Oil and Water: Easements and the Environment

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ARTICLES

OIL AND WATER: EASEMENTS AND THE ENVIRONMENT

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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. 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.


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

\(^3\) 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/lut/p/c4/04_SB8K8xLLM9MSSzPy8xBz9CP00s_gAC9-wMJ8Q¥0MDpxBDAD09nXw9DFxcXw2ALU_2CbEdFAFsoRU!?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).


\(^7\) See Berge v. State, 915 A.2d 189, 189 (Vt. 2006).
easements to enable a variety of developments, including opera houses, subdivisions in the middle of wildlife preserves, storage facilities, and fox hunting clubs.

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._

—Justice Joseph Story

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. Massive tracts of unimproved land represented largely untapped resources, resources the federal government hoped to exploit.

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8 See Howley v. Chaffee, 93 A. 120 (Vt. 1915).
9 See Berge, 915 A.2d at 189.
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).
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. 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.” If a survey showed the land vacant, the “party thereupon received a grant in absolute ownership.”

Land was virtually free—save one critical condition. “These grants were almost uniformly made upon condition of settlement, or some other improvement.” The law did not recognize a grantee’s ownership until the grantee built something on it. Why? Competing claims among European nations depended in part on colonization and settlement of wild lands. 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. 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).


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


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

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23 See Fremont, 58 U.S. (17 How.) at 569–70 (Catron, J., dissenting).
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 Routé”).
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).
31 Id. at 383–84.
each mile of track that it laid.\textsuperscript{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,\textsuperscript{33} the Illinois Central Railroad,\textsuperscript{34} and
others. This pervasive\textsuperscript{35} nineteenth-century "checkerboard[ing]"
continues to spur modern easement disputes today.\textsuperscript{36}

But "animating it all was the desire of the Federal
Government that the West be settled."\textsuperscript{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.\textsuperscript{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."\textsuperscript{39} The steady growth of established agrarian
communities coupled with "the feverish accumulation of
capitalism" left little room for land conservation.\textsuperscript{40} A
Congressional report on United States public land policy states
that "[d]uring most of the [nineteenth] century, our public land

\textsuperscript{32} Act of July 1, 1862, ch. 20 § 3, 12 Stat. 489, 492 (1862), amended by Act of

\textsuperscript{33} Act of July 2, 1864, ch. 216, § 3, 13 Stat. 365, 367–68. For a good summary of
(1940).

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

\textsuperscript{35} See Paul W. Gates with a chapter by Robert W. Swenson, History of

\textsuperscript{36} See Leo Sheep Co., 440 U.S. at 671–72; Mont. Wilderness Ass'n v. U.S. Forest
P.3d 357, 363–64 (Utah 2010); Granite Beach Holdings, L.L.C. v. State ex rel. Dep't.

\textsuperscript{37} Leo Sheep Co., 440 U.S. at 671.

\textsuperscript{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.").

\textsuperscript{39} Zinn, supra note 38, at 220.

\textsuperscript{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.”

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.”

Forests, wetlands, deserts, hill country, and other undeveloped land were seen as worthless until cleared, drained, cultivated, or otherwise converted into useful product.

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.

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

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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).


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. The book of Genesis confers dominion to mankind over all birds and beasts;
believers are admonished to “fill the earth and subdue it.” Early settlers took these provisions to heart, viewing
uncultivated wild land as dangerous and ungodly. The controversial 1967 article by historian Lynn White decried the
Judeo-Christian worldview of dominion as incompatible to environmentalism. 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.

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 un-
developed 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.”

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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.’ ”).
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
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.\textsuperscript{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.”\textsuperscript{55} There is a growing acknowledgement that supply of wild lands is limited,\textsuperscript{54} and “that access to areas of natural, undeveloped land benefits society.”\textsuperscript{55} Eroding plant and animal diversity through land development and destruction of natural habitats increases popular anxiety.\textsuperscript{56}


\textsuperscript{52} 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.


