

UNIFYING ADVERSE POSSESSION AND PRESCRIPTION

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It is no secret that adverse possession is a controversial doctrine. In contrast, its close relative—prescription—is far less notorious and divisive. Both doctrines are similar in that they allow longstanding possession or use to ripen into ownership or other property rights. But they are also dissimilar in a number of ways. For example, they have different historical origins, and the requirements that claimants must meet under each doctrine only partially overlap. The most crucial difference is one that courts and scholars have traditionally described as follows: Adverse possession applies to possessory rights—such as life estates or fees simple absolute—whereas prescription applies to nonpossessory rights—such as easements, profits, and water rights.

At first glance, this distinction seems coherent and useful, but closer scrutiny exposes its flaws. It is implicitly premised on the erroneous assumption that the difference between possessory and nonpossessory rights is clear-cut, when, in reality, it is not. This Article shows that many of the challenges that courts have encountered in this context result from relying on this traditional view, which is based on the understanding that the divide between possessory and nonpossessory rights is binary or discrete. As a close examination of the case law reveals, however, property rights

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exist on a continuum with varying levels of exclusiveness and breadth of use. In some areas, judicial efforts to reach sensible outcomes while simultaneously trying to follow the traditional framework have led to new sets of problems, including uncertainty and unfairness. In others, courts have simply disregarded this framework, further revealing its limited practical value.

This Article makes two distinct but related suggestions to resolve these issues. First, state legislatures should unify adverse possession and prescription into a single doctrine: acquisitive prescription. This will allow courts to avoid the unnecessary complications that result from having to choose between two doctrines that do not capture the true variability that property rights display. Second, legislatures should tailor the requirements to acquire property rights by continued use or possession to the specific nature and characteristics of each right, rather than to whether they are possessory or nonpossessory. Doing so will add nuance where it is most needed. By crafting not just two—but multiple—frameworks, legislators and judges will be able to distinguish more precisely between rights based on where they are in the exclusiveness/breadth-of-use continuum. These changes should also exempt those who, at the time the reform takes effect, have already started using or possessing the property of another.

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INTRODUCTION

Property disputes have become surprisingly popular on social media.¹ The case involving Taralyn Romero (who uses the name “Real Wicked Witch of the West” on TikTok²) is a notable example of this trend, as her most popular video covering her clash with Jefferson County, Colorado, has received close to five million views.³ The disagreement started in 2021 after Ms. Romero purchased a parcel of land adjacent to a creek and a public park in Colorado.⁴ Both Ms. Romero and the County believed they were the sole owners of an area that the County and the public had used to access the creek for decades.⁵ After Ms. Romero and her boyfriend placed a fence on

1. The search “property dispute” on TikTok, for example, returns a long list of short videos. Search Results for “Property Dispute,” TIKTOK (2025), <https://www.tiktok.com/search?q=property%20dispute>. Many of them have been viewed hundreds of thousands of times, and some exceed one million views. *Id.*

2. Real Wicked Witch of the West (@wickedwitch_ofthe_west), TIKTOK, https://www.tiktok.com/@wickedwitch_ofthe_west (on file with the Wake Forest Law Review).

3. Realtor.com, *I Bought My Dream Home with a Creek in the Backyard—Then the Locals Started a War*, N.Y. POST (Nov. 28, 2024), <https://perma.cc/56VY-S93E>; Video posted by Real Wicked Witch of the West (@wickedwitch_ofthe_west), TIKTOK, *Part 4: True Story* (Aug. 3, 2022), https://www.tiktok.com/@wickedwitch_ofthe_west/video/7127761188913532206 (on file with the Wake Forest Law Review) (appearing as the top result when the videos are sorted by “Popular”).

4. Bd. of Cnty. Comm’rs v. Romero, No. 2022CV30802, slip op. at 1 (Colo. Dist. Ct. Jan. 27, 2023) (order granting preliminary injunction).

5. *Id.*

different parts of the disputed property, the County sued and sought a declaratory judgment that it owned the property⁶ as well as a preliminary injunction to reestablish public access to it while the court decided the case.⁷

The County argued that it owned the parcel by relying primarily on the language in the deed.⁸ However, since the County had improved, maintained, and used the property for more than thirty-five years, it also reasoned that if it did not own the property outright, it had nonetheless acquired the parcel by adverse possession.⁹ Interestingly, the County also claimed, in the alternative, that it had obtained a prescriptive easement on the disputed land.¹⁰ More specifically, an easement for “public recreational use and for operation and maintenance purposes.”¹¹

While this case was ultimately settled in 2023,¹² the County’s strategy to rely on both adverse possession and prescription raises some important questions. How similar are these doctrines? Can they be used in the same context? Does it make a difference whether a party prevails based on one of them as opposed to the other?

These doctrines are undoubtedly very similar, which answers the first question.¹³ They both allow the acquisition of property rights by the passage of time.¹⁴ More specifically, they enable those who have

6. *Id.* at 1–2; Complaint for Declaratory Judgment and Injunctive Relief at 6, *Romero*, No. 2022CV30802 (Colo. Dist. Ct. filed July 12, 2022) (resolved in late 2023 by a settlement not located in the court’s docket).

7. *Romero*, slip op. at 2; Amended Motion for Preliminary Injunction at 25, *Romero*, No. 2022CV30802.

8. Complaint for Declaratory Judgment and Injunctive Relief, *supra* note 6, at 2. The County also based its claim on “the law of accretion and reliction” to support its argument that the original boundaries of the disputed parcel had shifted as the creek moved south. *Id.*

9. *Id.* at 2–3.

10. *Id.* at 2.

11. *Id.*

12. The County agreed to pay Ms. Romero \$250,000, and she agreed to provide a quitclaim deed to part of the disputed property. Memorandum from Joe Kerby, Cnty. Manager, to Honorable Chairman and Members of the Board of County Commissioners (Dec. 12, 2023), <https://perma.cc/W6V6-FSNS>.

13. See Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1124 (1985) (referring to prescriptive easements as “a first cousin of adverse possession”).

14. *Anderson v. United States*, 147 Fed. Cl. 661, 674 (2020) (“Prescription, like adverse possession, ‘permit[s] acquisition of property rights through the passage of time’” (alteration in original) (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (A.L.I. 2000))), *aff’d*, 23 F.4th 1357 (Fed. Cir. 2022); *Interior Trails Pres. Coal. v. Swope*, 115 P.3d 527, 529 (Alaska 2005) (“Both [prescription and adverse possession] permit acquisition of property rights through the passage of time” (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (A.L.I. 2000))); *Senez v. Collins*, 957 A.2d 1057, 1070 (Md. Ct. Spec. App. 2008) (“Adverse possession is a method whereby a person who

used or possessed someone else's property continuously for a certain number of years to acquire rights over it, provided that they meet some additional conditions.¹⁵ There is a significant overlap between the requirements that claimants must satisfy under prescription and adverse possession.¹⁶ Some common elements include the need for the use or possession of the property to be adverse, continuous, and open and notorious.¹⁷

Despite their similarities, these doctrines are distinct from one another, and, at least in theory, the divide between adverse possession and prescription is clear.¹⁸ Three main differences stand out. First, both under Roman law and under English law, prescription and adverse possession originated separately, and they also had different theoretical foundations.¹⁹ Second, these doctrines apply to different types of rights.²⁰ Therefore, the answers to the second and third questions noted above are that, while adverse possession and prescription may be pled in the alternative in the same dispute, the nature of the rights acquired will be different under each doctrine. Claimants who seek to obtain a right to possess or occupy someone else's property must generally resort to adverse possession.²¹ These so-called possessory or corporeal rights include, for example, fees simple absolute and life estates.²² Prescription, on the other hand, provides the appropriate avenue to obtain nonpossessory or incorporeal rights by continued use, such as easements, profits, and water rights.²³

was not the owner of property obtains a valid title to that property by the passage of time." (quoting MARYLAND CIVIL PATTERN JURY INSTRUCTIONS 2:1)).

