

# BALANCING INTERESTS: HOW THE PRESCRIPTIVE EASEMENT DOCTRINE CAN CONTINUE TO EFFICIENTLY SUPPORT PUBLIC POLICY

## INTRODUCTION

The common law doctrine of prescriptive easements does not efficiently balance the public policy rationales that are responsible for the current approach to prescriptive easements and needs to be adjusted to remain a viable doctrine. Prescriptive easement law in the United States was based on English doctrine and has been accepted by American courts since at least the 1800s.<sup>1</sup> In all that time, very few significant changes have been made to the doctrine.<sup>2</sup> The result is that the United States now has a deeply rooted common law doctrine that has not been significantly modified in over one hundred years.

Because prescriptive easement doctrine is a creature of state law, the doctrine's longevity means that states with prescriptive easement doctrines have had over one hundred years for state courts to obfuscate the doctrine in each state, which has led to a variety of inconsistencies between jurisdictions, both in how the law is articulated and in how it is applied.<sup>3</sup> For prescriptive easements to continue serving a legitimate function, the states should adopt a uniform approach. That approach should modify the prescriptive easement doctrine to better conform with the policy choices embraced by the *Restatement (Third) of Property: Servitudes* ("*Restatement (Third)*") and allow the doctrine to operate more efficiently, without needlessly granting property rights to those who do not pay for them.<sup>4</sup>

Designing a uniform approach that all states will be willing to accept and incorporate into their common law is undoubtedly a daunting task. This is especially true because prescriptive easements are a common law doctrine, which means that, unless state legislatures decide to intervene and tackle the issue, state courts will be the ones to accept or reject a modern approach to prescriptive easements.<sup>5</sup> However, such a daunting task is certainly

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1. See *Costello v. Harris*, 29 A. 874, 874–75 (Pa. 1894); *Saunders v. Simpson*, 37 S.W. 195, 196 (Tenn. 1896); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. b (AM. LAW INST. 2000).

2. See discussion *infra* Subpart I.A.

3. See discussion *infra* Subpart I.A.

4. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000).

5. See *Common Law*, BLACK'S LAW DICTIONARY (10th ed. 2014).

worth the effort; such an approach will simplify the doctrine's application and eliminate confusion between jurisdictions.

Conveniently, there is currently a perfect opportunity to articulate a new approach to prescriptive easements. As of this Comment's writing, the American Law Institute ("ALI") is currently working to produce the *Restatement (Fourth) of Property*.<sup>6</sup> The *Restatement (Fourth)* will be the first comprehensive restatement of property law and "seeks to bring comprehensiveness and coherence to American property law."<sup>7</sup> Additionally, easements are specifically listed as one of the areas that the new *Restatement (Fourth)* will address.<sup>8</sup> The new, comprehensive *Restatement (Fourth)* is an opportunity for the ALI to improve prescriptive easement law in the states by promulgating a uniform approach that incorporates the changes to the doctrine argued for in this Comment.

Prescriptive easements generally arise in two factual contexts.<sup>9</sup> First, and most common, is the situation where a claimant makes use of the easement without the servient owner's permission and thereby acquires an easement without compensating the servient owner for it.<sup>10</sup> The second context is where the parties agreed to create a servitude, but failed to do so because they either did not put their agreement in writing (thereby failing to comply with the statute of frauds) or because they failed some other formal requirement for creating the easement sought.<sup>11</sup> Because these situations involve different policy considerations, this Comment will focus on the more common situation where the claimant uses the servient owner's land without permission and acquires an easement without paying for it, and will address the policy considerations underlying prescriptive easements in that context.

Part I of this Comment will provide an overview of the current state of prescriptive easement law in the United States and highlight the major problems with the current doctrine. While the overview in Part I will discuss the entire doctrine, the discussion will focus predominately on the "adverse and hostile" element of a prescriptive easement. This element is arguably the cause of the greatest lack of uniformity. This is because courts have diverged on where the burden of proof lies with respect to this element.<sup>12</sup> Subpart I.B will then address the policy reasons—such as favoring

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6. *Restatement of the Law Fourth, Property*, A.L.I., <http://www.ali.org/projects/show/property> (last visited Nov. 13, 2015).

7. *Id.*

8. *Id.*

9. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000).

10. *Id.*

11. *Id.*

12. Compare, e.g., *Svoboda v. Johnson*, 281 N.W.2d 892, 899 (Neb. 1979) (presuming adverse use), with *Dickinson v. Pake*, 201 S.E.2d 897, 900 (N.C. 1974) (presuming permissive use).

the economically productive use of land and protecting private expectations—that the doctrine has been based on in the past and under the *Restatement (Third)*.<sup>13</sup>

In Part II, this Comment will propose a more effective, uniform approach that avoids giving property rights unnecessarily to those who have not paid for them. It will then justify that approach based on the policy considerations discussed in Subpart I.B, as well as those advanced by the *Restatement (Third)*.<sup>14</sup> It is the author's hope that basing a proposed policy in part on the policies already recognized and adopted by the *Restatement (Third)*'s drafters will encourage the *Restatement (Fourth)*'s drafters to recognize that the doctrine can be changed without disregarding the long-favored policy decisions that the previous *Restatement (Third)* embraced.

A uniform, effective reiteration of the prescriptive easement doctrine should include: (1) a presumption of permissive use, leaving the burden of proof on the claimant to show that his or her use was adverse (which resolves the split of authority on where the burden of proof lies for the adverse-use element); and (2) a requirement that the claimant either establish reasonable necessity for the easement or compensate the servient owner for the fair market value of the easement. This uniform approach should be adopted by the ALI in the *Restatement (Fourth) of Property*. State legislatures and state courts should consider adopting this approach to make their prescriptive easement law more efficient and avoid unnecessarily awarding property rights to undeserving landowners.

## I. PRESCRIPTIVE EASEMENT LAW AND THE WEB OF POLICY CHOICES

To help better understand the unique issues that prescriptive easement law presents, Subpart I.A begins with an overview of the current doctrine, identifying the problems that current prescriptive easement law presents and highlighting inconsistencies among jurisdictions. Subpart I.B will then address the policy issues underlying the current doctrine, and will provide an overview of some of the arguments for and against prescriptive easement law.

