy was basically one of disposal [of lands owned by the United States] into non-Federal ownership to encourage settlement and development of the country."¹⁹⁹

The common ownership requirement is inconsistently applied and, when courts allow claimants latitude to prove that common ownership existed over a century ago, it is a toothless restriction.

C. Prescriptive Easements

Like implied easements, the historical preference for land development also informs prescriptive easements. Prescriptive easements arise when a person uses another's property without permission for a certain time and the owner fails to prevent the use.²⁰⁰ The interloper's use of the owner's land effectively transfers an inheritable property right to the interloper.²⁰¹ This transfer of property rights from the title owner to the interloper based on land use roughly parallels the doctrine of adverse possession.²⁰²

Courts sometimes wrestle over whether the interloper's actions confer title by adverse possession or confer a right to use the land by prescriptive easement.²⁰³ Both doctrines reflect the

¹⁹⁸ See *id.* at 826.

¹⁹⁹ *Id.* (alteration in original).

²⁰⁰ BRUCE & ELY, *supra* note 92, § 5:1.

²⁰¹ Romualdo P. Eclavea et al., Annotation, 28A CORPUS JURIS SECUNDUM *Easements* § 8 (2011).

²⁰² See *Tenala, Ltd. v. Fowler*, 921 P.2d 1114, 1119 (Alaska 1996); *Kunkel v. Fisher*, 23 P.3d 1128, 1130–31 (Wash. Ct. App. 2001) (noting that they are "often treated as equivalent doctrines"); Jonathan M. Purver, Annotation, 2 CORPUS JURIS SECUNDUM *Adverse Possession* § 2 (2011); see also John R. Kennel, Annotation, 25 AM. JUR. *Easements and Licenses in Real Property* § 45 (2d 2011). But see 17 WILLIAM B. STOEBUCK & JOHN W. WEAVER, 17 WASHINGTON PRACTICE SERIES *Real Estate: Property Law* § 2.7 (2d ed. 2011) (noting that prescription and adverse possession are interchangeable in Washington but for some differences).

²⁰³ See, e.g., *Kapner v. Meadowlark Ranch Ass'n*, 11 Cal. Rptr. 3d 138, 142 (Ct. App. 2004); *Claussen v. City of Lauderdale*, 681 N.W.2d 722, 727 (Minn. Ct. App. 2004); *Home of Econ. v. Burlington N. Santa Fe R.R.*, 736 N.W.2d 780, 784–85 (N.D. 2007).

philosophy that patterns of land possession and use should be encouraged and that an industrious occupant should be rewarded at the expense of an idle owner.²⁰⁴

1. Required Elements

Generally, a claimant seeking a prescriptive easement must show open and notorious, continuous and uninterrupted, and adverse use of another's land for the period of prescription.²⁰⁵ Some courts also require a showing that the use was exclusive,²⁰⁶ but exclusivity does not require that the claimant is the only one that uses the easement.²⁰⁷ Use by the title owner, for example, does not defeat exclusivity in some cases.²⁰⁸ Courts have applied these elements inconsistently,²⁰⁹ prompting inquiry into the origin of prescriptive easement law. The origin, however, is unclear at best.

2. Doctrinal Origin

"Much of the misunderstanding and confusion that surrounds the court's treatment of prescription comes from the historical fog out of which the doctrine emerged."²¹⁰ Why was it originally recognized? What philosophy did it honor? Some commentators trace prescription back to the Roman law of Usucapio,²¹¹ others suggest it derived from local custom.²¹² In

²⁰⁴ See *Kunkel*, 23 P.3d at 1130–31; Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611, 669–70 (1988).

²⁰⁵ See, e.g., *Aaron v. Dunham*, 41 Cal. Rptr. 3d 32, 35 (Ct. App. 2006); *Sjuts v. Granville Cemetery Ass'n*, 719 N.W.2d 236, 240 (Neb. 2006); *Kunkel*, 23 P.3d at 1130.

²⁰⁶ See, e.g., *Weyerhaeuser Co. v. Brantley*, 510 F.3d 1256, 1265–66 (10th Cir. 2007); *Ammer v. Ariz. Water Co.*, 818 P.2d 190, 194 (Ariz. Ct. App. 1991); *Page v. Bloom*, 584 N.E.2d 813, 815 (Ill. App. Ct. 1991); *Hoffman v. United Iron & Metal Co.*, 671 A.2d 55, 64–65 (Md. Ct. Spec. App. 1996).

²⁰⁷ See *BRUCE & ELY*, *supra* note 92, § 5:23 (stating that exclusivity does not mean the claimant is the only one using the easement; "use shared with the owner of the servient estate generally may form the basis for a prescriptive easement").

²⁰⁸ See *id.*

²⁰⁹ See *Patch v. Baird*, 435 A.2d 690, 691 (Vt. 1981) ("The elements of adverse use are not always expressed in the cases in the same language, and confusion sometimes results.") (citations omitted); *Kunkel*, 23 P.3d at 1130 n.2 ("Many cases conflate various elements as different sub-components of the same element.").

²¹⁰ 2 GEORGE W. THOMPSON & LEONARD A. JONES, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY § 337, at 158 (1980).

²¹¹ See William B. Stoebuck, *The Fiction of Presumed Grant*, 15 U. KAN. L. REV. 17, 18 (1966).

early England, a claimant seeking land rights based on prescription had to show he used the property since time immemorial.²¹³

Without benefit of documentation, immemorial use proved ownership. Before 1275, immemorial use was either beyond living memory or at least back to the Norman Conquest.²¹⁴ In 1275, Parliament shortened the limit of legal memory to a date certain: 1189, beyond which English law presumed man's memory could not reliably extend.²¹⁵

But year after year, 1189 became increasingly distant, so English common law developed a fictional justification called "lost grant."²¹⁶ Rather than award prescriptive rights due to a claimant's immemorial use, the law awarded prescriptive rights based on the number of years of use.²¹⁷ If a particular use had long existed—but not necessarily since 1189—it was presumed that a grant authorizing such use had been made, but that the grant itself had been lost.²¹⁸

"American courts generally adopted the lost grant doctrine as part of the common law."²¹⁹ This presumption—that continued use reflects a fictional grant that was then lost—has propped up the law of prescriptive easements in America for some time.²²⁰ In light of the Statute of Frauds and modern

²¹² See A. W. B. SIMPSON, *A HISTORY OF THE LAND LAW* 110 (2d ed. 1986).

²¹³ See Stoebuck, *supra* note 211, at 19.

²¹⁴ See *id.*

²¹⁵ See *id.*; BRUCE & ELY, *supra* note 92, § 5:1 ("English law first presumed that a use that had continued 'during time whereof the memory of man runneth not to the contrary' had a lawful origin.").

²¹⁶ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000); BRUCE & ELY, *supra* note 92, § 5:1.

²¹⁷ Stoebuck, *supra* note 211, at 19–20. Twenty years was the generally accepted limitation period originally set for prescriptive claims. See *id.* at 21.

²¹⁸ See *Crigger v. Fla. Power Corp.*, 436 So. 2d 937, 941–42 (Fla. Dist. Ct. App. 1983) (reviewing development of lost grant fiction); *Big Cottonwood Tanner Ditch Co. v. Moyle*, 174 P.2d 148, 152–56 (Utah 1946). For a more in depth discussion of the court's holding in *Big Cottonwood* as it relates to the fiction of the "lost grant," see Mark A. Clawson, *Prescription Adrift in a Sea of Servitudes: Postmodernism and the Lost Grant*, 43 DUKE L.J. 845 (1994).

²¹⁹ BRUCE & ELY, *supra* note 92, § 5:1. See generally *Carter v. Walker*, 65 So. 170 (Ala. 1914); *Jessup v. Bard*, 201 S.W.2d 564 (Ky. 1947); *Marr v. Hemenny*, 297 N.W. 504 (Mich. 1941); *Wilson v. Williams*, 87 P.2d 683 (N.M. 1939); *Ward v. Warren*, 82 N.Y. 265 (1880); *Cornett v. Rhudy*, 80 Va. 710 (1885); *Tracy v. Atherton*, 36 Vt. 503 (1864).