15. 3 AM. JUR. 2D *Adverse Possession* § 8, Westlaw (database updated Nov. 2025); see also *Interior Trails*, 115 P.3d at 529; *Connolly v. Trabue*, 139 Cal. Rptr. 3d 537, 544 (Ct. App. 2012).

16. 68 AM. JUR. PROOF OF FACTS 3D 239 § 2, Westlaw (database updated July 2025) (noting that "the elements necessary to establish a claim of adverse possession or prescriptive easement are essentially the same in most jurisdictions" (footnotes omitted)).

17. See *infra* Section I.C.

18. Even courts that choose not to use the doctrinal terminology accurately nonetheless acknowledge this distinction. *E.g.*, *Matoush v. Lovingood*, 177 P.3d 1262, 1264 n.2 (Colo. 2008) ("We acknowledge this technical distinction. However, for clarity and consistency, we refer to the claim as termination of an easement by adverse possession.").

19. See *infra* Section I.A.

20. See *infra* Section I.B.

21. See *infra* Section I.B.

22. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (A.L.I. 2000); 16 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 91.01[3] (Michael Allan Wolf ed., 2025) [hereinafter POWELL ON REAL PROPERTY].

23. See *infra* Section I.B.

Third, courts do not generally require proof of all adverse possession elements in a prescription case,²⁴ even though, as noted earlier, there is some overlap between the two sets of requirements.²⁵ For example, while parties seeking to acquire ownership of a parcel of land through adverse possession must show that their possession during the statutory period was *exclusive*, courts typically do not require exclusive use to obtain easements or profits by prescription.²⁶ Moreover, in some states, claimants must prove that they paid taxes on the property to successfully acquire a possessory right via adverse possession.²⁷ This, however, is not necessary to obtain a right through prescription.²⁸

At first blush, this traditional understanding of the adverse possession and prescription landscape seems reasonable and coherent. Adverse possession applies to more robust rights, and, consequently, claimants must clear a higher bar by satisfying a longer list of requirements. In other words, under this framework, more expansive or comprehensive rights are harder to acquire than those that are comparatively more limited.²⁹

A closer look, however, reveals important problems with this traditional approach. For example, courts have struggled with prescriptive exclusive easements.³⁰ These are rights to use someone else's land that, due to their breadth, often limit the landowner's ability to use the part of their property that is subject to the easement.³¹ This results from the general rule that owners of land

24. *See infra* Section I.C.

25. *See supra* notes 16–17 and accompanying text.

26. *See infra* Section I.C. This is particularly so in the case of prescriptive easements where, even when “exclusive use” is listed as a necessary element, courts tend to interpret this requirement in a way that essentially gives it no effect. *See infra* note 118 and accompanying text.

27. *See, e.g.*, *St. Paul Park Refin. Co. v. Domeier*, 950 N.W.2d 547, 551 (Minn. 2020) (concluding that the Minnesota adverse possession statute required payment of taxes for five years); *see also* Moira Deirdre Ford, Comment, *The Payment of Taxes Requirement in Adverse Possession Statutes*, 37 CALIF. L. REV. 477, 477 n.3 (1949) (listing state statutes imposing tax-payment requirements for adverse possession); Shane P. Raley, Legislative Note, *Color of Title and Payment of Taxes: The New Requirements Under Arkansas Adverse Possession Law*, 50 ARK. L. REV. 489, 490 (1997) (discussing Arkansas' then-newly-enacted adverse possession statute, which imposed a tax-payment requirement).

28. *See infra* note 108 and accompanying text.

29. *See infra* notes 250–251 and accompanying text (explaining that courts have highlighted that the burden placed on landowners by adverse possession is greater than that imposed under the doctrine of prescription).

30. *See infra* Section II.A.

31. *See, e.g.*, *George v. Coombes*, 562 P.2d 200, 202 (Or. 1977) (defining the phrase “exclusive easement” to generally “mean that [the easement holder’s] right to use the easement [i]s exclusive in the sense that it could not be used by others, including [the landowner]”); *Orange Cnty., Inc. v. Citgo Pipeline Co.*, 934

subject to easements are able to use their land for all purposes that do not interfere with that easement.³² Thus, while an easement allowing A to cross B's land would be consistent with B's presence and broad ability to use their property, the same is not the case if A holds an easement to use B's property for a much broader purpose, such as a "driveway . . . and yard."³³ When parties have asked courts to recognize an exclusive easement by prescription, some courts have chosen to treat these rights as though they were possessory.³⁴ Consistent with this view, they have required proof of all adverse possession elements instead of applying the more lenient prescriptive easement framework.³⁵ The problem this raises, of course, is one of consistency: Easements are widely regarded as nonpossessory.³⁶

Courts have faced similar struggles when dealing with certain types of profits. A profit is a nonpossessory right to remove substances from the land of another, for example, soil, timber, and grass.³⁷ As with exclusive easements, the problem is that, despite their nonpossessory nature, profits can provide their holders with a substantial amount of control of the servient land.³⁸ This has led some courts to treat these expansive profits as if they were possessory in the context of prescription claims.³⁹ In other words, these courts have required claimants to satisfy all the elements of adverse possession, not merely those necessary to acquire a right by prescription.⁴⁰

Courts have also substantially deviated from the traditional approach when applying adverse possession and prescription in the context of natural resources. With rights to divert and use surface water—which are nonpossessory—courts have often labeled their

S.W.2d 472, 476 (Tex. App. 1996) ("An exclusive easement in gross is one that gives the owner the sole privilege of making the uses authorized by it.").

32. See *infra* note 130 and accompanying text.

33. See *Raab v. Casper*, 124 Cal. Rptr. 590, 596 (Ct. App. 1975). Such a broad use would be consistent with the idea that only the easement holder should be able to use that land (or the appropriate part thereof) to fulfill the easement's purpose. See *infra* Section II.A.3.

34. See *infra* Sections II.A.2–II.A.3.

35. See *infra* Section II.A.3.

36. MICHAEL PAPPAS, SALLY BROWN RICHARDSON & PETER M. GERHART, *PROPERTY: PRINCIPLES, VALUES, AND TRADEOFFS* 215 (2025); Marvin M. Brandt *Revocable Tr. v. United States*, 572 U.S. 93, 105 (2014) (citing RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2(1) (A.L.I. 2000)); *Rivera v. Clear Channel Outdoor, LLC*, 7 N.W.3d 734, 738 (Iowa 2024) (citing, among other sources, 28A C.J.S. *Easements* § 1 (2019) and JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS & LICENSES IN LAND* ¶ 1.01, at 1–2 (1988)).

37. See *infra* notes 159–162 and accompanying text.

38. There are many examples of profits of this nature, such as large mining operations involving a variety of different uses of the surface and certain types of grazing rights. See *infra* Section II.B.2.