### A. *An Overview of the Current Doctrine*

A prescriptive easement is an implied easement that awards property rights, in the form of a servitude, to the long time, adverse user of a piece of property.<sup>15</sup> Prescriptive easements are similar to adverse possession because both award property rights to the long

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13. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000); see discussion *infra* Subpart I.B.

14. RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16 cmt. a, 2.17 cmt. c (AM. LAW INST. 2000); see *infra* Part II.

15. *Wheeler v. Newman*, 394 N.W.2d 620, 622–23 (Minn. Ct. App. 1986).

time users of another person's land.<sup>16</sup> However, prescriptive easement doctrine is narrower than adverse possession in that it can only be used to award the adverse user an easement granting the dominant owner the right to use the property in a particular manner, while adverse possession generally awards a successful adverse user a possessory interest in the land in question.<sup>17</sup>

Prescriptive easement law is unique in that it has remained largely unchanged for many years, other than the differences in the individual elements that have developed among state courts.<sup>18</sup> While some states have added a presumption that shifts the burden of proof away from the claimant for the adverse-use element, the doctrine continues to revolve around the same essential requirements that the use be (1) adverse and hostile, under a claim of right, (2) open and notorious, such that the true owner has notice of the claim, and (3) continuous for the required period.<sup>19</sup> Some courts also require that the use be exclusive.<sup>20</sup> The *Restatement (Third)* approach also allows periods of prescriptive use to be tacked together to satisfy the prescriptive period where the subsequent users are in privity of estate.<sup>21</sup>

### 1. *Adverse and Hostile, Under a Claim of Right*

The *Restatement (Third)* provides that the adverse-use element requires that the claimant's use be adverse to the owner of the land or the interest in land against which the servitude is claimed.<sup>22</sup> Comment b to § 2.16 of the *Restatement (Third)* states that an "adverse" use means "a use made without the consent of the landowner, or holder of the property interest used, and without

16. *Id.* at 622.

17. *Id.* at 622–23.

18. Compare *Snowden v. Bell*, 75 S.E. 721, 722 (N.C. 1912) ("The term 'adverse user' or 'adverse possession' implies a user or possession that is not only under a claim of right, but that it is open and of such character that the true owner may have notice of the claim, and this may be proven by circumstances as well as by direct evidence."), with *Caldwell v. Branch*, 638 S.E.2d 552, 555 (N.C. Ct. App. 2007) (listing the elements of a prescriptive easement as "(1) that the use is adverse, hostile or under a claim of right; (2) that the use has been open and notorious such that the true owner had notice of the claim; (3) that the use has been continuous and uninterrupted for a period of at least twenty years; and (4) that there is substantial identity of the easement claimed throughout the twenty-year period" (quoting *Potts v. Burnette*, 273 S.E.2d 285, 287–88 (N.C. 1981))).

19. RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 2.16–17 (AM. LAW INST. 2000). Compare *Svoboda v. Johnson*, 281 N.W.2d 892, 899 (Neb. 1979) (presuming the use is adverse, shifting the burden to the landowner to prove that the use was permissive), with *Dickinson v. Pake*, 201 S.E.2d 897, 900 (N.C. 1974) (presuming the use is permissive).

20. *E.g.*, *Combs-DeMaio Living Tr. v. Kilby Butte Colony, Inc.*, 109 P.3d 252, 255 (Mont. 2005); *Plettner v. Sullivan*, 335 N.W.2d 534, 537 (Neb. 1983).

21. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 (AM. LAW INST. 2000).

22. *Id.* § 2.16.

other authorization.”<sup>23</sup> The comment further notes that use qualifying as adverse will generally be the type of use that creates a cause of action in tort against the adverse user for interference with property rights.<sup>24</sup>

The adverse and hostile element presents two interesting issues, both of which should be addressed in an attempt to find a workable, uniform approach to prescriptive easement law. First, a landowner taking self-help measures to prevent hostile use can actually help strengthen a claimant’s case for establishing adverse use.<sup>25</sup> Second, there is currently no uniform approach for which party bears the burden of proof to show adverse use (because some jurisdictions have adopted presumptions of permissive use, leaving the burden on the claimant to show adverse use, while others have adopted a presumption of adverse use, shifting the burden of proof to the landowner to show that the use was permissive).<sup>26</sup> These inconsistencies both present problematic policy considerations that need to be addressed for prescriptive easements to continue as a viable doctrine in modern law.

First, because use must be adverse to establish a prescriptive easement and landowners will generally not tolerate such use willingly, a landowner’s self-help measures to prevent adverse use can actually be used as evidence that the use was adverse in the first place.<sup>27</sup> This produces the absurd result that by taking measures to protect his or her own property rights, the landowner risks actually strengthening the claimant’s argument in favor of adverse use.<sup>28</sup>

This problem is illustrated by the decision in *Trustees of Forestgreen Estates, 4th Addition v. Minton*<sup>29</sup>, where the landowners had actually gone to the effort of placing a chain and barricades across the road in question, purportedly to prevent the claimants from using the road.<sup>30</sup> The claimants almost immediately moved the barricades out of the way and continued using the road.<sup>31</sup> In court,

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23. *Id.* § 2.16 cmt. b.

24. *Id.*

25. *Id.* § 2.17 cmt. j (“An unsuccessful attempt to block the use reinforces the argument that the use is adverse and does not work an interruption.”).

26. *E.g.*, *Svoboda v. Johnson*, 281 N.W.2d 892, 899 (Neb. 1979) (presuming adverse use for prescriptive easements, shifting the burden to the servient owner to show that the use was permissive); *Dickinson v. Pake*, 201 S.E.2d 897, 900 (N.C. 1974) (presuming permissive use for prescriptive easements, leaving the burden on the claimant to show adverse use).

27. *E.g.*, *Trs. of Forestgreen Estates, 4th Addition v. Minton*, 510 S.W.2d 800, 803 (Mo. Ct. App. 1974).

28. *Id.* (noting that the claimant’s removal of the barricades that the landowner had placed on the roadway in an attempt to interrupt the claimant’s use ultimately strengthened claimant’s argument for adverse use).

29. 510 S.W.2d 800 (Mo. Ct. App. 1974).