²²⁰ See BRUCE & ELY, *supra* note 92, § 5:1.

recording statutes, transferring property interests based on imaginary agreements that are themselves imagined lost retains little, if any, relevance.²²¹ Such a thin and antiquated legal fiction would have eroded the use of prescriptive easements long ago but for the fact that prescription, like adverse possession, advances an overarching policy promoting land use and development.²²² As courts began to reject the “lost grant” rationale, they analogized prescription to adverse possession, grafting adverse possession’s policies and rationales to prescriptive easements.²²³

3. *Landowner Diligence / Certainty of Title*

In light of this dubious history, some call for abolition of prescriptive easements,²²⁴ but proponents contend that prescription can be justified.²²⁵ For one, the threat of prescription encourages landowner diligence.²²⁶ But how is landowner diligence beneficial? Presumably, diligence connotes knowledge of property boundaries and vigilance as to all permitted uses. A vigilant owner builds fences, puts up signs, installs lights and often introduces other means of property protection. An absentee owner alters little, if anything. As a result, it is more likely that a diligent landowner can prevent prescription through such vigilance. But it is circular to suggest that prescription is justified by landowner diligence merely because landowner diligence protects against prescription.

²²¹ See *Plaza v. Flak*, 81 A.2d 137, 139 (N.J. 1951); *Morning Call, Inc. v. Bell Atl.-Pa., Inc.*, 761 A.2d 139, 142, 143 & n.7 (Pa. 2000); *Hernandez*, *supra* note 169, at 106 (“[T]he fanciful fiction of the lost grant, which bears no rational relation to modern property law, should be discarded.”).

²²² See William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 83 (1996) (“A review of authorities on the subject does not provide an exact reason why prescription and adverse possession became part of American law; although there is little doubt it was a result of the pro development effect of the doctrines and common law tradition.”).

²²³ See BRUCE & ELY, *supra* note 92, § 5:1 (citing *Felgenhauer v. Soni*, 17 Cal. Rptr. 3d 135, 138 (Ct. App. 2004); *Downing v. Bird*, 100 So. 2d 57, 64 (Fla. 1958); *Plaza*, 81 A.2d at 139).

²²⁴ See Ackerman & Johnson, *supra* note 222, at 79; *Hernandez*, *supra* note 169, at 105–06.

²²⁵ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (2000).

²²⁶ See *id.*

Proponents also claim prescription facilitates certainty of title.²²⁷ Technical mistakes in land conveyances can be corrected when an adverse user claims title.²²⁸ In such instances uncertainty from conveyance errors would be solved by vesting rights in the person who uses the land.²²⁹ This simplistic approach, however, betrays the uncertainty that prescription breeds. Where modern recording statutes seek to secure confidence in title ownership,²³⁰ prescription foments uncertainty.²³¹ Whether the disputed tract has been properly recorded ought to be the first step in any prescription dispute.

As it is, courts subvert the laudable goals of recording statutes by focusing instead on the adverse claimant and how long she used the property.²³² This approach destabilizes real estate transactions by undermining title certainty for buyers and creditors who justifiably rely on recording statutes.²³³ Moreover, the "lost grant" doctrine—which is still recognized in some jurisdictions²³⁴—is antithetical to the recording acts.²³⁵ A

²²⁷ See 4 RICHARD R. POWELL, *POWELL ON REAL PROPERTY* § 34.10[1] (2011).

²²⁸ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (2000).

²²⁹ See *id.*

²³⁰ See Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 231–33 (1962); Dan S. Schechter, *Judicial Lien Creditors Versus Prior Unrecorded Transferees of Real Property: Rethinking the Goals of the Recording System and Their Consequences*, 62 S. CAL. L. REV. 105, 109 (1988) (“[A] number of commentators seem to agree that the fundamental goal of any recording system is to promote the certainty of land titles.”); Jeanne L. Schroeder, *Some Realism About Legal Surrealism*, 37 WM. & MARY L. REV. 455, 460 n.16 (1996) (“The original purpose of recording statutes was ‘rebuttal of [the] fraud created by possession.’”) (alteration in original).

²³¹ See generally *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584 (Cal. 1984). See also *Ackerman & Johnson*, *supra* note 222, at 92 (stating the prescription “represent[s] the generation of animosity between neighbors, a source of damages to land or loss of land ownership, and the creation of uncertainty for the landowner”) (citations omitted).

²³² See *Felgenhauer v. Soni*, 17 Cal. Rptr. 3d 135, 138 (Ct. App. 2004); *Plaza v. Flak*, 81 A.2d 137, 139 (N.J. 1951).

²³³ See *Hernandez*, *supra* note 169, at 108 (“The sole cause of concern for purchasers or creditors is that prescription is sanctioned by law.”).

²³⁴ See *Stoebuck*, *supra* note 211, at 22–23 (citing *Carter v. Walker*, 65 So. 170 (Ala. 1914); *Jessup v. Bard*, 201 S.W.2d 564 (Ky. 1947); *Marr v. Hemenny*, 297 N.W. 504 (Mich. 1941); *Romans v. Nadler*, 14 N.W.2d 482 (Minn. 1944); *Wilson v. Williams*, 87 P.2d 683 (N.M. 1939); *Ward v. Warren*, 82 N.Y. 265 (1880); *Telford v. Stettmund*, 235 P.2d 692 (Okla. 1951); *Cornett v. Rhudy*, 80 Va. 710 (1885); *Tracy v. Atherton*, 36 Vt. 503 (1864); *Shellow v. Hagen*, 101 N.W.2d 694 (Wis. 1960)).

²³⁵ See JOHN E. CRIBBET & CORWIN W. JOHNSON, *PRINCIPLES OF THE LAW OF PROPERTY* 374 (3d ed. 1989).

fictional grant—especially one that is fictionally lost—can never be recorded and thus can never give anyone record notice. Awarding adverse claimants prescriptive rights, which themselves are not recorded, cuts counter to the recording system.²³⁶ It is hard to see how the “title curing function” justifies prescriptive easements.

4. *Personhood Theory*

Proponents also contend that prescription fulfills expectations fostered by long use.²³⁷ Justice Holmes famously described the emotional attachment accompanying extended use of property.

A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man. It is only by way of reply to the suggestion that you are disappointing the former owner, that you refer to his neglect having allowed the gradual dissociation between himself and what he claims, and the gradual association of it with another. If he knows that another is doing acts which on their face show that he is on the way toward establishing such an association, I should argue that in justice to that other he was bound at his peril to find out whether the other was acting under his permission, to see that he was warned, and, if necessary, stopped.²³⁸

Holmes’s quote presumes several facts not essential to a successful prescription claim. Further, it is outdated.²³⁹ Given modern recording statutes, prescription disputes ought to be grounded in who has title rather than who has an expectation of possession due to continuous trespass. Even with unwitting trespassers, the presumption should support rather than subvert

²³⁶ See Hernandez, *supra* note 221, at 108.

²³⁷ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (2000).

²³⁸ O. W. Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897).

²³⁹ See generally Todd Barnett, *The Uniform Registered State Land and Adverse Possession Reform Act, a Proposal for Reform of the United States Real Property Law*, 12 BUFF. ENVTL. L.J. 1 (2004) (proposing a new recording system that would eliminate adverse possession); Susan Lorde Martin, *Adverse Possession: Practical Realities and an Unjust Enrichment Standard*, 37 REAL EST. L.J. 133 (2008) (criticizing older view prioritizing possession over ownership).

the recording statutes.²⁴⁰ In other words, recording statutes give notice to buyers of title ownership; such notice ought to extend to adverse claimants. Why burden the title owner who paid for the property and properly recorded it with the additional duty to keep vigil over the land when public records, many of which are electronically available, alert the world to a parcel's boundaries and ownership?

If recorded title itself is unclear or erroneous, perhaps a claimant's expectation derived from decades of uninterrupted use merits a prescriptive easement.²⁴¹ If so, Holmes's justification retains some relevance—but only when a claimant acts according to an erroneous deed or other document that has been recorded.²⁴²

Holmes's justification also leapfrogs basic fairness. He bypasses *purposeful* trespass in a blithe phrase when he condones a prescriptive claim "however you came by it."²⁴³ Even a claimant who knows the property belongs to another, according to Holmes, can take that property by prescription or adverse possession.²⁴⁴ The popular uproar in Boulder, Colorado over a recent adverse possession claim indicates that basic fairness remains a critical factor.²⁴⁵

In *McLean v. Kirlin*,²⁴⁶ a retired judge and his wife, herself a land-use lawyer, claimed ownership over a chunk of their neighbor's million-dollar residential lot by adverse possession.²⁴⁷ The landowner alleged that the retired judge and his wife leveraged their expertise in the law and intentionally sought to

²⁴⁰ See Martin, *supra* note 239, at 147–52.

²⁴¹ See, e.g., Thompson v. Dypvik, 220 Cal. Rptr. 46, 51–52 (Ct. App. 1985).