39. See *infra* Section II.B.2.

40. See *infra* Section II.B.2.

acquisition by continued use as “adverse possession” instead of “prescription.”⁴¹ In the area of oil and gas law, courts have similarly refused to adhere to the traditional distinction between these two doctrines.⁴²

This Article argues that these issues are a manifestation of two larger, structural problems. First, the traditional approach is flawed because it is implicitly based on a binary understanding of property rights as either possessory or nonpossessory.⁴³ But nonpossessory rights, while more limited, can still be expansive and broad, both in terms of their exclusiveness and the range of uses they allow their holders to exercise.⁴⁴ Exclusive easements, comprehensive profits, and water rights, for example, are all nonpossessory rights but can also be significantly broad. When one views property rights as part of a continuum, the distinction between adverse possession and prescription becomes blurred and hard to justify.⁴⁵

Second, with specific types of rights, the way courts have analyzed claims of prescription or adverse possession is more a reflection of the nature of the right involved than of the particular doctrine that the claimant invoked.⁴⁶ This is particularly notable with surface water rights, an area where courts have struggled to apply the traditional land-based requirements and have had to adapt them to a significant degree.⁴⁷ For instance, some courts attempting to use the adverse possession framework for water rights have run into the issue that requiring the payment of taxes is not feasible, as water rights are typically not assessed separately from land for tax purposes.⁴⁸ This strongly suggests that there is little value, if any, in distinguishing between adverse possession and prescription.

In light of these issues, this Article proposes the elimination of the distinction between adverse possession and prescription. Given that this differentiation is not a useful one, unifying both doctrines into one—acquisitive prescription—will reduce unnecessary complications and confusion.⁴⁹ It is critically important, however, that state legislatures and courts refine the requirements that parties should satisfy in order to acquire rights by continued use or possession. The elements that claimants ought to prove should be based on the nature of the right that they seek to acquire.⁵⁰ For

41. *See infra* Section II.C.

42. *See infra* Section II.B.2.

43. This distinction is what determines which doctrine a court should apply. *See infra* Section I.B.

44. *See infra* Sections II.A.3, II.B.2, II.C.2.

45. *See infra* Section III.A.

46. *See infra* Section III.B.

47. *See infra* Section III.B.

48. *See infra* Section III.B.1.

49. *See infra* Section IV.A.

50. *See infra* Section IV.A.2.

example, parties attempting to obtain a right to use a property exclusively should show that their use during the statutory period was, in fact, exclusive, regardless of whether the right in question is possessory or nonpossessory.⁵¹

This Article proceeds in four Parts. Part I offers an account of the traditional distinction between adverse possession and prescription, identifying their diverse origins and theoretical foundations, the types of rights to which they apply, and the different requirements that claimants must prove under each doctrine. Part II reveals some important gaps with that traditional distinction, examining the challenges that exclusive easements, as well as certain types of profits and water rights, have created for courts. Part III analyzes these issues closely and reveals the structural reasons why the traditional distinction between adverse possession and prescription is deeply flawed. Part III then highlights the downsides of the traditional understanding and also the ways in which it does not provide any useful guidance for courts. Finally, Part IV proposes the elimination of that distinction and the adoption of a unified doctrine, acquisitive prescription. In addition, Part IV provides guidance on the requirements that courts should apply to acquisitive prescription claims.

I. DISTINGUISHING ADVERSE POSSESSION FROM PRESCRIPTION

The doctrines of adverse possession and prescription are very closely related.⁵² They both share the common goal of allowing the continued assertion of a right to become conclusive evidence that the right actually exists.⁵³ Moreover, the elements required to establish a successful claim under prescription or adverse possession have a significant overlap.⁵⁴ Although there is certainly some confusion with regard to these doctrines, as shown by the fact that courts frequently use these terms interchangeably,⁵⁵ this Part identifies the main differences between them.

51. See *infra* Section IV.A.2.

52. Merrill, *supra* note 13, at 1124.

53. Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 143 (1918).

54. 68 AM. JUR. PROOF OF FACTS 3D, *supra* note 16, § 2. As explained below, however, the requirements that many jurisdictions consider under these doctrines—or their interpretation thereof—are not exactly the same. See *infra* Section I.C.

55. See 3 AM. JUR. 2D, *supra* note 15, § 8; James S. Ford, Case Note, *Bonifay v. Garner*, 445 So. 2d 597 (Fla. 1st DCA 1984), 13 FLA. ST. U. L. REV. 447, 447 n.3 (1985).

A. *Different Origins and Theoretical Foundations*

1. *The Origins of Adverse Possession and Prescription in Roman and English Law*

The origin of adverse possession can be traced back to the Roman doctrine of *usucapio*, which allowed continuous good faith possession of real and personal property to ripen into ownership.⁵⁶ The Twelve Tables, which codified Roman law up to circa 450 B.C., recognized this doctrine,⁵⁷ but they did not mention the possibility that nonpossessory interests such as easements could also be acquired in this manner.⁵⁸ This was interpreted at the time as excluding these types of rights from the scope of the doctrine,⁵⁹ an idea that was later codified in Lex Scribonia, which explicitly prohibited the acquisition of servitudes by the passage of time.⁶⁰ Centuries later, Roman Emperor Justinian repealed Lex Scribonia, allowing the creation of servitudes and other nonpossessory interests by continued use.⁶¹

The development of these doctrines in English law occurred many centuries later. Adverse possession originated there when a set of statutes limited the ability of property owners to recover possession of their lands.⁶² The initial approach was to allow a claim to regain possession only if the property owner had been dispossessed recently, that is, not before a specific date.⁶³ For example, under the Statute of Westminster, claimants had to prove that they—or their ancestors—owned the property on the date of Richard I's coronation in 1189 or later.⁶⁴ As time passed, and this date became more and more ancient, this type of statute of limitations became less useful because, as a practical matter, it no longer required proof of recent ownership.⁶⁵ In 1540, Henry VIII changed this approach to one that is more common today, where claimants had to bring their action within a certain

56. *Usucapio*, BLACK'S LAW DICTIONARY (12th ed. 2024). At some point, the period of possession required to acquire real and personal property were ten and three years, respectively. *Id.*

57. P. Michael Hebert & James R. Pettway, Comment, *Sales of Another's Movables—History, Comparative Law, and Bona Fide Purchasers*, 29 LA. L. REV. 329, 329 & n.4 (1969) (citing FREDERICK PARKER WALTON, HISTORICAL INTRODUCTION TO THE ROMAN LAW 98 (4th ed. 1920)).

58. Marian P. Opala, *Praescriptio Temporis and Its Relation to Prescriptive Easements in the Anglo-American Law*, 7 TULSA L.J. 107, 121 (1971).

59. *Id.*

60. *Id.* at 120–21.

61. *See id.* at 122.

62. William F. Walsh, *Title by Adverse Possession*, 16 N.Y.U. L.Q. REV. 532, 532 (1939).

63. 16 POWELL ON REAL PROPERTY, *supra* note 22, § 91.01[1].

64. Thomas E. Atkinson, *Some Procedural Aspects of the Statute of Limitations*, 27 COLUM. L. REV. 157, 157–58 (1927).

65. *See id.*

number of years.⁶⁶ This shift was then confirmed by the 1623 version of the statute, which set the limitations period at twenty years.⁶⁷

The adoption and development of prescription in England was markedly different. English law started allowing the acquisition of easements and profits by prescription around the thirteenth century by way of the so-called “immemorial user” doctrine,⁶⁸ which required proof of the existing use going back to a time beyond human memory.⁶⁹ This rule was unsurprisingly difficult to apply, which led courts to instead set a specific date that would be treated as the beginning of human memory,⁷⁰ which was coincidentally established to be the same date as previously provided by the Statute of Westminster for purposes of adverse.⁷¹ The last stage in this process was one where, as with adverse possession, courts decided to require proof of use for a minimum number of years.⁷² This last approach provided the blueprint for prescription and adverse possession in the United States.⁷³

2. *The Theoretical Foundations of Adverse Possession and Prescription*

There are three potential theoretical foundations for doctrines that allow the acquisition of a right by the passage of time, such as prescription and adverse possession: (i) *acquisitive prescription*, that is, the notion that the use or enjoyment of property continuously for a long period of time should either rectify an initially flawed entitlement or create it anew, (ii) the *lost-grant fiction*, or, the idea that possession or use that is continued and lasts for long enough

66. Walsh, *supra* note 62, at 532; 10 OLAN B. LOWREY, THOMPSON ON REAL PROPERTY § 87.01 (Thomas ed. 2025) [hereinafter LOWREY, THOMPSON ON REAL PROPERTY].