30. *Id.* at 802.

31. *Id.*

the landowners argued that placing the chain and barricades across the road interrupted the claimants' use and that therefore the claimants had not satisfied the "continuous use" element.<sup>32</sup> The Missouri Court of Appeals rejected this argument, however, and upheld the trial court's finding that the brief interruptions were not sufficient to prevent the claimants from establishing continuous use.<sup>33</sup>

The court went on to state that "[the claimants'] actions in immediate removal of the barriers to avoid hampering of their use strengthens their argument of adverse, hostile use under claim of right," and found that the claimants had in fact established a prescriptive easement.<sup>34</sup> Interestingly, the *Restatement (Third)* adopts this same view—where comment j to section 2.17 states that "[a]n unsuccessful attempt to block the use reinforces the argument that the use is adverse."<sup>35</sup> This approach is troubling. Common sense would seem to tell us that a landowner trying to protect his own property rights should not help another individual acquire property rights from the landowner, especially without compensation.

The fact that a landowner trying to assert his own property rights to prevent a claimant's adverse use can actually strengthen a claimant's case for acquiring a prescriptive easement is problematic. This oddity in prescriptive easement law effectively leaves the landowner with only two realistic options to avoid the claimant eventually obtaining a prescriptive easement: (1) granting the claimant permission to use the land, thereby defeating the adverse-use element, or (2) resorting to the legal system through a lawsuit or law enforcement officials, which leaves the landowner shouldering the expense of maintaining a suit against the claimant. The important policy question presented here is why should a landowner who chains his gate be worse off than those he seeks to exclude from his land?

Even where a landowner engages in neighborly conduct by allowing another to use his land permissively, the fact that the use begins as permissive does not necessarily mean it will stay that way.<sup>36</sup> For example, the Minnesota Supreme Court has held that if the claimant shows "open assertion of hostile title, and knowledge [of that assertion] brought home to the owner of the land," then

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32. *Id.* at 803.

33. *Id.*

34. *Id.*

35. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. j (AM. LAW INST. 2000).

36. Jeffrey Chelstrom, *Property: Prescriptive Easements and a Change from Permissive to Hostile Use*—*Boldt v. Roth*, 28 WM. MITCHELL L. REV. 1283, 1292 (2002) ("Even if a servient landowner establishes that a use is initially found to be permissive, the claimant of a prescriptive easement may still succeed by providing evidence that the use has become hostile.").

permissive use can be reclassified as hostile use.<sup>37</sup> The uncertainty caused by the fact that the same use can change from permissive to adverse further discourages neighborly conduct by increasing the risk that landowners who allow permissive use by their neighbors will end up strengthening a claimant's case later down the road.

The comments to the *Restatement (Third)* recognize this drawback, noting that prescription "discourages neighborly conduct and accommodation. Landowners are required either to formalize permissive arrangements, or to prevent use by others to avoid the risk that rights will be established by prescription."<sup>38</sup>

Some courts have also added presumptions either for or against the adverse-use element.<sup>39</sup> The current majority approach is that once a claimant has established open and notorious, uninterrupted use for the prescriptive period, a presumption of adverse use arises.<sup>40</sup> Under this approach, if the claimant establishes the elements that give rise to a presumption of adverse use then the burden of proof, which normally rests with the claimant, shifts to the owner to show that the use was permissive.<sup>41</sup> This leaves the owner in the difficult position of having to establish that he allowed the prescriptive user access to the property.

Some courts have gone the opposite direction, instead adopting a presumption that the claimant's use was permissive, leaving the ultimate burden of proof with the claimant.<sup>42</sup> This decision reflects the policy recognized in some jurisdictions that prescriptive easements are disfavored by the law because they award property rights to an adverse user—at the true owner's expense—without compensation.<sup>43</sup> Additionally, a presumption of permissive use may arise where the adverse use is shared with the public.<sup>44</sup>

Interestingly, despite the fact that the law of prescriptive easements is deeply rooted in the doctrine of adverse possession, at least some jurisdictions that have adopted a presumption of permissive use in prescriptive easement law have not done so in

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37. *O'Boyle v. McHugh*, 69 N.W. 37, 38 (Minn. 1896); *see also* Chelstrom, *supra* note 36.

38. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000).

39. *E.g.*, *Svoboda v. Johnson*, 281 N.W.2d 892, 899 (Neb. 1979) ("[I]f a person proves uninterrupted and open use for the necessary period . . . the presumption is raised that the use is adverse . . ."); *Dickinson v. Pake*, 201 S.E.2d 897, 900 (N.C. 1974) (rejecting the majority approach presuming adverse use and adopting the presumption of permissive use for prescriptive easements).

40. 2 AM. JUR. 3D *Proof of Facts* § 3 (1988).

41. *Id.*

42. *Potts v. Burnette*, 273 S.E.2d 285, 288 (N.C. 1981).

43. *E.g.*, *Carroll v. Meredith*, 59 S.W.3d 484, 489–90 (Ky. Ct. App. 2001); *Potts*, 273 S.E.2d at 288.

44. *Patch v. Baird*, 435 A.2d 690, 692 (Vt. 1981).

their adverse possession doctrines.<sup>45</sup> Courts, by presuming adverse use in adverse possession, are essentially expressing that they are less hesitant to find prescriptive easements than they are to find adverse possession, despite the fact that some jurisdictions explicitly state that prescriptive easements are disfavored under their law.<sup>46</sup>

The fact that there is a divergence in who has the burden of proof to show adverse use may, at least in part, be attributable to the fact that adverse possession generally grants the claimants fee simple title to the land in question, while a prescriptive easement grants only a servitude, which is limited to the same type and scope of use as the original adverse use.<sup>47</sup> Another possible reason for the difference is that, while prescriptive easements are mostly established in common law, some jurisdictions have adopted adverse possession statutes.<sup>48</sup> Adoption of the doctrine in the form of a statute would give the court less flexibility in tweaking the doctrine than it would have over a purely common law doctrine, meaning courts would have more flexibility to adjust their common law prescriptive easement doctrine than a statutory adverse possession doctrine.