In response, federal and state governments have added land and funding to national parks and other conservation efforts. Park base funding increased from nine-hundred million dollars in 2001 to over one billion dollars by 2006. Park acreage in the lower forty-eight states increased incrementally from seven million acres in 1930 to nineteen million acres in 2000. While most insist that government play a large role in wild land conservation, many are dissatisfied with the results.

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

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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.").


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.


The distrust amplifies when, for example, the National Forest Service authorizes oil and gas development, mining, logging, and hunting in national forests. This oxymoronic quest, to simultaneously conserve and exploit, is not a new one. The 1897 “Organic Act” 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.” None of these government efforts, however misguided or successful, confronts the ongoing common law policy favoring land development.

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

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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.”).


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.”).

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.
74 NATURAL RESOURCES CONSERVATION SERV., supra note 73.
our scattered wilderness remnants." 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. The transfer occurs without the consent and over the objection of the title owner. 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. 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. 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. 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, berry picking and timber storing, gathering firewood, hunting and hiking, and culling and taking natural hay.

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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).
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.

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89 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

94 BRUCE & ELY, supra note 92, § 9:1.
95 Id. § 1:4.
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. Antiquated limitations like horizontal privity requirements are also abolished. The Restatement is a step in the right direction. It even accounts—in a few instances—for land conservation. 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. 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.

In Berge, a landowner conveyed 7,001 acres to the State of Vermont by a deed in 1959. 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.

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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/S t%20Johnsburry%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 Fillmore 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.\textsuperscript{107} She reserved thirty-eight acres that bordered a pond.\textsuperscript{108} Although she did not retain an express easement for automobile access to the thirty-eight acres, she could access the land by water.\textsuperscript{109}

Two years later, the grantor conveyed the thirty-eight acres to developers.\textsuperscript{110} That conveyance again omitted any reference to any easement across the State's wildlife preserve.\textsuperscript{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.\textsuperscript{112}

Thirty-six years later, after a succession of various owners, the claimant bought two of the eighteen lots.\textsuperscript{113} The claimant accessed the lots by car over a gravel road running across the State's wildlife preserve.\textsuperscript{114} Although the claimant owned a boat and could access the property via public boat launch, the claimant demanded vehicle access.\textsuperscript{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.\textsuperscript{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.\textsuperscript{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."\textsuperscript{118} In fact, the court's description of the policy motivating its ruling stemmed from three nineteenth

\textsuperscript{107} See Berge, 915 A.2d at 190.
\textsuperscript{108} See id.
\textsuperscript{109} See id.
\textsuperscript{110} See id.
\textsuperscript{111} See id.
\textsuperscript{112} See id.
\textsuperscript{113} See id.
\textsuperscript{114} See id.
\textsuperscript{115} See id.
\textsuperscript{116} See id.
\textsuperscript{117} See id. at 191.
\textsuperscript{118} Id. (quoting Smith v. Higbee, 12 Vt. 113, 123 (1840)).
century cases.\textsuperscript{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.'\textsuperscript{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.\textsuperscript{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?\textsuperscript{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.\textsuperscript{123} A creek winding through his land made the upper

\textsuperscript{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).

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

\textsuperscript{121} Id. at 193 n.3.

\textsuperscript{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.

portion of the tract "difficult" to access. 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." "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."

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." In Lobato, successors in title to an 1844 Mexican land grant demanded access to the Taylor Ranch for hunting, fishing, recreation, grazing, and timber. 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.

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. 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. 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." The appellate court reversed.

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124 Id. at 666.
125 See id.
126 Id. at 669 (quoting RESTATEMENT (FIRST) OF PROP. § 476 cmt. g (1944)).
127 Id. (citation omitted).
129 See id. at 942–43.
130 See id. at 953.
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." In short, one had to wait until all the foxes had been killed before bringing a claim. 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."

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." 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. Several courts employ a utilitarian trope to create easements where necessary: "The long-standing public policy of this state... favors utilization of land." The utilitarian approach facilitates whichever result leads to the "beneficial use of [the] property," or the "use and development" of the land.