67. 16 POWELL ON REAL PROPERTY, *supra* note 22, § 91.01[1]; 10 LOWREY, THOMPSON ON REAL PROPERTY, *supra* note 66, § 87.01.

68. Opala, *supra* note 58, at 111.

69. *Id.* at 115 (noting the interpretation by Bracton, a notable English jurist, that the existence of an easement by prescription be proven to have started at a time “*excedit memoriam hominum*”); Jane G. Printz, Note, *Prescriptive Easement in New Mexico*, 9 N.M. L. REV. 393, 395 (1979) (defining “*excedit memoriam hominum*” as “beyond human memory”); *see also* Charles P. Sherman, *Acquisitive Prescription—Its Existing World-Wide Uniformity*, 21 YALE L.J. 147, 156 (1911) (explaining how “[i]mmemorial prescription was borrowed from the Roman by the Canon Law, and in this way its principles have made an impression on English Law” (footnote omitted)).

70. Opala, *supra* note 58, at 123.

71. *See supra* note 64 and accompanying text.

72. EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES 125–26 (Simon Greenleaf Croswell ed., 4th ed. 1885).

73. John A. Lovett & Björn Hoops, *Adverse Possession by the State: Toward Remedial Equivalency*, 69 LOY. L. REV. 1, 10–11, 11 n.27 (2022); *see* 10 LOWREY, THOMPSON ON REAL PROPERTY, *supra* note 66, § 87.01.

strongly suggests that an entitlement existed in the past but was later lost, and (iii) the view that there should be a limit to the time someone has to assert a legal claim, that is, a *statute of limitations*.⁷⁴

Adverse possession has been primarily justified based on the theories of the statute of limitations and acquisitive prescription.⁷⁵ To be sure, adverse possession places a limit on actions to regain possession of real property, which is consistent with the idea that it acts as a statute of limitations.⁷⁶ This doctrine, however, does much more than that, as it can also transfer title to the claimant, thereby allowing someone who was originally a trespasser to become the lawful owner of the property.⁷⁷

Prescription, on the other hand, was initially based on the lost-grant theory.⁷⁸ Currently, however, American courts have for the most part left that justification behind and instead rely on the statute of limitations and acquisitive prescription theoretical foundations.⁷⁹ This shows that, despite their initial differences, prescription and adverse possession have converged in certain respects.

B. Different Types of Rights

The main difference between adverse possession and prescription is the type of right that one may acquire under each doctrine.⁸⁰ Interestingly, scholars have offered varied descriptions of what the

74. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. b (A.L.I. 2000).

75. *Id.*; 10 LOWREY, THOMPSON ON REAL PROPERTY, *supra* note 66, § 87.01.

76. Ilya Batikov & Steven R. Rech, *Eight-Eighths of the Oil and Nine-Tenths of the Law—Adverse Possession by Oil and Gas Lessees*, 69 NAT. RES. & ENERGY L. INST. § 15.01, § 15.02[1] (2023); Robert Laurence, *Straight Talk: To-the-Point Observations about Eight Recent Cases on the Occasion of the Fiftieth Anniversary of the Arkansas Law Review*, 50 ARK. L. REV. 29, 44 (1997); Carol M. Rose, *Possession as the Origin of Property*, 52 U. CHI. L. REV. 73, 79 (1985).

77. Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2422 (2001); *see also* Kimberly A. Selemba, Comment, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)constitutionally “Takes” Land Dirt Cheap*, 108 PENN. ST. L. REV. 657, 659 (2003).

78. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. b (A.L.I. 2000); *see, e.g.*, *Hill v. Lord*, 48 Me. 83, 96 (1861) (“Title by prescription arises by a presumption, from long continued use of an incorporeal hereditament, of a previous grant, which has been lost.”); *Albright v. Cortright*, 45 A. 634, 636 (N.J. 1900) (noting that prescription “presupposes a lost grant”); *Tinicum Fishing Co. v. Carter*, 61 Pa. 21, 36 (1869) (“Prescription rests upon the presumption of a grant, which has been lost by process of time.”).

79. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. b (A.L.I. 2000).

80. 16 POWELL ON REAL PROPERTY, *supra* note 22, § 91.01[3] (“The terms ‘adverse possession’ and ‘prescription’ differ from each other primarily in regard to the kinds of land interests acquirable under the two processes.”); 3 AM. JUR. 2D, *supra* note 15, § 8 (noting that these “terms differ principally in the nature of the right or the kinds of land interests acquired” (footnotes omitted)).

relevant categories of rights are.⁸¹ A common way of expressing this dichotomy is that adverse possession allows the claimant to become the owner of the property, whereas prescription ripens into a right to use the land of another.⁸²

The Restatement of Property adopts a slightly broader approach that differentiates between possessory estates and servitudes.⁸³ Possessory estates allow their holders to use the property in a wide variety of ways and include fees simple, life estates, and leaseholds.⁸⁴ Servitudes, which the Restatement defines as “a legal device that creates a right or an obligation that runs with land or an interest in land,”⁸⁵ are more limited in scope and include easements, profits, covenants, rights to use party walls, and rights to contributions to maintenance costs for common fences.⁸⁶ For the purposes of this discussion, the most important practical implication of this categorization of property rights is that adverse possession applies to estates, whereas prescription is the appropriate doctrine to acquire servitudes.⁸⁷

The more traditional approach is even broader and distinguishes between possessory and nonpossessory rights or interests. Possessory interests are those that allow their holders to presently control property, conferring an exclusive right to use and possess it, such as those identified above as possessory estates (e.g., fees simple, life estates, etc.).⁸⁸ These interests may, consistently with what was indicated earlier, be acquired by adverse possession.⁸⁹ Nonpossessory rights, on the other hand, do not entitle their holders to legal possession and include servitudes as well as other property rights,

81. Compare 16 POWELL ON REAL PROPERTY, *supra* note 22, § 91.01[3] (listing easements, party walls, fences, water, public ways, and “the continuance of nuisance” as categories of rights), with RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(2) (A.L.I. 2000) (listing “easements, profits, and covenants” as categories of rights).

82. 42 CAUSES OF ACTION 2D 111 § 3, Westlaw (database updated Oct. 2025); 6 WARREN’S WEED NEW YORK REAL PROPERTY § 69.07, LexisNexis (database updated Oct. 2025) [hereinafter WARREN’S WEED].

83. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (A.L.I. 2000).

84. *Id.*

85. *Id.* § 1.1(1).

86. *Id.* §§ 1.1(2), 2.17 cmt. a.

87. *Id.* § 2.17 cmt. a.

88. *Possessory Interest*, BLACK’S LAW DICTIONARY (12th ed. 2024). The terms “possessory estate” and “possessory interest” are sometimes viewed as synonymous. See *id.* But see Wex Definitions Team, *Possessory Interest*, LEGAL INFO. INST. (July 2021), <https://perma.cc/2LP8-DL53> (excluding the quintessential possessory estate—ownership of a fee simple—from the definition of “possessory interest”).

89. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (A.L.I. 2000) (stating that “adverse possession is applied to possessory estates”).

such as those to divert and use water.⁹⁰ Importantly, they are typically viewed as acquirable through prescription.⁹¹

The terms “corporeal” and “incorporeal” hereditaments are also frequently used in this context.⁹² A corporeal hereditament is defined as “[a] tangible item of property,”⁹³ whereas its incorporeal counterpart is an intangible right, that is, one having “no physical appearance or body,”⁹⁴ such as the right to inherit, intellectual property rights, and, again, servitudes and water rights.⁹⁵ This distinction, however, is hardly defensible on analytical grounds, given that even a corporeal interest to a tangible object is, by virtue of being a *right*, intangible and therefore incorporeal.⁹⁶ Putting this issue aside, in practice, the terms corporeal/incorporeal and possessory/nonpossessory are viewed as interchangeable.⁹⁷ Thus, it is not surprising that courts and scholars have explained that prescription, rather than adverse possession, is the doctrine judges should use to evaluate claims that an incorporeal hereditament has been acquired by the passage of time.⁹⁸

An important common theme in many discussions about the types of rights that are subject to either adverse possession or prescription is the contrast between *possession and occupation*, on the one hand, and *use*, on the other. The main idea is that adverse possession requires the claimant to show continued possession or

90. Servitudes, for example, are defined as “[a]n encumbrance consisting in a right to the limited use of a piece of land or other immovable property without the possession of it.” *Servitude*, BLACK’S LAW DICTIONARY (12th ed. 2024); see Christine A. Klein, *Owning Groundwater: The Example of Mississippi v. Tennessee*, 35 VA. ENV’T L.J. 474, 517 (2017) (articulating that “the vast majority of states . . . consider water rights as nonpossessory use rights”).

91. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. a (A.L.I. 2000). As will be discussed below, however, some courts have referred to the process of acquiring water rights through continued use as “adverse possession.” See *infra* Section II.C.

92. The term “hereditament” refers to the broad concept of “property that can be inherited.” *Hereditament*, BLACK’S LAW DICTIONARY (12th ed. 2024).

93. *Id.*

94. Wex Definitions Team, *Incorporeal*, LEGAL INFO. INST. (Mar. 2022) (quoting LA. CIV. CODE ANN. art. 461), <https://perma.cc/5J2L-RYE6>.

95. LA. CIV. CODE ANN. art. 461 (2025).

96. RESTATEMENT (FIRST) OF PROP. § 473 cmt. a (A.L.I. 1944).

97. *Id.* (“[C]orporeal interests are, in general, coincident with possessory interests; incorporeal interests with non-possessory interests.”); Andrew S. Graham et al., *One Stick in the Bundle: Characterizing Nonparticipating Royalty Interests Under West Virginia Law*, 117 W. VA. L. REV. 519, 542 (2014) (“[A]n incorporeal hereditament is a non-possessory interest by definition . . .”).

98. See, e.g., *Platt v. Pietras*, 382 So. 2d 414, 416 (Fla. Dist. Ct. App. 1980); *Cobb v. Davenport*, 32 N.J.L. 369, 386–87 (1867); 10 LOWREY, THOMPSON ON REAL PROPERTY, *supra* note 66, § 87.01; 6 WARREN’S WEED, *supra* note 82, § 69.07; Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 1955 (1985).

occupation of the property and that, as a result, this behavior will—if all applicable requirements are met—ripen into a right of that same nature, that is, to possess and occupy the property in question.⁹⁹ Conversely, to succeed in a prescription claim, the focus is instead on continued use, which is also the type of right that this doctrine allows the claimant to acquire.¹⁰⁰ This, of course, is consistent with the view described above that adverse possession applies to possessory rights while prescription is concerned with rights to use (i.e., nonpossessory).¹⁰¹

In sum, what this analysis shows is that, despite the varied and potentially confusing terminology that courts and scholars employ in this area of the law, the key distinction can be summarized as follows: adverse possession should be used with rights to occupy or possess (that is, those possessory in nature), and prescription is appropriate in the context of mere rights to use (that is, those that are regarded as nonpossessory).

C. *Different Requirements*

The exact formulation of the adverse possession requirements can vary based on the state. Generally speaking, however, claimants will have to show that they have possessed someone else's property in a manner that is actual, hostile, open and notorious, exclusive, and continuous for the statutory period.¹⁰² Whether the adverse possessor will also have to prove a particular state of mind—that is, that the property was possessed either in good or bad faith—is also subject to some variation.¹⁰³ Moreover, some jurisdictions have additional requirements, such as proving the payment of taxes on the property during the statutory period or showing that the relevant property was

99. 6 WARREN'S WEED, *supra* note 82, § 69.07; 21 TENN. JUR. *Prescription* § 2 n.6, LexisNexis (database updated Oct. 2025).

100. 21 TENN. JUR., *supra* note 99, § 2 n.6.

101. *See supra* notes 88–98 and accompanying text.

102. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORN. L. REV. 816, 824 (1994) (“[T]he successful adverse possessor must hold actual, hostile, exclusive and continuous possession of land in an open and notorious manner . . . for a requisite period.”); *Soderholm v. Nauman*, 466 S.W.3d 610, 619 (Mo. Ct. App. 2015) (“To prevail on a claim of adverse possession, a claimant must prove by a preponderance of the evidence that his possession of the tract of land was: (1) hostile, (2) actual, (3) open and notorious, (4) exclusive, and (5) continuous for a period of ten years.” (citing *Luttrell v. Stokes*, 77 S.W.3d 745, 750 (Mo. Ct. App. 2002))).

103. JOHN G. SPRANKLING, RAYMOND R. COLETTA & RACHAEL E. SALCIDO, *PROPERTY: A CONTEMPORARY APPROACH* 108 (2024).

enclosed, cultivated, or improved.¹⁰⁴ There is additional variation based on the type of property involved (e.g., land vs. water).¹⁰⁵

The elements necessary to acquire a property interest by prescription, on the other hand, do not perfectly overlap with those required for adverse possession. A general list of prescription elements would include, at least, a use that is continuous and open and notorious for the statutory period.¹⁰⁶ Scholars and courts also frequently list “adversity” and “making a claim of right” as one of the necessary requirements and, less often, exclusiveness and actual use.¹⁰⁷ The payment of taxes on the property, though common with adverse possession, is not needed to acquire a right by prescription.¹⁰⁸ Also, as is to be expected of a doctrine that state courts have shaped over the decades in their respective jurisdictions, there are a number of other elements that certain courts have incorporated into their prescription analysis.¹⁰⁹

104. *E.g.*, *St. Paul Park Refin. Co. v. Domeier*, 950 N.W.2d 547, 551 (Minn. 2020) (“[A] claim of adverse possession to any portion of a separately assessed parcel requires the adverse claimant to pay taxes for at least five consecutive years”); *Van Valkenburgh v. Lutz*, 106 N.E.2d 28, 29 (N.Y. 1952) (requiring “that the premises (1) [be] protected by a substantial inclosure, or [be] (2) usually cultivated or improved”); *see also infra* note 249 and accompanying text (discussing legislative imposition of a tax requirement).

105. *See* D. Austin Rueschhoff, Case Note, *Archuleta v. Gomez: Reinforcing the Requirement of Beneficial Use of Water in Colorado Adverse Possession Law*, 16 U. DENV. WATER L. REV. 431, 431 (2013) (explaining that the Colorado Supreme Court had added a new requirement for the adverse possession of water rights, namely, “proof of ‘the amount of water expressed in acre feet . . . that the adverse claimant has placed to beneficial consumptive use’” (alteration in original) (emphasis omitted) (quoting *Archuleta v. Gomez*, 200 P.3d 333, 346 (Colo. 2009))).

106. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 & cmt. a (A.L.I. 2000); JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 558 (4th ed. 2017).

107. *See, e.g.*, SPRANKLING, *supra* note 106 (looking specifically at the elements in relation to prescriptive easements); *SGS Land, LLC v. EFN Bellwood Prop., LLC*, No. 1-15-3111, 2016 WL 7436363, at *7 (Ill. App. Ct. Dec. 22, 2016) (requiring exclusivity, adversity, and a claim of right); *Dukes v. Farrell*, No. 2017-UP-155, 2017 WL 4619168, at *3 (S.C. Ct. App. Apr. 12, 2017) (per curiam) (citing cases and noting the different requirements used); *see infra* Section IV.A.2 (discussing the “actual use” requirement in more depth).

108. SPRANKLING, *supra* note 106, at 558 n.44; *Hansen v. Sandridge Partners, L.P.*, 232 Cal. Rptr. 3d 247, 256 (Ct. App. 2018) (“[A] ‘prescriptive easement does not require payment of taxes.’” (quoting *Mehdizadeh v. Mincer*, 54 Cal. Rptr. 2d 284, 289 (Ct. App. 1996))).

109. *E.g.*, *Ronkowski v. United States*, No. 17-cv-226, 2018 WL 2376298, at *11 (W.D. Wis. May 23, 2018) (requiring the use be “inconsistent with the exercise of the titleholder’s rights” (quoting *Ludke v. Egan*, 274 N.W.2d 641, 646 (Wis. 1979))), *aff’d*, 911 F.3d 887 (7th Cir. 2018); *Backman v. Lawrence*, 210 P.3d 75, 81 (Idaho 2009) (requiring the use be “with the actual or imputed knowledge of the owner of the servient tenement” (citing *Hughes v. Fisher*, 129 P.3d 1223, 1229

Two requirements warrant further discussion: exclusiveness and adversity. Focusing first on exclusiveness, a person who is not able to prove exclusive possession will typically be unsuccessful in an adverse possession claim.¹¹⁰ This element will not be met if the claimant has shared possession of the property either with the record owner or with someone else during the statutory period.¹¹¹ Some courts, however, have clarified that casual use or entries by the record owner will not defeat the exclusive use of the adverse possessor.¹¹²

With prescription, on the other hand, it is generally accepted that exclusiveness is not a necessary requirement.¹¹³ This is consistent with nonpossessory rights, such as easements, typically being nonexclusive. What this means is that the owner of the servient land will still be able to use, to an extent, the portion of it that is affected by the easement.¹¹⁴ Therefore, it would be unreasonable to demand that a person relying on the doctrine of prescription show that their use was exclusive in order to acquire a right that does not have that same attribute.¹¹⁵ Although court rulings on this question have not been uniform,¹¹⁶ there are two main trends that confirm that this

(Idaho 2006)); *Town of Carrboro v. Slack*, 820 S.E.2d 527, 535 (N.C. Ct. App. 2018) (requiring there be “substantial identity of the easement claimed”).

110. *See Crowley v. Crowley*, No. 11-0201, 2012 WL 2122304, at *2–4 (Iowa Ct. App. June 13, 2012); *Pettus v. Keeling*, 352 S.E.2d 321, 324 (Va. 1987); *Reed v. Garnett*, 43 S.E. 182, 183 (Va. 1903).

111. Brandon Berry, Note, *Protecting the “Dominant” Interest: The Application of Lapse Statutes in Mineral Rights Disputes*, 45 ENERGY L.J. 411, 415 (2024); *Wanha v. Long*, 587 N.W.2d 531, 539 (Neb. 1998); *Gruebele v. Geringer*, 640 N.W.2d 454, 458 (N.D. 2002); *Akin v. Castleberry*, 286 P.3d 638, 642 (Okla. 2012).

112. *E.g.*, *Schuler v. Oldervik*, 143 P.3d 1197, 1203 (Colo. App. 2006) (“[A] mere casual entry for a limited purpose by the record owner is not necessarily sufficient to prove that the use of the property was joint.” (quoting *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989))); *Stark v. Stanhope*, 480 P.2d 72, 78 (Kan. 1971) (“[M]ere casual entries [are not] sufficient to break the continuity of the appellants’ exclusive possession . . .”).

113. *See, e.g.*, JAMES CHARLES SMITH, THE GLANNON GUIDE TO PROPERTY 315–16 (5th ed. 2019); 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, 88 (1996); Selemba, *supra* note 77, at 661; *Snyder v. Myerow*, No. 04 MISC 303223, 2023 WL 2472058, at *13 (Mass. Land Ct. Mar. 10, 2023), *aff’d*, 242 N.E.3d 1149 (Mass. App. Ct. 2024) (unpublished table decision); *Portage Cnty. Bd. of Comm’rs v. City of Akron*, 808 N.E.2d 444, 469 (Ohio Ct. App. 2004), *aff’d in part, rev’d in part*, 846 N.E.2d 478 (Ohio 2006); *White v. Wheatland Irrigation Dist.*, 413 P.2d 252, 260 (Wyo. 1966).

114. This, of course, does not include a use by the servient owner that will interfere with the easement. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. g (A.L.I. 2000).

115. *See* 7 JOHN H. PEARSON, THOMPSON ON REAL PROPERTY § 60.03(b)(7)(viii) (Thomas ed. 2025) [hereinafter PEARSON, THOMPSON ON REAL PROPERTY].

116. *See id.*

reasoning is accurate, at least when it comes to easements. First, courts in many states do not include exclusiveness as one of the prescription elements.¹¹⁷ Second, even courts that do list it as a requirement tend to interpret it “in a way that gives it no effect,”¹¹⁸ for example, by analyzing unrelated issues that are already examined under other elements, such as adversity and claim-of-right considerations.¹¹⁹

Moving on to the second noteworthy requirement, that is, adversity, the main difference to highlight is that it is strictly enforced in the context of adverse possession,¹²⁰ whereas a majority of courts presume that it exists when they apply it to a prescription claim.¹²¹ This presumption typically arises when all the other applicable elements are met.¹²² One of the main reasons why courts rely on it is that it would be unfair to demand that a litigant prove a negative.¹²³ This presumption, however, is often a rebuttable one and will therefore lose its effect if the opposing party provides evidence of permissive use.¹²⁴

Thus, the aggregate effect of the variations among these two doctrines is that acquiring a property interest through prescription

117. See, e.g., *Akers v. D.L. White Const., Inc.*, 127 P.3d 196, 206 (Idaho 2005); *Lincoln v. Burbank*, 147 A.3d 1165, 1172 (Me. 2016); *Flaherty v. Muther*, 17 A.3d 640, 660 (Me. 2011); *Christopher v. Chan*, No. 12 MISC. 472667, 2015 WL 759201, at *2 (Mass. Land Ct. Feb. 24, 2015); *Leventi Tr. v. Waltersdorf*, No. 2015AP1068, 2016 WL 6604107, at *7 (Wis. Ct. App. Nov. 9, 2016).

118. Dena Cohen, Note, *Exclusiveness in the Law of Prescription*, 8 CARDOZO L. REV. 611, 623 (1987).

119. *Id.* at 623–24.

120. See Will Saxe, Note, *When “Comprehensive” Prescriptive Easements Overlap Adverse Possession: Shifting Theories of “Use” and “Possession,”* 33 B.C. ENV'T AFFS. L. REV. 175, 181–82 (2006) (stating that some adverse possession claims fail because courts presume the possessor had permission from the owner).