²⁴² Cf. Will Saxe, Note, *When "Comprehensive" Prescriptive Easements Overlap Adverse Possession: Shifting Theories of "Use" and "Possession,"* 33 B.C. ENVTL. AFF. L. REV. 175, 196–97 (2006) (proposing claimant demonstrate "good faith belief in the right to use" before prescriptive easement could be awarded).

²⁴³ Holmes, *supra* note 238.

²⁴⁴ See *id.*

²⁴⁵ See generally Don Kirlin & Susie Kirlin, *Heartfelt Thanks!*, LANDGRABBER.ORG (Nov. 19, 2008, 11:00 AM), <http://www.landgrabber.org/>.

²⁴⁶ This dispute was settled in trial court, but the author refers those interested to the trial court's findings of fact and conclusions of law under the following style and case number: Minute Order Re: Bench Trial, *McLean v. Kirlin*, No. 06 CV 982 (Dist. Ct. Boulder Cnty. Colo. filed Oct. 4, 2006).

²⁴⁷ See *id.* at 1–5.

take valuable land using adverse possession.²⁴⁸ Public outcry garnered national attention and prompted the Colorado Legislature to overhaul the state's adverse possession law: The case "prompted public protests; death threats against McLean and Stevens . . . [and] spurred changes to Colorado's adverse possession law."²⁴⁹

Finally, prescriptive easements provoke litigation and neighborhood conflict.²⁵⁰ Unable to rely on recorded title, feuding landowners must often sue to resolve prescription claims—claims that rest on multiple fact-intensive elements and that differ from jurisdiction to jurisdiction. Property law, in some form, should encourage peaceful interaction among neighbors.²⁵¹ Because courts have found that prescriptive easements "encourage[] expensive litigation between neighbors to either obtain some legal injunction to stop the use of the land, or obtain a legal ruling definitively establishing an easement," the doctrine fails to engender the peaceful co-existence promoted by the rule of law.²⁵²

²⁴⁸ See Jaclyn Allen, *Couple Accused of Faking Evidence in Boulder Land Dispute*, DENVER NEWS (Feb. 14, 2008, 6:56 PM), <http://www.thedenverchannel.com/news/15307055/detail.html>; Robert Siegel, *Landowner Fights Squatter's Right to Vacant Lot* (National Public Radio Broadcast Dec. 10, 2007), available at <http://www.npr.org/templates/transcript/transcript.php?storyId=17105532>.

²⁴⁹ Kirlin & Kirlin, *supra* note 245; see also Heath Urie, *Adverse Possession Bill Set for Senate Committee*, BOULDER DAILY CAMERA (Mar. 4, 2008, 3:43 AM), http://www.dailycamera.com/ongoing-coverage/ci_13137940.

²⁵⁰ See Saxe, *supra* note 242, at 201 ("[T]he doctrine of prescriptive easements actually increases litigation by forcing land owners to bring suit when a trespass has occurred."); Lewis J. Soffer & David E. Harris, *Ten Years After Silacci, Mehdizadeh and Scruby, Neighbors in California Are Still Behaving Like the "Hatfields and McCoys"*, MILLER & STARR REAL EST. NEWSALERT, July 2006, at 417, 417.

²⁵¹ See, e.g., *O'Dell v. Stegall*, 703 S.E.2d 561, 585–86 (W. Va. 2010) ("Easements by prescription are not favored in the law, because they essentially reward a trespasser and allow the taking of another's property without compensation. In this modern age, it does little to encourage civility between neighbors to have a rule whereby a landowner, who allows his neighbor to use some part of his land, runs the risk that the use may transmogrify into a legally-binding prescriptive use merely by the passage of time. Such a rule, as this case demonstrates, encourages expensive litigation between neighbors to either obtain some legal injunction to stop the use of the land, or obtain a legal ruling definitively establishing an easement. Worse, such a rule might impel neighbors to resort to aggressive, extra-legal acts in defense of their property.").

²⁵² *Id.* at 586.

Perhaps surprisingly, given the doctrinal history, outmoded policy justifications, and popular disdain, all fifty states recognize prescriptive easements in some form.²⁵³ In fact, prescriptive easements are becoming easier to claim because the required time of prescription is becoming shorter and shorter²⁵⁴ and because the Restatement dilutes the adversity element, furthering the reach of prescriptive easements.²⁵⁵ Moreover, due to the similarities in the two doctrines, claimants can often achieve the benefits of ownership under prescription without having to meet the more stringent adverse possession requirements.²⁵⁶

Many problems plague the doctrine of prescriptive easements. None of the rationales offered to support prescription—(1) promoting land use; (2) honoring a “lost grant,” (3) curing title errors, (4) encouraging landowner diligence; or (5) facilitating expectations—account for conservation or preservation. If anything, “absentee landowners” are disparaged in light of “our society’s traditional preference for the development of land.”²⁵⁷ As discussed below, use of prescriptive easements should be receding not growing.

D. Express Easements

With implied and prescriptive easements, the pro-development or anti-wilderness bias most readily appears in the creation of the easement—when the court fabricates property rights by operation of law rather than by agreement of the parties. Express easements, by contrast, raise no question as to the creation of the property interest. Rather, disputes hinge on problems that arise after creation of the easement, including scope of the easement,²⁵⁸ interference by the servient estate owner,²⁵⁹ modified use by the dominant estate owner,²⁶⁰ abandonment,²⁶¹ and relocation of the easement.²⁶²

²⁵³ See Ackerman & Johnson, *supra* note 222, at 106–10.

²⁵⁴ See *id.* at 92–93 (“Recent trends show a shortening of the period, which lessens the landowner’s opportunity to discover the adverse possessor.”).

²⁵⁵ BRUCE & ELY, *supra* note 92, § 5:11.

²⁵⁶ See Saxe, *supra* note 242, at 196.

²⁵⁷ Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939, 942 (1996); see BRUCE & ELY, *supra* note 92, § 5:1. See generally 4 POWELL, *supra* note 227.

²⁵⁸ See, e.g., *Mason v. Garrison*, 998 P.2d 531, 535 (Mont. 2000).

²⁵⁹ See, e.g., *id.* at 540; *Palmer v. Soloe*, 601 A.2d 1250, 1252 (Pa. 1992).

1. *Doctrinal Origin*

Before dissecting some of these areas, it is insightful to ask why the law recognizes express easements at all. Certainly, freedom of contract justifies enforcement of express easements. Allowing private agreements on property use and disposal is a bedrock legal and economic principle.²⁶³ But why bind subsequent landowners? What rationale supports enforcement of easements generation after generation? Doesn't the same laissez-faire economic model that justifies freedom of contract require maximum property alienation?²⁶⁴

When considering the question of whether to bind subsequent landowners, one scholar says the answer lies in the inducement to continue building, improving, and using property: "[W]e tolerate these 'dead hand' arrangements because they provide a long lasting security for land development and encourage property owners to invest in the long term improvements that are essential to the productive use of real estate."²⁶⁵ If this rationale has credence, the very idea of easements stems from a diffuse emphasis on encouraging development.

2. *Promoting Land Use: Servient Estate*

Take, for example, disputes between the easement holder and the owner of the servient estate arising from a right-of-way. Most courts agree that the owner of the servient estate may not put up obstacles or structures that encroach on the right-of-

²⁶⁰ See, e.g., *Daniel v. Town of Delhi*, 185 A.D.2d 500, 502, 586 N.Y.S.2d 359, 360–61 (3d Dep't 1992); *Petersen v. Port of Seattle*, 618 P.2d 67, 71 (Wash. 1980) (en banc).

²⁶¹ See, e.g., *Whipple v. Hatcher*, 658 S.E.2d 585, 586 (Ga. 2008); *Johnston v. Cornelius*, 218 P.3d 129, 135–36 (Or. App. 2009), *appeal denied*, 228 P.3d 1213 (Or. 2010); *Stonier v. Kronenberger*, 214 P.3d 41, 46 (Or. App. 2009).

²⁶² See, e.g., *Sloan v. Sarah Rhodes, L.L.C.*, 560 S.E.2d 653, 655 (Ga. 2002); *Lewis v. Young*, 92 N.Y.2d 443, 452, 705 N.E.2d 649, 653–54, 682 N.Y.S.2d 657, 661–62 (1998).

²⁶³ See Max Gibbons, *Of Windfalls and Property Rights: Palazzolo and the Regulatory Takings Notice Debate*, 50 UCLA L. REV. 1259, 1301 (2003); Richard E. Manning, *The Development of Restraints on Alienation Since Gray*, 48 HARV. L. REV. 373, 373–74 (1935).