## 2. *Open and Notorious, Such That the True Owner Has Notice of the Claim*

Generally, to establish a prescriptive easement, the claimant's use must be open and notorious. Some states phrase this requirement more explicitly, stating that the use must be "open and notorious such that the true owner had notice of the claim."<sup>49</sup> The purpose of this element is to give the true property owner an opportunity to protect his or her rights against a claimant trying to establish a prescriptive easement.<sup>50</sup> Comment h to section 2.17 of the *Restatement (Third)* provides that open and notorious use requires that the claimant use the land "in such a way that a reasonably diligent owner would learn of its existence."<sup>51</sup> Under the *Restatement (Third)* approach, "[o]pen' generally means that the use is not made in secret or stealthily," while "[n]otorious' generally means that the use is actually known to the owner, or is widely known in the neighborhood."<sup>52</sup> While jurisdictions vary in the exact language they use, they generally seem to revolve around the same

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45. *Barrett v. Williams*, 7 S.E.2d 383, 384 (N.C. 1940).

46. *E.g.*, *Carroll*, 59 S.W.3d at 489-90; *Tuf Flight Indus. v. Harris*, 129 S.W.3d 486, 488 (Mo. Ct. App. 2004); *Potts*, 273 S.E.2d at 288.

47. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (AM. LAW INST. 2000).

48. *E.g.*, N.C. GEN. STAT. § 1-40 (2014).

49. *Potts*, 273 S.E.2d at 287.

50. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (AM. LAW INST. 2000).

51. *Id.*

52. *Id.*

basic question of whether the use was such that the owner should have figured out that someone was using his or her land.<sup>53</sup>

The Supreme Court of Appeals of West Virginia has held that where the landowner had actual knowledge of the adverse use, a claimant need not show that the use was open and notorious.<sup>54</sup> This shortcut around showing open or notorious use may not be a bad thing. In theory, allowing actual knowledge as a substitute for open and notorious use would prevent landowners from asserting that the use was not obvious enough for them to figure out that someone was using their land when in fact it was obvious enough that the landowner knew about it in the first place.

Because even jurisdictions that use different language seem to focus on the same consideration of whether a reasonable landowner should have noticed the use, this element would likely be easy to incorporate into a uniform approach to prescriptive easement law.

### 3. *Continuous for the Prescriptive Period*

To establish a prescriptive easement “[a] claimant . . . must have continuously used the easement for the full prescriptive period.”<sup>55</sup> “The continuity required is that the use be exercised more or less frequently, according to the purpose and nature of the easement.”<sup>56</sup> Continuous use in prescriptive easement law does not require specific intervals or frequency of use.<sup>57</sup> As the Missouri Court of Appeals has phrased it, continuous use simply requires “use ‘at such times by the users as their convenience and business needs require[.]’”<sup>58</sup> Continuous use has come to mean that the claimant exercises his or her use “as frequently as convenience or necessity requires consistent with the character of the property and the nature of the easement asserted.”<sup>59</sup>

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53. Compare *Silverstein v. Byers*, 845 P.2d 839, 842 (N.M. 1992) (“To be open and notorious, the use must be of such a nature as to charge the landowner with constructive notice.”), with *O’Dell v. Stegall*, 703 S.E.2d 561, 590 (W. Va. 2010) (“To establish that an adverse use was ‘open and notorious,’ the [claimant] must show that the wrongful use was visible and apparent, was not made stealthily or in secret, and was so conspicuous and obvious that a reasonable, prudent owner of land would have noticed.”).

54. *O’Dell*, 703 S.E.2d at 590; see also *Conley v. Conley*, 285 S.E.2d 140, 142 (W. Va. 1981) (holding that claimant had established a prescriptive easement for a gas pipeline across landowner’s property where the use of the pipeline was continuous and interrupted, and “the identity of the pipeline [was] obvious to all parties involved”).

55. *Supal v. Miller*, 455 So. 2d 593, 594 (Fla. Dist. Ct. App. 1984).

56. *Dickinson v. Pake*, 201 S.E.2d 897, 900–01 (N.C. 1974) (quoting J. WEBSTER, REAL ESTATE LAW IN NORTH CAROLINA § 288 (1971)).

57. *Moss v. Ward*, 881 S.W.2d 238, 241 (Mo. Ct. App. 1994).

58. *Id.* (quoting *Moravek v. Ocsody*, 456 S.W.2d 619, 625 (Mo. Ct. App. 1970)).

59. *Id.* (quoting *White v. Millington Living Tr.*, 785 S.W.2d 782, 785 (Mo. Ct. App. 1990)).

Under the *Restatement (Third)* approach, the continuous use element is broken down into two parts: a mental part and a physical part.<sup>60</sup> The mental aspect requires that the user maintain adversity to the servient owner for the entire prescriptive period.<sup>61</sup> Under this aspect, if the claimant submits to the owner's title or abandons his adverse claim, then there would be a break in the continuity of adverse use sufficient to stop the prescriptive period.<sup>62</sup> However, if the user maintains an adverse attitude towards the use for the prescriptive period, even in cases where physical use ceases for some time, the prescriptive use is continuous and the prescriptive period continues to run.<sup>63</sup>

The physical continuity requirement does not require constant, or even frequent, physical use.<sup>64</sup> Under the *Restatement (Third)*, "[s]easonal uses, intermittent uses, and changing uses all may meet the continuity requirement so long as they are open or notorious."<sup>65</sup> Once a lapse in use sufficient to interrupt continuous use occurs, the prescriptive period stops running.<sup>66</sup> "[I]f the user later resumes an adverse posture, [then] a new prescriptive period begins."<sup>67</sup>

This loose definition of continuous use means that effectively interrupting the claimant's use to stop the prescriptive period can be difficult. The *Restatement (Third)* comments provide that to successfully interrupt the claimant's use, "the owner must either cause the adverse user to stop the use, comply with a statutory procedure that produces an interruption, or bring a legal action that results in establishing the landowner's right to terminate the use."<sup>68</sup> However, the *Restatement (Third)* comment goes on to essentially endorse the result in *Minton*, discussed above, by stating that "[a] physical interference with the use is effective only if it brings about a cessation of use. If the adverse user resumes the use, the interruption has not been successful unless the cessation of use was long enough to indicate abandonment."<sup>69</sup>

This definition of continuous use is somewhat problematic, mostly because it seems unpredictable. Specifically, it seems to leave no bright-line rule for when use will be considered sufficiently interrupted, which means that landowners attempting to interrupt a

60. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. i (AM. LAW INST. 2000).