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.

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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 "[t]he appellants 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.
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").
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").


\(^{146}\) 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. 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. 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.

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. If the property is landlocked, if it is wholly inaccessible, what good is it? As our English progenitors put it, “[A]nnyone who grants a thing to someone is understood to grant that without which the thing cannot be or exist.” 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. As mentioned

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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 Daugherties, 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.


155 See Klass, supra note 43, at 284.
above, several surveys reflect popular support for preserving undeveloped land.\textsuperscript{156} A recent California decision calls attention to a distinct market for landlocked parcels.\textsuperscript{157} That court argued that courts ought not "intrude into even a 'market' as distinctive as this one."\textsuperscript{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.\textsuperscript{159} Curiously, the strong policy promoting land development often trumps even the parties' clear intent to keep property landlocked.\textsuperscript{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.\textsuperscript{161} But to what access is he or she entitled? Early courts held foot and horseback access

\textsuperscript{156} See supra note 53 and accompanying text.

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

\textsuperscript{158} Id.


\textsuperscript{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).

\textsuperscript{161} See, e.g., Riggs v. Bert, 452 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).
However, contemporary courts reflect contemporary transportation. Courts even reject access by boat as unreasonable, awarding easements most often for automobile access.

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.

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." If the servient land is a wildlife preserve, as in Berge, can an easement holder run eighteen

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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").


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.\(^\text{168}\)

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.\(^\text{169}\) "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 . . . ."\(^\text{170}\) 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.\(^\text{171}\) 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.\(^\text{172}\)

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\(^{168}\) 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").


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

\(^{171}\) See Simonton, supra note 153, at 580.

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. By contrast, most modern courts grant easements when an owner already has access, but the access is deemed too difficult or unreasonable. This standard reflects the public policy theory. "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." 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, too steep, too marshy, or if it requires a longer distance, a


175 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., 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, or considerable expense, 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. The common ownership requirement, they argue, limits the implication of easements “to cases where it is most equitable to imply such servitudes.” Courts will not create, for example, implied easements over a third party’s land.

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; did not own it in fee simple;

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\[182\] 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).


\[186\] 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).

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 *Moores 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.\(^{197}\)

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\(^{189}\) 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); Moores v. Walsh, 45 Cal. Rptr. 2d 389, 391 (Ct. App. 1995).


\(^{192}\) *Kinscherff*, 586 F.2d at 161; *Andrus*, 486 F. Supp. at 1000; *Moores*, 45 Cal. Rptr. 2d at 390.


\(^{194}\) Id. at 885.

\(^{195}\) Id.

\(^{196}\) *Moores*, 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. "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." 

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. The interloper's use of the owner’s land effectively transfers an inheritable property right to the interloper. This transfer of property rights from the title owner to the interloper based on land use roughly parallels the doctrine of adverse possession.

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. Both doctrines reflect the
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.\textsuperscript{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.\textsuperscript{205} Some courts also require a showing that the use was exclusive,\textsuperscript{206} but exclusivity does not require that the claimant is the only one that uses the easement.\textsuperscript{207} Use by the title owner, for example, does not defeat exclusivity in some cases.\textsuperscript{208} Courts have applied these elements inconsistently,\textsuperscript{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."\textsuperscript{210} Why was it originally recognized? What philosophy did it honor? Some commentators trace prescription back to the Roman law of Usucapio,\textsuperscript{211} others suggest it derived from local custom.\textsuperscript{212} In


\textsuperscript{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.


\textsuperscript{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").

\textsuperscript{208} See id.

\textsuperscript{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 confute various elements as different sub-components of the same element.").