²⁶⁴ See Gibbons, *supra* note 263, at 1298–99; Manning, *supra* note 263, at 389.

²⁶⁵ Carol M. Rose, Comment, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1403 (1982).

way.²⁶⁶ Some encroachments, however, are relatively minor and some easement holders rarely, if ever, use their easement. What policy guides courts on when to deviate from the general premise restricting the servient estate holder from encroachment?

The Supreme Court of Delaware, in *Vandeleigh Industries, L.L.C. v. Storage Partners of Kirkwood, L.L.C.*,²⁶⁷ allowed a substantial encroachment because the court did not see "the wisdom of requiring land to be put to no use at all."²⁶⁸ There, Vandeleigh had an express right-of-way easement over land used by Stor-All for commercial storage.²⁶⁹ Stor-All, fully aware of the encumbrance, built an eight-building facility and a retaining wall that extended to the center of Vandeleigh's easement.²⁷⁰ Before construction began, Vandeleigh objected to any interference with its easement, but Stor-All ignored the objection and began construction nonetheless.²⁷¹

At trial, the court ruled that a valid easement existed and that the easement was not limited to pedestrian traffic but extended to automobile use.²⁷² But then the court found that "Vandeleigh really has no current use for this parcel."²⁷³ Because the easement holder (Vandeleigh) was not currently using the property—and therefore infrequently using the easement—the court could not justify removing or tearing down the retaining wall.²⁷⁴

I'm just not certain I appreciate the wisdom of requiring land to be put to no use at all just so someone has a theoretical right Because otherwise what would happen is that land would sit there fallow in perpetuity, I would assume, without any use being made of it by anybody²⁷⁵

²⁶⁶ See *Howard v. Cramlet*, 939 S.W.2d 858, 860 (Ark. Ct. App. 1997); *Hoff v. Scott*, 453 So. 2d 224, 226 (Fla. Dist. Ct. App. 1984); *Lamb v. Wyo. Game & Fish Comm'n*, 985 P.2d 433, 437–38 (Wyo. 1999); see also *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584, 588–89 (Cal. 1984) (noting that where a servient estate owner encroaches upon the dominant estate owner's easement, the dominant estate owner may be entitled to legal relief).

²⁶⁷ 901 A.2d 91 (Del. 2006).

²⁶⁸ *Id.* at 100–01.

²⁶⁹ See *id.* at 92.

²⁷⁰ See *id.* at 93.

²⁷¹ See *id.*

²⁷² See *id.* at 94–95.

²⁷³ *Id.* at 95.

²⁷⁴ See *id.*

²⁷⁵ *Id.*

The court ruled that Vandeleigh, in order to realize the property rights conferred by the express easement, must demonstrate an imminent and viable use for the easement.²⁷⁶ Specifically, Vandeleigh must obtain “all necessary regulatory approvals for the use of the area of the [e]asement for a proper purpose of the [e]asement.”²⁷⁷

The court not only suspended a real property interest based on pro-development policy, it required more development to undo the suspension.²⁷⁸ In other words, Vandeleigh lost use of its easement because it did not use the easement enough.²⁷⁹ To regain use of the easement, it must affirmatively demonstrate plans to develop and improve its land.²⁸⁰

On appeal, Delaware’s Supreme Court agreed, reiterating that Vandeleigh “is not presently utilizing the area and has only speculative, uncertain, and vague plans to do so.”²⁸¹ Because the servient estate constructed an eight-building facility, and because the easement holder chose not to develop its property, the policy and the ruling favored the developer.²⁸² An easement holder’s right to use an express easement was effectively taken away because of disuse.²⁸³

In arriving at this result, the *Vandeleigh* court looked to the Restatement (Third) of Property for guidance.²⁸⁴ Conflicts among parties to a servitude, according to the Restatement, require a balancing test that maximizes “the aggregate utility of the servitude and the servient estate.”²⁸⁵ The Restatement commentary then defines “socially productive use of land” by listing several examples.²⁸⁶ Not surprisingly, “development for residential, commercial, recreational, and industrial uses,” is

²⁷⁶ *Id.* at 95–96.

²⁷⁷ *Id.* at 96.

²⁷⁸ *See id.* at 95–96.

²⁷⁹ *See id.*

²⁸⁰ *Id.* at 96.

²⁸¹ *Id.* at 99 (quoting *Renaissance Dev. Corp. v. Universal Props. Group, Inc.*, 821 A.2d 233, 237 (R.I. 2003)).

²⁸² *See id.* at 101–02.

²⁸³ *See id.*

²⁸⁴ *See id.* at 100.

²⁸⁵ *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 cmt. b (2000)).

²⁸⁶ *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 cmt. b (2000)).

included in the list.²⁸⁷ But the striking part of the definition sounds in conservation: "Socially productive uses of land include maintaining stable neighborhoods, conserving agricultural lands and open space" ²⁸⁸

Part III, below, discusses how modern courts should integrate environmental conservation into easement disputes. The Restatement's rather timid attempt lumps conservation onto the long standing pro-development policy. While refreshing to see *some* recognition of a conservation counterbalance, defining conservation as a pro-development "use" confuses more than refines. As if to illustrate this point, the court in *Vandeleigh* quotes much of the policy definition but omits all conservation language.²⁸⁹

3. *Promoting Land Use: Relocating Easements*

Development policy can also be seen in disputes about an easement's location. When expressly created, easement location will often be specified in writing.²⁹⁰ Once location has been established, most jurisdictions reject attempts by either the easement holder or the servient estate owner to unilaterally relocate the servitude.²⁹¹ Treating the location as variable would incite litigation and "discourage the improvement of the land upon which the easement is charged."²⁹² Fascinatingly, the same pro-development policy supporting the rule also supports the exception.

²⁸⁷ *Id.* (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 cmt. b (2000)).

²⁸⁸ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 cmt. b (2000).

²⁸⁹ *Vandeleigh*, 901 A.2d at 100–01.

²⁹⁰ *See, e.g.*, *Teitel v. Wal-Mart Stores, Inc.*, 287 F. Supp. 2d 1268, 1276–77 (M.D. Ala. 2003); *Edgell v. Divver*, 402 A.2d 395, 397–98 (Del. Ch. 1979); *Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App. 2000). The locations of prescriptive easements are generally determined by the actual use during the prescriptive period. *See, e.g.*, *Applegate v. Ota*, 194 Cal. Rptr. 331, 336–37 (Ct. App. 1983); *Swaggerty v. McKinzey*, 876 S.W.2d 795, 798 (Mo. Ct. App. 1994); *Smith v. Bixby*, 242 N.W.2d 115, 118–19 (Neb. 1976); *Keidel v. Rask*, 290 N.W.2d 255, 259 (N.D. 1980).

²⁹¹ *See, e.g.*, *Rogers v. P-M Hunter's Ridge, L.L.C.*, 967 A.2d 807, 820–26 (Md. 2009); *Estate Court, L.L.C. v. Schnall*, 49 A.D.3d 1076, 1077–78, 856 N.Y.S.2d 251, 253–54 (3d Dep't 2008); *Sweezy v. Neel*, 904 A.2d 1050, 1052 (Vt. 2006); *Crisp v. VanLaecken*, 122 P.3d 926, 927–29 (Wash. Ct. App. 2005); *R.C.R., Inc. v. Deline*, 190 P.3d 140, 147 (Wyo. 2008).

²⁹² *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1951).

In *M.P.M. Builders, L.L.C. v. Dwyer*,²⁹³ for example, the Massachusetts Supreme Court allowed the servient estate owner to unilaterally relocate an express easement based on utilitarian and development policies.²⁹⁴ There, a 1941 deed defined the location of an expressly created right-of-way.²⁹⁵ Sixty years later, a successor in interest to the servient estate demanded easement relocation to facilitate its plans to subdivide and develop its property.²⁹⁶ The easement holder objected. On appeal, the court began its analysis by recognizing the general rule against unilateral relocation.²⁹⁷

But the Court then turned to the Restatement for the premise that an easement ought not unduly diminish the servient owner's use or development of her estate.²⁹⁸ To the contrary, whether to allow unilateral relocation turns on "reducing the risk that the easement will prevent future beneficial development of the servient estate."²⁹⁹ As long as the easement holder retains the advantage of using the easement without material inconvenience, unilateral relocation is justified based on the prospect of future development.