61. *Id.*

62. *Id.*

63. *Id.*

64. *Id.*

65. *Id.*

66. *Id.*

67. *Id.*

68. *Id.* § 2.17 cmt. j.

69. *Trs. of Forestgreen Estates, 4th Addition v. Minton*, 510 S.W.2d 800, 803 (Mo. Ct. App. 1974); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. j (AM. LAW INST. 2000).

claimant's use do not have a clear standard to tell landowners when they have or have not succeeded.

The length of the prescriptive period varies from state to state.<sup>70</sup> According to the *Restatement (Third)* comments, "courts base the prescriptive period on the time provided by the statute of limitations for bringing an action to recover possession of land."<sup>71</sup> A uniform approach should also recommend a uniform prescriptive period under state law to ensure consistency between jurisdictions.

#### 4. *Exclusive*

The term "exclusive use" as used in prescriptive easement law also differs from the term as used in adverse possession doctrine. Generally, the term "exclusive" in prescriptive easement law is less comprehensive than in adverse possession.<sup>72</sup> "The word *exclusive* in reference to a prescriptive easement does not mean that there must be use only by one person but, rather, means that the use cannot be dependent upon a similar right in others, i.e., the user must exclude the public at large."<sup>73</sup> This means that an adverse user need not exclude the true owner to establish exclusive use.<sup>74</sup>

This deviation from adverse possession law is necessary, however, because the very nature of easements is that one estate is burdening another. This means that more than one party has the right to use the land, because the servient owner still has a possessory interest in the land, while an easement holder has the right to use the land for a specific purpose.<sup>75</sup> Arguably, requiring that the claimant's use be truly exclusive would make it nearly impossible to establish a prescriptive easement.<sup>76</sup> Therefore, interpreting the word "exclusive" narrowly to simply require that "one's claim be asserted independently of other users" in the context of prescriptive easements is necessary to make prescriptive easements a viable doctrine.<sup>77</sup>

In summary, while prescriptive easements and adverse possession both require exclusive use in most states, the term

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70. Compare *Supal v. Miller*, 455 So. 2d 593, 594 (Fla. Dist. Ct. App. 1984) (providing for a twenty-year prescriptive period), with *Moss v. Ward*, 881 S.W.2d 238, 241 (Mo. Ct. App. 1994) (providing for a ten-year prescriptive period).

71. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. k (AM. LAW INST. 2000).

72. *E.g.*, *Plettner v. Sullivan*, 335 N.W.2d 534, 538 (Neb. 1983) ("Whereas the exclusivity required for adverse possession relates to 'all others' . . . the exclusive use for acquisition of a prescriptive right or prescriptive easement is not so comprehensive.").

73. *Id.*

74. *Id.*

75. *Easement*, BLACK'S LAW DICTIONARY (10th ed. 2014).

76. *Jones v. Daley*, 609 S.E.2d 597, 600 (S.C. Ct. App. 2005).

77. *Id.*

“exclusive” is not used in the same manner when applied to prescriptive easements as it is when applied to adverse possession.<sup>78</sup> In the adverse possession context, “exclusive” tends to be used as challenging the true owner’s right to use the property or preventing the true owner from using the land, which is usually accomplished by fencing or marking off the land.<sup>79</sup> In the prescriptive easement context, on the other hand, exclusive use tends to refer to a challenge to the true owner’s right to prevent the adverse user from using the land for the particular use for which the easement is claimed.<sup>80</sup> Essentially, to establish adverse possession a claimant’s use must be exclusive against all others, including the true owner, while to establish a prescriptive easement the claimant’s use cannot be in conjunction with others, such as the general public, using a right of way.

*B. Policy Considerations For and Against Prescriptive Easements*

Prescriptive easement doctrine, as adopted by the *Restatement (Third)*, is based on the policy choice to reward longtime property users and penalize owners who sleep on their rights.<sup>81</sup> The rationale for this choice tracks the *Restatement (Third)*’s policy favoring the economically productive use of land.<sup>82</sup> This approach also maintains the parties’ expectations based on long-term use, helps bring title into conformity with the claimant’s actual use of the property, and protects creditor and purchaser expectations.<sup>83</sup> Notably, even though the *Restatement (Third)* embraces the policy choice to reward the productive use of land as the rationale for prescriptive easements,<sup>84</sup> it has not adopted any requirement that a person claiming a prescriptive easement actually need the easement to access their land.<sup>85</sup> This means that a claimant can obtain a prescriptive easement over another’s land even when that claimant does not actually need the easement to access his or her own land. This outcome creates concerns about whether the policy in favor of the productive use of land (other than the easement itself) is actually being furthered by allowing prescriptive easements where an easement is not necessary.

Despite the benefits of rewarding the productive use of land, the prescriptive easement doctrine also presents significant downsides.

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78. *Patch v. Baird*, 435 A.2d 690, 692 (Vt. 1981) (explaining the difference between “exclusion” as used with adverse possession compared to prescriptive easements).

79. *Id.*

80. *Id.* at 691–92.

81. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000).

82. *Id.*

83. *Id.*

84. *Id.*

85. *Id.* § 2.17.

For example, it can discourage neighborly conduct because landowners will need to formalize permissive arrangements or prevent neighbors from using any part of their land to avoid the risk of the neighbor acquiring permanent property rights through prescription.<sup>86</sup> The possibility that another person could acquire property rights through prescription can also increase monitoring costs because owners must monitor for adverse use of their land to avoid another person obtaining property rights.<sup>87</sup>

Perhaps due to these concerns, many jurisdictions disfavor prescriptive easements in their common law.<sup>88</sup> Courts express this disfavor either by creating a presumption of permissive use,<sup>89</sup> leaving the burden on the claimant to show that the use was adverse, or by raising the standard of proof to clear and convincing evidence for some or all of the elements, increasing the amount of proof that the claimant must provide to the trier of fact.<sup>90</sup> This may be because courts are hesitant to find prescriptive easements, since doing so results in granting property rights to the claimant at the expense of the true owner of the property and without compensating the owner of the servient estate.