121. 7 PEARSON, THOMPSON ON REAL PROPERTY, *supra* note 115, § 60.03(b)(7)(viii) (listing the District of Columbia, South Dakota, Illinois, New York, and Missouri as jurisdictions that presume adversity).

122. See John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 MARQ. L. REV. 939, 1029 (2021) (explaining that, for prescription, most jurisdictions adhere to the presumption of adversity in one form or another).

123. See 7 PEARSON, THOMPSON ON REAL PROPERTY, *supra* note 115, § 60.03(b)(7)(viii); *Biddix v. McConnell*, 911 So. 2d 468, 476 (Miss. 2005) (“[W]hen trying to establish the elements of a prescriptive easement, requiring the litigant to prove a lack of permission (exclusivity) is unreasonable because the law typically frowns upon requiring a party to prove a negative.” (quoting *Dieck v. Landry*, 796 So. 2d 1004, 1008 (Miss. 2001))).

124. See, e.g., *Bridle Trail Ass’n v. O’Shanick*, 290 S.W.2d 401, 406 (Mo. Ct. App. 1956); see 1 PAUL B. BARTON, OREGON REAL ESTATE DESKBOOK § 12.2-4(c) (2015) (citing *Feldman v. Knapp*, 250 P.2d 92, 101 (Or. 1952); *R & C Ranch, LLC v. Kunde*, 33 P.3d 1011, 1017 (2001), *modified on reconsideration*, 44 P.3d 607 (Or. Ct. App. 2002); *Rendler v. Lincoln County*, 709 P.2d 721, 726 (Or. Ct. App. 1985), *aff’d*, 728 P.2d 21 (Or. 1986)).

will be easier than under adverse possession. This is the case because, as noted above, courts will rarely require strict exclusiveness and will often presume adversity.¹²⁵ To be sure, this is reasonable as long as the type of right that one may acquire through adverse possession is more robust and valuable than those obtained by prescription.¹²⁶

In sum, the prevailing or traditional view is that, while prescription and adverse possession are similar in many ways, they also have important differences that justify treating them as analytically distinct. They do not share the same historical origins and initial justifications, even though, more recently, their theoretical foundations have become remarkably aligned. Moreover, they apply to different types of rights, and the elements that courts will require for a claim under each doctrine to succeed do not perfectly overlap.

II. TESTING THE DISTINCTION BETWEEN ADVERSE POSSESSION AND PRESCRIPTION

One may be tempted to view the distinction between adverse possession and prescription captured in Part I as straightforward and simple. The following discussion, however, presents a set of scenarios that show that, in many instances, such a divide is less clear than it may initially seem. It also reveals how much courts have struggled when deciding some of these cases, sometimes reaching questionable conclusions.

A. *Exclusive Easements*

The principles outlined in Part I can be easily applied to most easements. An easement, that is, the right to use the property of another (the servient land),¹²⁷ is one of the main examples of a right that, due to its incorporeal or nonpossessory nature, is capable of being acquired by prescription.¹²⁸ In contrast, full ownership is regarded as a possessory right that may instead be obtained by adverse possession.¹²⁹

This distinction does not raise significant issues as long as the easements examined are non-exclusive vis-à-vis the owner of the servient land. Typically, owners of the servient land (“servient owners”) may use the property subject to the easement as long as they do not interfere with the uses that the easement authorizes.¹³⁰ Thus,

125. See *supra* notes 113–124 and accompanying text.

126. See *supra* Section I.B.; see also *infra* note 251 and accompanying text.

127. See 1 JAMES H. BACKMAN & DAVID A. THOMAS, A PRACTICAL GUIDE TO DISPUTES BETWEEN ADJOINING LANDOWNERS—EASEMENTS § 1.01[2] (2025); Pub. Land/Water Access Ass’n v. Jones, 300 P.3d 675, 677 (Mont. 2013).

128. See 4 CALDWELL’S KENTUCKY FORM BOOK § 316.00 (5th ed. 2025); House v. Close, 346 S.W.2d 445, 447 (Tenn. Ct. App. 1961); see also *supra* Section I.B.

129. See *supra* Section I.B.

130. See *Dunkley v. Hueler*, No. A19-2047, 2020 WL 5507847, at *3 (Minn. Ct. App. Sep. 14, 2020); *Taylor v. Hiatt*, 865 S.E.2d 331, 333 (N.C. Ct. App. 2021); 28

if an easement allows its holder to access her land by crossing part of someone else's property (i.e., the servient land), the servient owner will still be able to use that portion of his property as long as he does not burden the easement holder's rights.

1. *Defining Exclusive Easements*

Once exclusive easements are added to the equation, however, important complications arise. It is first worth noting that courts have used the phrase "exclusive easement" fairly loosely. For example, in *Latham v. Garner*,¹³¹ which concerned a dispute involving a right of way, the Idaho Supreme Court noted that the language "exclusively for their use" contained in the instrument creating the easement could have different meanings.¹³² It could be interpreted as "the exclusion of all others, except the [servient owner]" or the exclusion of "all others, including [the servient owner]."¹³³ The Court of Appeals of Minnesota made a very thoughtful observation in *Apitz v. Hopkins*¹³⁴ and broke down easements *that exclude the servient owner* into the following two additional categories: (i) the servient owner is excluded from the easement property completely and (ii) the servient owner may not use the easement property for any of the purposes contemplated in the easement but may do so in any other way that does not interfere with the easement.¹³⁵ With easements that are broad in scope, even this latter category can virtually result in the total exclusion of the servient owner. This can occur when most of the potential uses for the servient land would either interfere with or overlap with the purposes of the easement. For example, with an exclusive easement for road and park purposes, the vast majority of uses by the owner of the servient land would either jeopardize the use as a park—for instance, those involving a disruption of the ground cover—or be covered by it—for example, most outdoor recreational activities.¹³⁶

The remainder of this Article will use the phrase "exclusive easement" in a manner consistent with how the Court of Appeals of Minnesota and many other courts have employed it.¹³⁷ More

CAL. JUR. 3D *Easements and Licenses in Real Property* § 63, Westlaw (database updated Apr. 2025).

131. 673 P.2d 1048 (Idaho 1983).

132. *Id.* at 1052.

133. *Id.* The court even included "the grant of a fee simple estate" as one of the possible interpretations. *Id.*

134. 863 N.W.2d 437 (Minn. Ct. App. 2015).

135. *Id.* at 440–41.

136. For an example of a case examining this type of easement, see generally *Johnson v. Lake Cushman Maintenance Co.*, 425 P.3d 560 (Wash. Ct. App. 2018).

137. See *Apitz*, 863 N.W.2d at 440–41; see also, e.g., *Hoffman v. Capitol Cablevision Sys., Inc.*, 383 N.Y.S.2d 674, 676 (App. Div. 1976) (stating that easements are "exclusive vis-a-vis the grantor"); *George v. Coombes*, 562 P.2d

specifically, it will refer to situations where the owners of the servient land face significant restrictions on their use of the property subject to the easement.

2. Express and Implied Exclusive Easements Are Disfavored but Permissible

Exclusive easements are controversial. Some courts have expressed their disfavor for exclusive easements because they view them as perilously close to a fee simple.¹³⁸ The prevailing view, however, is that exclusive easements should be recognized when it is clear that the parties intended to create one, either by grant or reservation.¹³⁹ Courts have even enforced exclusive easements created by implication. In a case decided in 2024, the Supreme Court of California concluded that there was no legal obstacle to recognizing an exclusive easement by implication where one part of a parcel “had been used as the driveway to the home on the neighboring parcel.”¹⁴⁰

Given that some courts have voiced concerns about the breadth of exclusive easements, it is important to highlight the fundamental way in which this type of easement differs from a transfer of title. As long as an easement only authorizes the use of the servient land for

200, 202 (Or. 1977) (explaining that, ordinarily, the phrase “exclusive easement” means “that [the easement holder’s] right to use the easement [i]s exclusive in the sense that it could not be used by others, including [the landowner]”); *Orange Cnty., Inc. v. Citgo Pipeline Co.*, 934 S.W.2d 472, 476 (Tex. App. 1996) (“An exclusive easement in gross is one that gives the owner the sole privilege of making the uses authorized by it. Neither the owner of the servient estate nor any other person except the owner of the easement is entitled to make such a use.”).