4. *Promoting Land Use: Dominant Estate*

It may not be unfair to say that almost every interest in an express easement is vulnerable to development. Pro-development policy does not just favor servient estate owners and threaten easement holders. Servient estate holders are at risk, too.³⁰⁰ Easements that specify only "horse and buggy"³⁰¹ or "team

²⁹³ 809 N.E.2d 1053 (Mass. 2004).

²⁹⁴ See *id.* at 1057.

²⁹⁵ See *id.* at 1055.

²⁹⁶ See *id.*

²⁹⁷ See *id.* at 1056.

²⁹⁸ See *id.* at 1056–57 (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000)).

²⁹⁹ *Id.*

³⁰⁰ Scores of cases illustrate that even express easements are elastic. In the following cases, courts found express easements to include more rights than provided for in writing. See *Fla. Power Corp. v. Silver Lake Homeowners Ass'n*, 727 So. 2d 1149, 1150–51 (Fla. Dist. Ct. App. 1999) (finding that utility could replace wooden frame structures with modern steel structures and increase voltage carried by wires); *State Soil & Water Conservation Comm'n v. Stricklett*, 555 S.E.2d 800, 804 (Ga. Ct. App. 2001) (finding easement to operate and maintain a dam encompasses the right "to insure" the safety of the dam); *Mattson v. Mont. Power Co.*, 215 P.3d 675, 685–88 (Mont. 2009) (finding an express easement to flood and

and wagon,"³⁰² for example, expand with modernity to include all manner of cars and trucks. An express easement granted in 1820 for horse carts has been interpreted to include gravel trucks carrying twenty loads a day, expanding the width of the lane and generating dust in the plaintiffs' homes.³⁰³

Express easements providing a right-of-way have been interpreted to include the right to erect television cables and wires,³⁰⁴ as well as underground water, gas, or sewer pipes.³⁰⁵ An express easement to flood and drain land has been interpreted to allow erosion.³⁰⁶ Cutting the servient owner's trees to improve access to an easement has been upheld³⁰⁷ as well as "safety" and

drain servient land encompasses the right to cause erosion); *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, L.L.C.*, 740 N.E.2d 328, 336 (Ohio Ct. App. 2000) (holding that easement holder could remove trees from pipeline easement to facilitate aerial observation of pipeline); *Bowers v. Tex. E. Transmission Corp.*, 611 A.2d 1350, 1351–52 (Pa. Commw. Ct. 1992) (permitting easement holder to clear additional space and replace twenty-inch pipeline with thirty-six-inch pipeline); *Lamar Cnty. Elec. Coop. Ass'n v. Bryant*, 770 S.W.2d 921, 923 (Tex. App. 1989) (recognizing that easement holder could remove branches that interfered with power line easement).

³⁰¹ See *Skow v. Goforth*, 618 N.W.2d 275, 278 (Iowa 2000).

³⁰² *McDonnell v. Sheets*, 15 N.W.2d 252, 255 (Iowa 1944) (words "team and wagon" did not restrict type of vehicle that could use easement).

³⁰³ See *Hodgkins v. Bianchini*, 80 N.E.2d 464, 466–67 (Mass. 1948).

³⁰⁴ See *Parc Holdings, Inc. v. Killian*, 785 A.2d 106, 113–15 (Pa. Super. Ct. 2001) (general right-of-way easement by express reservation encompasses installation of utilities); *Harrington v. Bldg. Sys., Inc.*, 656 A.2d 624, 625 (R.I. 1995) (permitting use of right-of-way for utility purposes).

³⁰⁵ See *Cline v. Richardson*, 526 N.W.2d 166, 169 (Iowa Ct. App. 1994) (easement for ingress and egress included right to install underground utility lines); *Bivens v. Mobley*, 724 So. 2d 458, 464–65 (Miss. Ct. App. 1998) (declaring that express easement "for ingress and egress to a tract on which a home is to be built means more than a surface roadway" and encompasses right to lay waterline); *Hill Farm, Inc. v. Hill Cnty.*, 436 S.W.2d 320, 321 (Tex. 1969) (city street easement "is not confined to the surface but extends to a depth that will enable the urban authority to do that which is done in every street, including the laying of sewer, gas and water pipes"). Massachusetts even enacted a statute broadening express right-of-way easements. MASS. GEN. LAWS ANN. ch. 187, § 5 (West 2009) (granting owners with right of access over private ways right to construct utility lines on or under such ways). *But see* ME. REV. STAT. ANN. tit. 33, § 458 (1998); *Brown Props., Inc. v. Looper*, 732 S.W.2d 471, 473 (Ark. 1987) ("The grant of an easement for ingress and egress does not expressly or by implication include the right to lay utilities below the surface of the easement.").

³⁰⁶ See *Mattson v. Mont. Power Co.*, 215 P.3d 675, 685–88 (Mont. 2009).

³⁰⁷ See *Radspinner v. Charlesworth*, 369 N.W.2d 109, 115–16 (N.D. 1985); *see also* *Crane Hollow, Inc. v. Marathon Ashland Pipe Line, L.L.C.*, 740 N.E.2d 328, 336 (Ohio Ct. App. 2000).

“management” activities on the servient owner’s land—even though such activities were absent from the express agreement.³⁰⁸

Coincidentally, the backstop protecting servient estate owners from overzealous development by easement holders is the servient estate owner’s right to use and develop her land.³⁰⁹ As the Restatement puts it, allowing unilateral easement relocation is a “fair trade-off for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate.”³¹⁰ In short, your easement dispute—no matter what ilk—will enjoy policy support if: (1) you are developing/improving property;³¹¹ and (2) your use does not unreasonably impinge on your opponent’s right to develop/improve his property.³¹²

The fascinating aspect of pro-development policy in easement law is its adaptability. It is not relegated to prescription, creation of implied easements, or disputes stemming from a servient estate owner’s interference with an easement. The frightening aspect of pro-development policy is that no common law policy favoring conservation stands as a counterbalance.

III. CONSERVATION COUNTERWEIGHT

*[L]and use has historically been favored over disuse, and that therefore he who uses land is preferred in the law to he who does not*³¹³

³⁰⁸ State Soil & Water Conservation Comm’n v. Stricklett, 555 S.E.2d 800, 804 (Ga. Ct. App. 2001); Schwarz & Schwarz, L.L.C. v. Caldwell Cnty. R.R. Co., 677 S.E.2d 546, 549 (N.C. Ct. App. 2009) (railroad may use right-of-way easement to manage safety risks and may close crossing over tracks that interfered with railroad operations).

³⁰⁹ See, e.g., Swenson v. Marino, 29 N.E.2d 15, 17 (Mass. 1940); Parsons v. N.Y., N.H. & H.R. R.R. Co., 103 N.E. 693, 695 (Mass. 1913); Rendell v. Mass. Dep’t of Conservation & Recreation, No. 05MISC308443KCL, 2009 WL 4441212, at *17 (Mass. Land Ct., 2009).

³¹⁰ RESTATEMENT (THIRD) OF PROP.: (SERVITUDES) § 4.8(3) cmt. f (2000).

³¹¹ See Fla. Power Corp. v. Silver Lake Homeowners Ass’n, 727 So. 2d 1149, 1150 (Fla. Dist. Ct. App. 1999); *Radspinner*, 369 N.W.2d at 115–16.

³¹² See M.P.M. Builders, L.L.C. v. Dwyer, 809 N.E.2d 1053, 1056–58 (Mass. 2004).

³¹³ Finley v. Yuba Cnty. Water Dist., 160 Cal. Rptr. 423, 427 (Ct. App. 1979).

A. *Restricting Implied Easements*

As discussed above, courts grant implied easements where parties to the land conveyance did not. As a result, the dominant estate holder receives a windfall while the servient estate is burdened by an inheritable property interest for which the servient estate holder receives no compensation.³¹⁴ Many decisions creating implied easements rely on public policy that promotes land use and development.³¹⁵ Due to the inherent unfairness in court-created easements and widespread public concern for conserving wild lands, implied easements should be curtailed rather than expanded.

One way to limit easements by necessity and easements by implied grant is to discard the public policy favoring land development. As noted above, the policy is arguably irrelevant. Many scholars and courts alike recognize that the age of America's wilderness faded long ago and that conservationist policies should replace tireless development.

Eliminating "productive use of land" as a justification for creating implied easements will force courts to rely on the contracting parties' intent.³¹⁶ Reliance on intent preserves these easements but also restricts them. A court can still award an easement by necessity, for example, when evidence shows the parties paid full value for and anticipated the conveyance of a

³¹⁴ See *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584, 590 (Cal. 1984).