Granting property rights to a claimant simply because the claimant has successfully managed to trespass for the prescriptive period seems inherently unfair. So why do it? The fact that a claimant is essentially rewarded by being granted a servitude because he or she got away with trespassing demonstrates just how strong the *Restatement (Third)*'s policy in favor of the productive use of land is. It also demonstrates that the Restatement policy actually goes even further, opting to "penalize[] the property owner who sleeps on his or her rights."<sup>91</sup>

If prescriptive easements are disfavored in many jurisdictions, and other types of implied easements exist, then why use prescriptive easements at all? Despite the downsides, prescriptive easements still serve a legitimate social purpose (albeit one that is narrower now than it was when the doctrine was developed) and solve a problem that other types of implied easements (easement by necessity, easement by estoppel, easement by prior existing use, etc.) do not.

For example, assume A owns Blueacre, a landlocked parcel of real property. Further assume that the only way to access a public

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86. *Id.* § 2.17 cmt. c.

87. *Id.*

88. *E.g.*, *Carroll v. Meredith*, 59 S.W.3d 484, 489–90 (Ky. Ct. App. 2001); *Tuf Flight Indus. v. Harris*, 129 S.W.3d 486, 488 (Mo. Ct. App. 2004); *Potts v. Burnette*, 273 S.E.2d 285, 288 (N.C. 1981).

89. *E.g.*, *Potts*, 273 S.E.2d at 288.

90. *Tuf Flight Indus.*, 129 S.W.3d at 488.

91. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000).

road from Blueacre is by a driveway across Whiteacre, a neighboring parcel. Unless Blueacre and Whiteacre were previously under common ownership, and the split in ownership created the necessity for Blueacre's owner to use the driveway across Whiteacre, then A will not be able to establish an easement by necessity over the driveway to his property.<sup>92</sup> A is then out of options and will be stuck with a landlocked parcel.

On the other hand, if A were to use the driveway without B's permission, in an open and notorious manner, continuously for the prescriptive period (assuming the public was not also using the driveway) then A would acquire a prescriptive easement, which would grant him the right to use the driveway for the purpose of entering and leaving his property.<sup>93</sup> While A acquiring this right is a detriment to B, it does not affect B's right to also use the property, so long as B's use does not interfere with A's. The easiest solution would be for A to simply offer to pay B to grant A an express easement over the driveway. This would solve the problem without having to rely on an implied easement, the results of which can be unreliable, depending on whether the court agrees that the implied easement's elements were satisfied.

Even once a prescriptive easement has been established, the servient owner is not entirely without protection. After acquiring a prescriptive easement, the dominant owner's use is limited to the same type and scope as the use that the dominant owner made of the land during the prescriptive period.<sup>94</sup> Limiting the type and scope of use to the same as during the prescriptive period protects the servient owner's interest by preventing the dominant owner from unilaterally expanding the easement's scope, thus further depriving the servient owner.<sup>95</sup> Courts generally allow reasonable adjustments to reflect changes in society and technology.<sup>96</sup> However, even these adjustments are typically limited in scope to the original category of use (residential, commercial, etc.).<sup>97</sup> When determining whether an adjustment is permissible, courts compare the original burden on the servient tenement to the burden with the

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92. See, e.g., *Jernigan v. McLamb*, 665 S.E.2d 589, 592 (N.C. Ct. App. 2008); see also RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 (AM. LAW INST. 2000) (stating that there must be prior common ownership and a conveyance that split the property in order to establish an easement by necessity).

93. See *Yadkin Valley Land Co. v. Baker*, 539 S.E.2d 685, 688 (N.C. Ct. App. 2000) (listing the elements for a prescriptive easement).

94. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. f (AM. LAW INST. 2000).

95. See *id.*

96. Annotation, *Scope of Prescriptive Easement for Access*, 79 A.L.R. 4th § 2(a) (1990).

97. *Id.*

adjustment, asking whether the increase in burden is substantial or material.<sup>98</sup>

## II. DEVELOPING AN EFFECTIVE PRESCRIPTIVE EASEMENT DOCTRINE THAT CONFORMS WITH CURRENT POLICY CONSIDERATIONS

This Part first proposes a new approach to prescriptive easement law, which will allow prescriptive easements to be more efficient and better balance the policy concerns that the *Restatement (Third)* supports with private property rights. It will then demonstrate how this approach actually supports the policy considerations that have already been embraced by the *Restatement (Third)*, but that these policy concerns can be effectively balanced with protecting landowners' property rights. It will also discuss why prescriptive easements should not be totally abolished, despite some commentary to the contrary.<sup>99</sup> This Part urges that, in light of these policy arguments, the ALI should adopt this approach in the *Restatement (Fourth) of Property*, which is one of the ALI's current projects and will be the first comprehensive restatement of property law.<sup>100</sup>

To solve the problems not covered by other types of implied easements, while not extending property rights to those who do not need them, the prescriptive easement doctrine should be adjusted to better suit its proper role in the modern world. This can be accomplished by making a few fairly simple changes. First, a uniform approach should adopt a presumption of permissive use. Second, a uniform approach should require that the claimant either: (1) establish reasonable necessity for an easement over the servient estate, or (2) compensate the servient estate's owner in order to receive a prescriptive easement. This approach would cut down on the problem of rewarding trespassers and encourage neighborly behavior. Further, the necessity requirement would allow only those persons who actually need the easement to acquire prescriptive rights, so long as the other elements are satisfied, filling the gap left by the other implied easements while avoiding inequitably extending property rights to those who have not paid for them.

While some commentators have argued that prescriptive easements should be abolished altogether<sup>101</sup>, abolishment of the doctrine is not the best approach. Although prescriptive easements do intrude on a person's property rights, prescriptive easements still serve a legitimate purpose. By narrowing, rather than abolishing,

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98. *Id.*

99. Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 105 (2005) (arguing for abolishment of prescriptive easements).

100. *Restatement of the Law Fourth, Property*, *supra* note 6.

101. *E.g.*, Hernandez, *supra* note 99.

the doctrine, prescriptive easements could solve problems not covered by the other types of implied easements, while not over-intruding into private property rights.