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

early England, a claimant seeking land rights based on prescription had to show he used the property since time immemorial.\textsuperscript{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.\textsuperscript{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.\textsuperscript{215}

But year after year, 1189 became increasingly distant, so English common law developed a fictional justification called “lost grant.”\textsuperscript{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.\textsuperscript{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.\textsuperscript{218}

“American courts generally adopted the lost grant doctrine as part of the common law.”\textsuperscript{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.\textsuperscript{220} In light of the Statute of Frauds and modern

\textsuperscript{212} See A. W. B. SIMPSON, A HISTORY OF THE LAND LAW 110 (2d ed. 1986).
\textsuperscript{213} See Stoebuck, supra note 211, at 19.
\textsuperscript{214} See id.
\textsuperscript{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.”).
\textsuperscript{216} RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g (2000); BRUCE & ELY, supra note 92, § 5:1.
\textsuperscript{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.
\textsuperscript{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).
\textsuperscript{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. 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. 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.

3. Landowner Diligence/Certainty of Title

In light of this dubious history, some call for abolition of prescriptive easements, but proponents contend that prescription can be justified. For one, the threat of prescription encourages landowner diligence. 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.


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

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).
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. Stettmud, 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)).
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. 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. 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.

Holmes’s quote presumes several facts not essential to a successful prescription claim. Further, it is outdated. 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

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236 See Hernandez, supra note 221, at 108.
the recording statutes. 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. 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.

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.” Even a claimant who knows the property belongs to another, according to Holmes, can take that property by prescription or adverse possession. The popular uproar in Boulder, Colorado over a recent adverse possession claim indicates that basic fairness remains a critical factor.

In *McLean v. Kirlin*, 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. The landowner alleged that the retired judge and his wife leveraged their expertise in the law and intentionally sought to

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240 See Martin, supra note 239, at 147–52.
243 Holmes, supra note 238.
244 See id.
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.\textsuperscript{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."\textsuperscript{249}

Finally, prescriptive easements provoke litigation and neighborhood conflict.\textsuperscript{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.\textsuperscript{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.\textsuperscript{252}

\begin{quote}

\textsuperscript{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.

\textsuperscript{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 ESTATE NEWSALERT, July 2006, at 417, 417.

\textsuperscript{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.").

\textsuperscript{252} Id. at 586.
\end{quote}
Perhaps surprisingly, given the doctrinal history, outmoded policy justifications, and popular disdain, all fifty states recognize prescriptive easements in some form. In fact, prescriptive easements are becoming easier to claim because the required time of prescription is becoming shorter and shorter and because the Restatement dilutes the adversity element, furthering the reach of prescriptive easements. 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.

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.” 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, interference by the servient estate owner, modified use by the dominant estate owner, abandonment, and relocation of the easement.

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.
EASEMENTS AND THE ENVIRONMENT

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. 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?

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.” 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-

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264 See Gibbons, supra note 263, at 1298–99; Manning, supra note 263, at 389.
way. 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., allowed a substantial encroachment because the court did not see "the wisdom of requiring land to be put to no use at all." There, Vandeleigh had an express right-of-way easement over land used by Stor-All for commercial storage. 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. Before construction began, Vandeleigh objected to any interference with its easement, but Stor-All ignored the objection and began construction nonetheless.

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. But then the court found that "Vandeleigh really has no current use for this parcel." 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.

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 anybody.

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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.\textsuperscript{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.”\textsuperscript{277}

The court not only suspended a real property interest based on pro-development policy, it required more development to undo the suspension.\textsuperscript{278} In other words, Vandeleigh lost use of its easement because it did not use the easement enough.\textsuperscript{279} To regain use of the easement, it must affirmatively demonstrate plans to develop and improve its land.\textsuperscript{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.’”\textsuperscript{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.\textsuperscript{282} An easement holder’s right to use an express easement was effectively taken away because of disuse.\textsuperscript{283}

In arriving at this result, the Vandeleigh court looked to the Restatement (Third) of Property for guidance.\textsuperscript{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.”\textsuperscript{285} The Restatement commentary then defines “socially productive use of land” by listing several examples.\textsuperscript{286} Not surprisingly, “development for residential, commercial, recreational, and industrial uses,” is