³¹⁵ See *Galvin v. Gaffney*, 24 F. Supp. 2d 223, 233 (D. Conn. 1998) (holding that the implication of an easement by necessity could not be defeated by a showing of contrary actual intent where the parcel was effectively landlocked); *B & J Dev. & Inv., Inc. v. Parsons*, 887 P.2d 49, 52 (Idaho Ct. App. 1994) (holding that the expectations of one party will not defeat the implication of an easement on public policy grounds); *Bob Daniels & Sons v. Weaver*, 681 P.2d 1010, 1018 (Idaho Ct. App. 1984) ("[A]n easement arises independently from any contract and may even thwart the intent of the sellers or purchasers."); *Ghen v. Piasecki*, 410 A.2d 708, 712 (N.J. Super. Ct. App. Div. 1980) ("[W]e are satisfied that this mutual intent is not an essential element in the establishment of a way of necessity. Such an easement is created as a result of a strong public policy that no land may be made inaccessible or useless."); *Berge v. State*, 915 A.2d 189, 192 (Vt. 2006).

³¹⁶ See, e.g., *Hollywyle Ass'n v. Hollister*, 324 A.2d 247, 253 (Conn. 1973); *Matthews v. Quarles*, 504 So. 2d 1246, 1247 (Fla. Dist. Ct. App. 1986); *MacCaskill v. Ebbert*, 739 P.2d 414, 417-18 (Idaho Ct. App. 1987); *Gacki v. Bartels*, 859 N.E.2d 1178, 1184 (Ill. App. Ct. 2006); *Rau v. Collins*, 891 A.2d 1175, 1180-84 (Md. Ct. Spec. App. 2006); *Adams v. Planning Bd. of Westwood*, 833 N.E.2d 637, 642-43 (Mass App. Ct. 2005).

fully accessible tract.³¹⁷ On the other hand, if nothing indicates the parties' anticipated need for ingress and egress and the price is below market,³¹⁸ no ambiguity permits the court to re-write the agreement. The intent approach also removes the servient estate holder's call for compensation because the purchase price presumably accounts for the encumbrance.³¹⁹

Restricting implied easements to a determination of the parties' intent may result in a greater number of landlocked tracts. But parties often intend to isolate land.³²⁰ wilderness and open areas increase in value as supply decreases, and public opinion values wild lands more and more.³²¹ Landowners may hope to protect a species or an ecosystem by denying vehicular access. Even when unintended, landlocked property honors freedom of contract and eliminates windfall by requiring landlocked owners to negotiate and pay for access across neighboring lands.³²²

³¹⁷ See *Hollywyle Ass'n*, 324 A.2d at 252; *Matthews*, 504 So. 2d at 1247; *MacCaskill*, 739 P.2d at 418; *Gacki*, 859 N.E.2d at 1184.

³¹⁸ Cf. *Gulotta v. Triano*, 608 P.2d 81, 83 (Ariz. Ct. App. 1980); *Doten v. Bartlett*, 78 A. 456, 458 (Me. 1910).

³¹⁹ See *Matthews*, 504 So. 2d at 1247; *MacCaskill*, 739 P.2d at 418; *Gacki*, 859 N.E.2d at 1184.

³²⁰ See, e.g., *Galvin*, 24 F. Supp. 2d at 233; *Sayre v. Dickerson*, 179 So. 2d 57, 68–70 (Ala. 1965); *Gulotta*, 608 P.2d at 82; *Hewitt v. Meaney*, 226 Cal. Rptr. 349, 351–53 (Ct. App. 1986); *Daywalt v. Walker*, 31 Cal. Rptr. 899, 902–03 (Dist. Ct. App. 1963); *Pencader Assocs., Inc. v. Glasgow Trust*, 446 A.2d 1097, 1100 (Del. 1982); *B. & J. Dev. & Inv.*, 887 P.2d at 52; *Bob Daniels & Sons*, 681 P.2d at 1018–19; *Luthy v. Keehner*, 412 N.E.2d 1091, 1093 (Ill. App. Ct. 1980); *O'Connell v. Larkin*, 532 A.2d 1039, 1043 (Me. 1987); *Shpak v. Oletsky*, 373 A.2d 1234, 1240 (Md. Ct. App. 1977); *Orpin v. Morrison*, 120 N.E. 183, 185 (Mass. 1918); *White v. Landerdahl*, 625 P.2d 1145, 1147 (Mont. 1981); *Jackson v. Nash*, 866 P.2d 262, 269–70 (Nev. 1993); *Bradley v. Patterson*, 435 A.2d 129, 132 (N.H. 1981); *Mountain View, Inc. v. Bryson*, 336 S.E.2d 432, 433 (N.C. Ct. App. 1985); *Mougey Farms v. Kaspari*, 579 N.W.2d 583, 587 (N.D. 1998); *Traders, Inc. v. Bartholomew*, 459 A.2d 974, 978 (Vt. 1983).

³²¹ See Spencer Phillips, *Windfalls for Wilderness: Land Protection and Land Value in the Green Mountains*, in 2 WILDERNESS SCIENCE IN A CHANGE OF TIME CONFERENCE 258, 262 (Stephen F. McCool et al. eds., 2000); Elena G. Irwin, *The Effects of Open Space on Residential Property Values*, 78 LAND ECON. 465, 465, 478–79 (2002); *The Economic Benefits of Wilderness: Focus on Property Value Enhancement*, THE WILDERNESS SOCIETY SCIENCE AND POLICY BRIEF, Mar. 2004, at 1, 1–8.

³²² See *Doten*, 78 A. at 458.

To be sure, many jurisdictions already look to the contracting parties' intent when deciding whether to grant an implied easement.³²³ But many assume sufficient intent based solely on the fact that the property is difficult to access.³²⁴ When evidence of parties' intent is inadequate, some jurisdictions revert to the policy promoting the fullest land use.³²⁵

Therefore, the implied intention of the parties is a more reliable foundation than public policy upon which to build the analytical framework necessary to sustain easements by necessity; it is only when the record provides absolutely no insight from which an inference as to the intent of the parties can be drawn that public policy is employed as a significant factor.³²⁶

Courts should limit their analysis to party intent. Resorting to defunct public policy disservices conservation concerns and effectively grants easements whenever property becomes landlocked or difficult to access.

Implied easements by prior existing grant already rely heavily on the contracting parties' intent.³²⁷ But some courts have diluted the intent requirement when the other elements for easements by implied grant are met.³²⁸ These courts maintain

³²³ See, e.g., *Hollywyle Ass'n v. Hollister*, 324 A.2d 247, 253 n.4 (Conn. 1973); *Matthews*, 504 So. 2d at 1247; *MacCaskill*, 739 P.2d at 417–418; *Gacki*, 859 N.E.2d at 1184; *Rau v. Collins*, 891 A.2d 1175, 1180–84 (Md. Ct. Spec. App. 2006); *Adams v. Planning Bd. of Westwood*, 833 N.E.2d 637, 642 (Mass App. Ct. 2005).

³²⁴ See *supra* note 315.

³²⁵ See, e.g., *United States v. Jenks*, 129 F.3d 1348, 1353, (10th Cir. 1997); *Murphy v. Burch*, 205 P.3d 289, 293 (Cal. 2009); *Kellogg v. Garcia*, 125 Cal. Rptr. 2d 817, 828 (Ct. App. 2002); *Hewitt v. Meaney*, 226 Cal. Rptr. 349, 351 (Ct. App. 1986); *Thompson v. Whinnery*, 895 P.2d 537, 540 (Colo. 1995); *Hurlocker v. Medina*, 878 P.2d 348, 352 (N.M. Ct. App. 1994).

³²⁶ *Hurlocker*, 878 P.2d at 352.

³²⁷ See *Muzzi v. Bel Air Mart*, 89 Cal. Rptr. 3d 632, 639 (Ct. App. 2009) ("Easements cannot be implied if the express provisions of the lease exclude them."); *Hallock v. Wear*, 551 N.E.2d 712, 718–19 (Ill. App. Ct. 1990) (grantors "expressly disavowed any intent to create an easement in plaintiffs' favor"); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.12 cmt. h (2000) ("Implication of a servitude [by prior use] . . . is based on what the parties probably intended or had reasonable grounds to expect.").

³²⁸ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.12 cmt. e (2000) ("The fact that the use is reasonably necessary lends substantial weight to the conclusion that the parties had reasonable grounds to expect that the right to continue the use was included in the conveyance."); *id.* at cmt. f ("[K]nowledge of [the prior use's] existence is a useful indicator of their probable intent that the conveyance include a servitude to continue the use.").

that only explicit and unambiguous language in the deed will *negate* an easement by implied grant when the other factors exist.³²⁹ Like easements by necessity, a closer nexus to the parties' intent ensures that easements by implied grant issue only when the contracting parties indicate as much, rather than whenever a pro-development argument is invoked.