A reasonable necessity requirement would help alleviate the types of problems not solved by other types of implied easements—such as easements by necessity, which generally require prior common ownership of the dominant and servient estates—while narrowing the doctrine so that those who do not need to have prescriptive easements are not awarded property rights to the landowner's detriment.<sup>102</sup> As the official comments to the *Restatement (Third)* point out, “the common law never developed a general method for providing access to landlocked property.”<sup>103</sup>

It is important to note that the necessity requirement to establish a prescriptive easement should require *reasonable*, rather than strict, necessity. Different jurisdictions have adopted different standards for necessity in the context of easements by necessity. Some jurisdictions, such as Vermont, have only required reasonable necessity, while others have required strict or absolute necessity before finding an easement by necessity.<sup>104</sup> A reasonable necessity requirement better protects the claimant's needs and is consistent with the *Restatement (Third)* approach to easements by necessity.<sup>105</sup>

Requiring reasonable necessity as a prerequisite to establishing a prescriptive easement protects owners of landlocked parcels or parcels with features that prevent access to a public road over that parcel (for example, a parcel that borders a road, but the side of the land by the road is entirely a cliff, making it impossible to access the road from the land bordering it). This means that landowners who need to travel over another's land to access their own property can establish a prescriptive easement, as long as the prescriptive easement elements are met, even where there is a lack of prior common ownership. Further, leaving the burden of proof on the claimant to establish reasonable necessity is consistent with the current *Restatement (Third)* approach, under which the claimant

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102. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 (AM. LAW INST. 2000) (defining an easement by necessity as “[a] conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land . . . unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights”).

103. *Id.* § 2.15 cmt. a.

104. Compare *Thompson v. Whinnery*, 895 P.2d 537, 541 (Colo. 1995) (en banc) (finding that the claimant failed to establish “great necessity” where claimant had legal access to land by foot and horseback), with *Berge v. State*, 915 A.2d 189, 192 (Vt. 2006) (requiring only “reasonably consistent, *practical* means of reaching [the landowner's] property”).

105. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 (AM. LAW INST. 2000) (“A conveyance that would otherwise deprive the land conveyed . . . of rights necessary to *reasonable enjoyment* of the land implies the creation of a servitude granting or reserving such rights . . . .” (emphasis added)).

bears the burden of showing all of the elements of a prescriptive easement.<sup>106</sup>

Opponents of prescriptive easements, even with the introduction of a reasonable necessity requirement, might argue that easements by necessity already exist, and therefore a prescriptive easement with a reasonable necessity requirement is redundant. However, this argument is flawed because a landowner cannot establish an easement by necessity unless the dominant and servient estates were once under common ownership, there was a conveyance severing the parcel, and the conveyance caused the need for the easement.<sup>107</sup> Where a landlocked parcel was not under prior common ownership with the land over which the owner seeks to obtain an easement, an easement by necessity cannot arise and the landowner is stuck with a landlocked parcel.<sup>108</sup>

Opponents of prescriptive easements may also argue that whether there is reasonable necessity or not, absent prior common ownership, the landowner knew what he was purchasing and should not be able to acquire property rights greater than what he bargained for when he purchased the landlocked parcel. This argument is flawed for two reasons: (1) it is inconsistent with the policy of rewarding the productive use of land, and (2) it ignores the economic reality that where a road or driveway crosses another person's property, the fact that the driveway is not wholly on the property in question may not always be ascertainable to a real property buyer.

First, the *Restatement (Third)* has embraced the policy rewarding the productive use of land.<sup>109</sup> Obviously it is harder to make productive use of land when a parcel is landlocked, as ingress and egress from the property becomes more difficult since the owner has to travel over another's property to access his or her own land. Allowing a claimant to obtain a prescriptive easement where there is reasonable necessity but no prior common ownership furthers these same policies. A reasonable necessity requirement rewards the productive use of land by allowing a landowner with a landlocked parcel another method of acquiring an easement to access his or her property when the landowner cannot establish another type of implied easement.

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106. See *id.* § 2.16 cmt. g ("There are a few states that claim to apply no presumption as to the initial character of an unexplained use, but they arrive at a result similar to the states with a presumption of permissive use because *the claimant of a prescriptive right carries the burden of proof* to show that the use was not permissive." (emphasis added)).

107. See *id.* § 2.15 cmt. a ("Only if the cause of the landlocking can be traced back to a particular conveyance does the common law provide a solution.").

108. *Id.*

109. *Id.*

Second, a reasonable necessity requirement protects an innocent buyer's expectation that he or she will be able to access his or her land with reasonable effort. Easements by necessity in particular have been justified both by the policy in favor of productive use of land and by private needs.<sup>110</sup> During the twentieth century, courts recognized both the public-policy basis for easements by necessity and private needs—through presumptions regarding the intent of the parties—as justifications supporting easements by necessity.<sup>111</sup>

Allowing prescriptive easements where there is reasonable necessity protects those buyers who rely on a seller's representations or the apparent condition of the property when purchasing land. While there is some detriment to the landowner who allows a prescriptive easement to be obtained over his land, this detriment is outweighed by the combination of the need to protect the buyer's expectations and the policy of encouraging the economically productive use of land. Because a reasonable necessity requirement would further the policy decisions already embraced by the *Restatement (Third)*, it should be incorporated into prescriptive easement law in the *Restatement (Fourth) of Property*.

Requiring that, in the absence of reasonable necessity, a claimant compensate the landowner for the fair market value of the easement prevents a claimant from being unjustly enriched by receiving property rights at a detriment to an uncompensated landowner. A compensation alternative also prevents unfair loss to a claimant who has spent money to improve the condition of an easement. This approach is consistent with the current Restatement policy of rewarding the productive use of land, but avoids punishing owners for neighborly conduct when they simply cannot meet the burden of showing permissive use (in states that have adopted a permissive use presumption).<sup>112</sup>

Even one commentator who argued for abolishing prescriptive easements recognized that in the absence of abolishment prescriptive easements could be feasible if the owner of the dominant estate was required to compensate the owner of the servient estate.<sup>113</sup> The article, *Restating Implied, Prescriptive, and Statutory Easements*, argues for required compensation, although only as an alternative to abolishing the doctrine altogether.<sup>114</sup> Requiring compensation for every prescriptive easement, however, is

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110. *Id.*

111. *Id.*

112. *Id.* § 2.17 cmt. c ("In its positive aspect, the rationale for prescription is that it rewards the person who has made productive use of the land, it fulfills expectations fostered by long use, and it conforms titles to actual use of the property.").