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\item \textsuperscript{276} Id. at 95–96.
\item \textsuperscript{277} Id. at 96.
\item \textsuperscript{278} See id. at 95–96.
\item \textsuperscript{279} See id.
\item \textsuperscript{280} Id. at 96.
\item \textsuperscript{281} Id. at 99 (quoting Renaissance Dev. Corp. v. Universal Props. Group, Inc., 821 A.2d 233, 237 (R.I. 2003)).
\item \textsuperscript{282} See id. at 101–02.
\item \textsuperscript{283} See id.
\item \textsuperscript{284} See id. at 100.
\item \textsuperscript{285} Id. (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 cmt. b (2000)).
\item \textsuperscript{286} Id. (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 cmt. b (2000)).
\end{enumerate}
included in the list. 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 . . . ."

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.

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. Once location has been established, most jurisdictions reject attempts by either the easement holder or the servient estate owner to unilaterally relocate the servitude. Treating the location as variable would incite litigation and "discourage the improvement of the land upon which the easement is charged." Fascinatingly, the same pro-development policy supporting the rule also supports the exception.

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287 Id. (quoting Restatement (Third) of Prop.: Servitudes § 4.9 cmt. b (2000)).
289 Vandeleigh, 901 A.2d at 100-01.
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...
and wagon," 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. Express easements providing a right-of-way have been interpreted to include the right to erect television cables and wires, as well as underground water, gas, or sewer pipes. An express easement to flood and drain land has been interpreted to allow erosion. Cutting the servient owner's trees to improve access to an easement has been upheld as well as “safety” and

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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).
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.”).
“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

[Land 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


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.


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. Many decisions creating implied easements rely on public policy that promotes land use and development. 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. 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

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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).
fully accessible tract. On the other hand, if nothing indicates the parties' anticipated need for ingress and egress and the price is below market, 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.

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: wilderness and open areas increase in value as supply decreases, and public opinion values wild lands more and more. 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.

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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.


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


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. But many assume sufficient intent based solely on the fact that the property is difficult to access. When evidence of parties' intent is inadequate, some jurisdictions revert to the policy promoting the fullest land use:

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.

Courts should limit their analysis to party intent. Resorting to defunct public policy disserves 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. But some courts have diluted the intent requirement when the other elements for easements by implied grant are met. These courts maintain

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324 See supra note 315.


326 Hurlocker, 878 P.2d at 352.


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.\textsuperscript{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.’”\textsuperscript{330} Supplementing a presumption against implied easements with a higher burden of proof—clear and convincing evidence—further restricts pro-development bias.\textsuperscript{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.\textsuperscript{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.\textsuperscript{333} Requiring strict necessity more closely tracks the parties’ intent.\textsuperscript{334} Disallowing implied easements for access that is considered too steep, too narrow, or too marshy, particularly where the tract is wholly inaccessible and the buyer paid a price similar to that of a fully accessible tract, will further restrict pro-development bias.

\begin{footnotesize}
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\item 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)).
\item 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 . . . .”).
\item See Simonton, supra note 153, at 580.
\item 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.”).
\end{enumerate}
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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. 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.

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. 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. To preserve “one of the few prairie savanna habitats west of the

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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.”

Easement use can be limited to a particular season, particular vehicles, and include various other conditions. Some are subject to termination at the will of the servient estate holder—the forest service or national park service. Limiting the life of such easements may transform them into licenses, 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.

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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.”).
The secondary rationale supporting prescriptive easements—that they clear title and fulfill long-held expectations—possibly justifies an extremely limited existence. 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. 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. "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." This “shortcut” cuts the wrong
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).


\(^{354}\) 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,” disfavor “absentee landowners,” and question “the wisdom of requiring land to be put to no use.”

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. In doing so, the court elevated “safeguard[ing] property rights” over “economically unproductive behavior.”

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.”

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. Private property is no longer sacrosanct such that the community may not interfere with its domain.

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

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363 See Sprankling, supra note 76, at 519 (discussing the trend in American property law favoring wilderness destruction over wilderness preservation).
Developed Land, 1982 - 2007

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NATURAL RESOURCES CONSERVATION SERV., supra note 73.