Another way to limit implied easements—perhaps in conjunction with focusing on intent—is to make them harder to obtain. Courts should turn the policy favoring “productive use” on its head by imposing a presumption *against* creating implied easements. The West Virginia Supreme Court recently “made it clear that ‘[t]he law does not favor the creation of easements by implied grant or reservation.’”³³⁰ Supplementing a presumption against implied easements with a higher burden of proof—clear and convincing evidence—further restricts pro-development bias.³³¹

Similarly, the trend favoring “reasonable” necessity over strict necessity should be reversed. Access that is considered too steep, too narrow, or too marshy ought not amount to necessity sufficient to create an easement by operation of law.³³² Only the most egregious cases, where, for example, the tract is wholly inaccessible and the buyer paid a price similar to that of a fully accessible tract, will give rise to an inference that the parties intended to include a way of access.³³³ Requiring strict necessity more closely tracks the parties' intent.³³⁴ Disallowing implied

³²⁹ See *Dubin v. Robert Newhall Chesebrough Trust*, 116 Cal. Rptr. 2d 872, 878 (Ct. App. 2002); *Story v. Hefner*, 540 P.2d 562, 566 (Okla. 1975).

³³⁰ *Cobb v. Daugherty*, 693 S.E.2d 800, 807 (W. Va. 2010) (alteration in original) (quoting *Stuart v. Lake Wash. Realty*, 92 S.E.2d 891, 898 (1956)).

³³¹ See *Berkeley Dev. Corp. v. Hutzler*, 229 S.E.2d 732, 735 (W. Va. 1976).

³³² See *Shaver v. Edgell*, 37 S.E. 664, 667 (W. Va. 1900) (“That the way through his own land is too steep or too narrow does not alter the case. It is only where there is no way through his own land that the right of way through the land of another can exist. That a person claiming a way of necessity has already one way is a good plea . . .”).

³³³ See *Simonton*, *supra* note 153, at 580.

³³⁴ See *BRUCE & ELY*, *supra* note 92, § 4:10 (“The strict necessity standard is based on the belief that necessity is required as a measure of the parties' intent to create an easement and that such intent should be inferred in only the most compelling circumstances, such as when the alleged dominant tenement is otherwise inaccessible.”).

easements when landowners already have access to part of the land but cannot easily access the rest of it curbs the incessant call for the "productive use of land."

Finally, courts should limit the scope of implied easements to encourage sustainable use. In dissecting the nature of a court's power to create implied easements, one characterized the court's power as equitable in nature.³³⁵ Because the court acted in equity, it considered several factors apart from the traditional easement by necessity test:

[O]ur decisions in regard to easements of necessity should not be read to imply that an easement of necessity always arises as a matter of law whenever the two required elements are proved because the equities that drive the creation and the scope of an easement may vary, requiring the circuit court to weigh the burdens and benefits the easement would create.³³⁶

That court suggested a number of factors, including whether the landlocked party was the grantor, whether the landlocked party knew the land lacked access at purchase, and the value of the property with and without the easement.³³⁷ Given the overwhelming public concern for environmental conservation, why not allow courts to go a step further and consider ecological and environmental effects of the claimed easement? Moreover, instead of granting an outright easement in perpetuity that may someday expand with the dominant estate, why not limit the easement's use?

Implied easements over government lands provide an apt analogy. When private landowners claim implied easements that burden national parks, national forests, and other government lands, courts often impose restrictions on the easement's scope.³³⁸ To preserve "one of the few prairie savanna habitats west of the

³³⁵ *McCormick v. Schubring*, 672 N.W.2d 63, 67 (Wisc. 2003).

³³⁶ *Id.* at 67–68.

³³⁷ *See id.* at 68–70.

³³⁸ *See McFarland v. Kempthorne*, 545 F.3d 1106, 1110–12 (9th Cir. 2008); *Hale v. Norton*, 437 F.3d 892, 894 (9th Cir. 2006) (determining the existence of a right-of-way over national park land does not shield an inholder from reasonable regulation by the Park Service); *Adams v. United States*, 3 F.3d 1254, 1259 (9th Cir. 1993) (observing preservation of land is an important consideration where the United States owns the servient estate for the benefit of the public); *see also Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1263 (9th Cir. 2006) (noting government has authority to impose some regulations on the use of roads regardless of any common law easements held by private individuals).

Continental Divide,” one court stated an easement by necessity “could be limited in scope to . . . non-motorized means.”³³⁹ Easement use can be limited to a particular season,³⁴⁰ particular vehicles,³⁴¹ and include various other conditions.³⁴² Some are subject to termination at the will of the servient estate holder—the forest service or national park service.³⁴³ Limiting the life of such easements may transform them into licenses,³⁴⁴ but other use restrictions allow the holder to retain an inheritable interest in real property—one that is not subject to unchecked expansion but that conforms with broader societal goals.

B. *Abolishing Prescriptive Easements*

Good arguments support abolition of prescriptive easements. The doctrine’s genesis confuses more than clarifies its application. Fictional “grants” that are fictionally lost undermine modern recording statutes and serve no contemporary purpose. The doctrine survives only by grafting public policy from adverse possession law. That policy, which perpetually promotes the fullest use and improvement of land, holds increasingly little relevance. As a result, easements justified principally on this policy should be abolished or materially restricted.

³³⁹ *McFarland v. Kempthorne*, 464 F. Supp. 2d 1014, 1022 (D. Mont. 2006).

³⁴⁰ See *Skranak v. Castenada*, 425 F.3d 1213, 1215 (9th Cir. 2005); *McFarland*, 464 F. Supp. 2d at 1022 (finding that Park Service can limit easement access in the winter for reasons of safety, environmental resource protection).

³⁴¹ See *McFarland*, 464 F. Supp. 2d at 1022 (finding that Park Service could restrict claimant’s implied easement to “non-motorized means and egress by snowmobile in emergency situations during the winter”).

³⁴² See *United States v. Jenks*, 804 F. Supp. 232, 236–37 (D.N.M. 1992) (“[E]ven if [the court agrees] with defendant that there are preexisting easements for each of the roads . . . [the United States] can still regulate these access rights pursuant to [the Alaska National Interest Lands Conservation Act] and [the Federal Land Policy Management Act].”), *rev’d*, 22 F.3d 1513 (10th Cir. 1994).

³⁴³ See *Fitzgerald Living Trust v. United States*, 460 F.3d 1259, 1267 (9th Cir. 2006) (“We conclude further that the conditions in the easement providing for the suspension, revocation, or termination of the easement also are reasonable.”).

³⁴⁴ See *Blackburn v. Lefebvre*, 976 So. 2d 482, 490 (Ala. Civ. App. 2007); *Brown v. Rice*, 716 So. 2d 807, 809 (Fla. Dist. Ct. App. 1998); *Millbrook Hunt, Inc. v. Smith*, 249 A.D.2d 281, 282, 670 N.Y.S.2d 907, 908–09 (2d Dep’t 1998); *Morning Call, Inc. v. Bell Atl.-Pa., Inc.*, 761 A.2d 139, 144 (Pa. Super. Ct. 2000).

The secondary rationale supporting prescriptive easements—that they clear title and fulfill long-held expectations—possibly justifies an extremely limited existence.³⁴⁵ Where the claimant uses property for a long period in accord with a documented grant to do so, prescription makes sense when the documentation is erroneous.³⁴⁶ In such cases, prescription justifies good faith expectations and clears obscured title without undermining recording statutes or encouraging land exploitation.

Absent abolition or restricting prescriptive claims to those made under color of title, courts should at least require claimants prove each element. Many jurisdictions *presume* the claimant's trespass meets the adverse requirement unless shown otherwise.³⁴⁷ "Where a use has been open, continuous, visible and uninterrupted for a period of longer than ten years, a presumption arises that the use was adverse and under a claim of right and the burden shifts to the landowner to show that the use was in fact permissive."³⁴⁸ This "shortcut"³⁴⁹ cuts the wrong

³⁴⁵ See *Clinger v. Hartshorn*, 89 P.3d 462, 466 (Colo. App. 2003) (affirming a jury determination of a prescriptive easement after eighteen years of use without permission pursuant to an ineffective grant); *Klar Crest Realty, Inc. v. Rajon Realty Corp.*, 459 A.2d 1021, 1025 (Conn. 1983) (upholding a jury's determination of a prescriptive easement after over sixteen years of use pursuant to an invalid grant).