113. Hernandez, *supra* note 99, at 110.

114. *Id.*

reaching too far. As discussed above, allowing prescriptive easements without compensation where it is reasonably necessary to enjoy the land furthers the public policy interest of encouraging productive use of land and protects the expectations of buyers of land. Furthering these public policy interests outweighs the need to compensate the owner of the servient estate. However, if there is not reasonable necessity for the easement, then those public policy concerns are not implicated. In this situation, compensation is appropriate.

Because there is no reasonable necessity, the dominant owner could access his land by other means than traveling over the servient owner's land. Because there is another mode of access—even if less convenient—the dominant owner can still make productive use of the land, which means that the policy of encouraging productive use of land is not furthered. Even if the landowner has to drive farther or over worse terrain to access his land, that is not enough to discourage the productive use of the land.

Additionally, the policy of protecting a buyer's expectations is not furthered where there is no reasonable necessity. Generally speaking, a buyer's expectation is that he or she will be able to access his or her land. The fact that the landowner must access the land by a different—even if less convenient—route is not enough to frustrate those expectations. Because the buyer's expectations are not frustrated and the productive use of the land is not impaired, public policy should not weigh as heavily in the claimant's favor, absent reasonable necessity.

Where public policy does not cut in favor of granting a prescriptive easement, the dominant owner should compensate the servient owner for an easement over his property. This protects landowners—even those who sleep on their rights. It also protects landowners who take self-help measures instead of potentially expensive legal action, because even if the claimant establishes adverse use, absent reasonable necessity, the landowner will be entitled to compensation for the fair market value of the easement.

Requiring compensation for the easement in the absence of reasonable necessity also protects claimants. For example, in situations where landowner *A* subjectively thinks that he has easement rights over a driveway—and based on that belief pays to improve the right-of-way through landscaping, paving, etc.—it would be inequitable for the owner of the land over which the right-of-way lies (I will call him *B*) to then assert his rights, ending *A*'s access over the right-of-way that *A* paid to improve. Assuming *A*'s use of the driveway is not reasonably necessary to *A*'s use and enjoyment of his own parcel, the options are to: (1) give *A* no easement, which results in *A* losing the resources he paid to improve the right-of-way, unjustly enriching *B*; (2) allow *A* to have a prescriptive easement without compensating *B*; or (3) allow *A* the choice between keeping the easement over the land, and

compensating *B* for the fair market value of the easement, or relinquishing rights to the easement and the improvements.

Abolishing prescriptive easements altogether would result in situation (1). In this situation, *A* does not get a prescriptive easement and has wasted money improving a driveway that he can no longer use. *B*, on the other hand, is unjustly enriched because he has given up no property rights and gets the benefit of the improvements to the driveway that *A* paid for. This result contradicts the policy of encouraging productive use of land because *A* is the one who made productive use of the land by paying to improve the driveway, but *B* reaps the benefit of *A*'s efforts.

Situation (2), as discussed above, does not further the *Restatement (Third)* policy concerns in the absence of reasonable necessity for the easement because it intrudes into *B*'s rights without compensating *B* for what he has lost, which would be inequitable where there is not a reasonable necessity for the easement.

Situation (3) is ideal. It protects both *A* and *B*, though in different ways. *B* is protected because he is ensured compensation in exchange for the property rights he surrenders to *A*. *A*'s reliance interest in *A*'s continued use of the land is protected based on his continuous use for the prescriptive period. As the comments to the *Restatement (Third)* point out, this result is one of the positive effects of the prescription doctrine.<sup>115</sup>

However, neither reasonable necessity nor compensation, on their own, present an acceptable solution. As illustrated by the examples above, adopting the alternative of either reasonable necessity or compensation balances the *Restatement (Third)* policy rationales with a landowner's interest in his private property rights. The alternative approach allows prescriptive easements without compensation where there is reasonable necessity and the easement is therefore necessary to further the *Restatement (Third)* policy of encouraging productive use of land.

On the other hand, where there is no reasonable necessity—and the *Restatement (Third)* rationales are therefore not implicated (because the claimant could make productive use of his land by means other than using the servient owner's property)—requiring compensation ensures that the servient owner is protected in the absence of serious concerns for the productive use of the dominant estate. Because requiring necessity or compensation in the alternative protects both groups without overextending prescriptive easements where the *Restatement (Third)* policy rationales are not

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115. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. c (AM. LAW INST. 2000) (“[Prescription] protects the reliance interests of those whose uses have continued without interruption for the prescriptive period. . . . [P]rescription increases the security of arrangements based on long-continued uses . . .”).

actually implicated, adopting both requirements as alternatives is preferable to simply adopting one of them without the other.

As the examples above illustrate, adopting a presumption of permissive use—leaving the burden on the claimant to show that his or her use was adverse—and adopting a requirement that the claimant either (1) establish reasonable necessity (with the burden of proof resting on the claimant to so establish) or (2) compensate the servient owner for the fair market value of the easement, actually supports the *Restatement (Third)* policy rationales and protects landowners from unnecessary intrusion into their private property rights.

#### CONCLUSION

Because the current prescriptive easement doctrine does not effectively balance the policy encouraging the economically productive use of land with an owner's interest in his or her private property rights, the ALI should consider revising the doctrine of prescriptive easements in the comprehensive *Restatement (Fourth) of Property*. Such a revision should include a presumption of permissive use, leaving the burden on the claimant to prove all of the elements of prescription. It should also require either (1) that the claimant establish reasonable necessity or (2) that the dominant owner compensate the servient owner for the fair market value of the easement which he or she acquires. This revision would allow prescriptive easements to continue fulfilling a legitimate purpose without unnecessarily granting property rights to those who neither need nor deserve them. Further, the requirements of such a revision are supported by both the public policy of protecting individual property rights and the current *Restatement (Third)* policy encouraging the economically productive use of land.<sup>116</sup>

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116. *Id.*

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