³⁴⁶ See *Inch v. McPherson*, 859 P.2d 755, 758 (Ariz. Ct. App. 1992); *Gilardi v. Hallam*, 636 P.2d 588, 590 (Cal. 1981); *Clinger*, 89 P.3d at 466 (declaring that easement by prescription may be acquired by use "pursuant to an attempted but ineffective grant"); *Klar Crest Realty*, 459 A.2d at 1025; *Walker v. Hollinger*, 968 P.2d 661, 666–67 (Idaho 1998); *Montagne v. Elliott*, 92 P.3d 731, 739 (Or. Ct. App. 2004) ("The use of an easement under a mistaken belief as to the recorded location of a way is sufficient to satisfy the element of hostility."); *Garrett v. Mueller*, 927 P.2d 612, 616 (Or. Ct. App. 1996) (holding that use of roadway under mistaken belief that claimant had recorded easement was sufficient to establish prescriptive right); *Kondor v. Prose*, 622 P.2d 741, 744 (Or. Ct. App. 1981); see also *Plymouth Canton Cmty. Crier, Inc. v. Prose*, 619 N.W.2d 725, 730 (Mich. Ct. App. 2000) (holding that claimant obtained prescriptive easement for loading and unloading based on mistaken belief as to scope of express easement).

³⁴⁷ See *Hodgins v. Sales*, 76 P.3d 969, 976 (Idaho 2003); *Moss v. Ward*, 881 S.W.2d 238, 242 (Mo. Ct. App. 1994); *Homan v. Hutchison*, 817 S.W.2d 944, 948 (Mo. Ct. App. 1991) (quoting *Speer v. Carr*, 429 S.W.2d 266, 268 (Mo. 1968); *Hamad Assam Corp. v. Novotny*, 737 N.W.2d 922, 925 (S.D. 2007); *Rancour v. Golden Reward Mining Co.*, 694 N.W.2d 51, 54 (S.D. 2005).

³⁴⁸ *Moss*, 881 S.W.2d at 242 (citing *Neale v. Kottwitz*, 769 S.W.2d 474, 476 (Mo. Ct. App. 1989); *Homan*, 817 S.W.2d at 948; *Gill Grain Co. v. Poos*, 707 S.W.2d 434, 437 (Mo. Ct. App. 1986); *Burgess v. Sweet*, 662 S.W.2d 916, 918 (Mo. Ct. App. 1983)).

³⁴⁹ *Hodgins*, 76 P.3d at 976 ("Although clear and convincing proof of each of the elements necessary to establish a prescriptive easement is generally essential to a claim, there is a *shortcut* in terms of proving adverse use." (emphasis added)).

way; the presumption should be reversed. Before rewarding trespass with inheritable rights in real estate, claimants ought to bear the full burden of proving the claim.

The one bright spot in prescription jurisprudence stems from the “wild lands” exception.³⁵⁰ When an alleged easement involves wild or unenclosed lands, some courts impose “a rebuttable presumption that use of such lands is permissive, and the burden is on the party asserting the easement to establish adversity.”³⁵¹ While it is refreshing to see property law favor wild lands, this presumption should be universal. A prescriptive claimant should carry the burden to prove each element by clear and convincing evidence at all times.

Finally, some private undeveloped lands are protected by statute from prescriptive easements. For example, owners of woodlands cannot easily detect open and notorious prescriptive use against unknown encroachments; a Pennsylvania statute bars prescriptive easements through unenclosed woodlands.³⁵² If the common law fails to curb public policy favoring land development, a patchwork of statutes may ultimately supersede large areas of property law.

C. *Balancing Express Easements*

Public policy favoring land development saturates disputes arising from scope and management of expressly created easements.³⁵³ Whether it is the easement holder seeking to expand easement use in order to facilitate development of the dominant estate or the servient estate owner seeking to restrict easement use in order to develop the servient estate, pervasive policy supports developing and “improving” land.³⁵⁴

³⁵⁰ See, e.g., *id.*

³⁵¹ *Id.*; see *Gibbens v. Weisshaupt*, 570 P.2d 870, 873–74 (Idaho 1977); *Moss*, 881 S.W.2d at 242; *Hamad Assam Corp.*, 737 N.W.2d at 927 n.2; *Rancour*, 694 N.W.2d at 54 (recognizing that where land is wild, unimproved, and unenclosed, the uninterrupted use of the land for the statutorily prescribed period does not raise a presumption that the use is adverse).

³⁵² See 68 PA. CONS. STAT. § 411 (1981). For cases analyzing this statute, see *Sprinkle v. Burns*, 675 A.2d 1287, 1289–90 (Pa. 1996) (discussing the statute); *Martin v. Sun Pipe Line Co.*, 666 A.2d 637, 640–41 (Pa. 1995) (same).

³⁵³ See, e.g., *Johnson v. Suttles*, 227 P.3d 664, 669 (Okla. Civ. App. 2009).

³⁵⁴ See *id.*

That policy must be revisited. Entirely one-dimensional, it fails to countenance overdevelopment and rising national concern for conservation of open and undeveloped lands. Despite national consensus favoring conservation, modern courts remain wedded to nineteenth-century development policy. Such courts recoil at the prospect of "idle lands,"³⁵⁵ disfavor "absentee landowners,"³⁵⁶ and question "the wisdom of requiring land to be put to no use."³⁵⁷

One solution suggests subverting the policy altogether. Without the pervasive policy promoting land development, what remains? "Protecting" private property rights might inform decisions in close cases. The Wisconsin Supreme Court, for example, denied a developer's request to relocate an easement to accommodate new construction.³⁵⁸ In doing so, the court elevated "safeguard[ing] property rights" over "economically unproductive behavior."³⁵⁹ The Court expressly rejected two sections from the Restatement, noting that the Court was not convinced that "the interest in increased development of property should overcome the durability of easement rights."³⁶⁰

But reliance on private property rights can be just as one-dimensional as reliance on land development policy. Dedication to private property ownership reverses course and turns the ship back toward Blackstone's view on an absolute right to exclude others.³⁶¹ Private property is no longer sacrosanct such that the community may not interfere with its domain.³⁶²

³⁵⁵ See *Traders, Inc. v. Bartholomew*, 459 A.2d 974, 978 (Vt. 1983).

³⁵⁶ See *Johnson*, 227 P.3d at 666, 668-70.

³⁵⁷ *Vandeleigh Indus. v. Storage Partners of Kirkwood, L.L.C.*, 901 A.2d 91, 95 (Del. 2006).

³⁵⁸ See *AKG Real Estate, L.L.C. v. Kosterman*, 717 N.W.2d 835, 838, 840 (Wis. 2006).

³⁵⁹ *Id.* at 845.

³⁶⁰ *Id.* at 846.

³⁶¹ See *Morris R. Cohen, Property and Sovereignty*, 13 CORNELL L.Q. 8, 12 (1927).

³⁶² See *id.* (stating that in past regimes where land was the main source of livelihood, the landowner received "homage and service from those who wish[ed] to live on [the land]").

CONCLUSION

America has changed; our property law has not. In the 1800s, when 95% of America was wilderness, and when the government's claim to these lands was itself tenuous, it made sense to encourage settlement and development of wild land.³⁶³ That policy became deeply ingrained. It informs almost every common law property doctrine, including easements.

A review of easement disputes through case law shows that courts continue to cite and rely on nineteenth-century pro-development policy. Courts cite this policy to justify (1) the creation of implied easements, (2) the recognition of prescriptive easements, and (3) the enforcement decisions arising from express easements. Given the evolution of popular opinion and receding wild lands, a counterbalance is needed.

The creation of implied and prescriptive easements should be restricted rather than facilitated. If a court creates an easement by implication, it should restrict the easement's scope in time or type, similar to easements awarded over federal government lands. Instead of "reasonable" necessity, courts should require strict necessity before awarding implied easements arising from accessibility claims. Prescriptive easements could be abolished altogether or severely limited to good faith claims made under color of title.

Perhaps most importantly, property law needs a policy overhaul. Courts considering easement disputes should not presume that use trumps nonuse or that developed land outstrips idle land. Some consideration that reflects the importance of unused wild land is needed to balance an otherwise unchecked drive to develop.

³⁶³ See Sprankling, *supra* note 76, at 519 (discussing the trend in American property law favoring wilderness destruction over wilderness preservation).

APPENDIX³⁶⁴

³⁶⁴ NATURAL RESOURCES CONSERVATION SERV., *supra* note 73.