138. *See, e.g.*, *Duke v. Pine Crest Homes, Inc.*, 358 So. 2d 148, 151 (Ala. 1978) (denying an easement’s existence because the easement would have been “tantamount to a fee simple”); *Mehdizadeh v. Mincer*, 54 Cal. Rptr. 2d 284, 290 (Ct. App. 1996) (explaining that an exclusive easement “resembles or is nearly the equivalent of a fee interest”); *Latham*, 673 P.2d at 1050 n.1 (“[A] few courts have stated that an exclusive easement is tantamount to a fee, and therefore inconsistent with the nature of an easement.”); *Proto-Cam Inc. v. 940 Monroe LLC*, No. 251387, 2004 WL 2913616, at *3 (Mich. Ct. App. Dec. 16, 2004) (*per curiam*) (“[E]xclusive easements are not generally favored by the courts.” (quoting *Latham*, 673 P.2d at 1050)).

139. *See, e.g.*, *Latham*, 673 P.2d at 1050–51 (“[E]xclusive easements are recognized servitudes on land which may be created when the parties so intend.”); *Proto-Cam Inc.*, 2004 WL 2913616, at *3 (noting that both the document granting the easement in that case and additional extrinsic evidence showed the intent to create an exclusive easement); *Apitz*, 863 N.W.2d at 441 (remanding the case to the district court to determine whether the party that reserved the easement intended for it to be exclusive).

140. *Romero v. Shih*, 541 P.3d 1112, 1114, 1124 (Cal.), *cert. denied*, 145 S. Ct. 144 (2024).

specific purposes, it will remain an easement.¹⁴¹ In other words, it is only when an exclusive right to use a piece of land for any purposes is conveyed to a third party that the line between an easement and estate in land (such as a fee simple) has been crossed.

3. *The Main Challenge: Prescriptive Exclusive Easements*

The main challenge with exclusive easements arises in the prescription context. Just as exclusive easements can be created by grant, reservation, and implication, they can also result from continued use that meets the prescription requirements in the relevant jurisdiction.¹⁴²

Prescriptive exclusive easements, however, are peculiar in that the reason they are exclusive is not based on the intent of the parties but rather on the nature of the use. This point is best illustrated with some examples of uses that are consistent with a significant degree of exclusiveness. In *Warsaw v. Chicago Metallic Ceilings, Inc.*,¹⁴³ the plaintiffs had been using part of the servient land as an extended driveway that allowed trucks servicing their facility “to enter, turn, park and leave the area of plaintiffs’ loading dock.”¹⁴⁴ In *Raab v. Casper*,¹⁴⁵ the uses for which an easement was being claimed included a “driveway, utility lines and yard.”¹⁴⁶ In both cases, the servient owners’ ability to use the portions of their properties covered by the easement would be severely limited due to how broad the uses for the claimed easements were. This has led some authors and courts to

141. See 4 POWELL ON REAL PROPERTY, *supra* note 22, § 34.02 (“If a conveyance purported to transfer to A an *unlimited* use or enjoyment of land, it would be in effect a conveyance of ownership to A, not an easement.”); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2 cmt. f (A.L.I. 2000) (“[T]he more extensive . . . the uses authorized to the grantee, . . . the more likely that the conveyance was intended to transfer an estate to the grantee.”); *Latham*, 673 P.2d at 1050 n.1 (“[A]n interest ceases to be an easement only where the *whole* exclusive use of a thing is conveyed.”).

142. Prescription is typically listed as one of the possible ways of acquiring an easement generally. 6B MICHIE’S JURISPRUDENCE OF VIRGINIA & WEST VIRGINIA, EASEMENTS § 2, LexisNexis (database updated Oct. 2025) (“The general rule is that an easement can be created in three ways: by prescription—the easement equivalent of adverse possession; by an express grant or reservation; or by implication from the particular set of facts and circumstances.”); 1 KATHLEEN K. LAW, IOWA REAL PROPERTY LAW AND PRACTICE § 10.04[1] (2025) (“It is well settled in American property law . . . that there exist four ways to create an easement: 1) by express grant or reservation, 2) by prescription, 3) by necessity, or 4) by implication.”).

143. 188 Cal. Rptr. 563 (Ct. App. 1983), *vacated*, 676 P.2d 584 (Cal. 1984).

144. *Id.* at 565.

145. 124 Cal. Rptr. 590 (Ct. App. 1975).

146. *Id.* at 596.

refer to these types of interests as “comprehensive prescriptive easements.”¹⁴⁷

But courts have been very reluctant to recognize exclusive easements acquired by prescription,¹⁴⁸ mainly for two reasons. First, they regard them as rights that blur the line separating adverse possession and prescription.¹⁴⁹ Second, they view them as a way of circumventing the stricter adverse possession requirements.¹⁵⁰ This can occur, for example, when someone’s adverse possession claim fails because they did not pay taxes on the property, and then they argue that the court should, at least, recognize an exclusive prescriptive easement to use the property in question (as payment of taxes may be necessary under adverse possession but is seldom required under prescription).¹⁵¹

One of the most common ways in which courts have responded to this problem is simply by rejecting these claims—that is, cases where a party was seeking to obtain an exclusive easement by prescription.¹⁵² To support this outcome, courts have reasoned that an easement that prevents servient owners from using their parcel (or part of it) amounts to title and that, therefore, it would be inappropriate to allow the claimant to acquire that property via prescription.¹⁵³ In other words, this type of claim should be based on adverse possession instead. In *Mehdizadeh v. Mincer*,¹⁵⁴ for example, the court concluded that an easement that allowed its holder to fence a certain part of the servient land and use it for landscape and recreation would “look[] more like . . . ownership,” as it “would divest the [landowner] of nearly all rights that owners customarily have in residential property.”¹⁵⁵ As a result, the court explained that this type

147. *E.g.*, *Jones v. Ghadiri*, 546 P.3d 831, 835 (Nev. 2024) (en banc) (citing *Saxe*, *supra* note 120, at 193).

148. *See id.* at 837 (“Many . . . jurisdictions, including Arizona, Florida, Idaho, Montana, and Utah, have categorically rejected comprehensive prescriptive easements.”).

149. *E.g.*, *id.*; *Raab*, 124 Cal Rptr. at 596.

150. *E.g.*, *Ghadiri*, 546 P.3d at 837.

151. *Id.*

152. At least one court attempted to appease these concerns by instead providing that the person acquiring the exclusive easement by prescription should compensate the servient landowner. *See Warsaw v. Chi. Metallic Ceilings, Inc.*, 188 Cal. Rptr. 563, 565 (Ct. App. 1983), *vacated*, 676 P.2d 584 (Cal. 1984). The highest court in the state then overruled that part of the appellate court’s decision. *See Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584, 590–91 (Cal. 1984).

153. *See, e.g.*, *Mehdizadeh v. Mincer*, 54 Cal. Rptr. 2d 284, 290 (Ct. App. 1996); *Silacci v. Abramson*, 53 Cal. Rptr. 2d 37, 40 (Ct. App. 1996); *Raab*, 124 Cal. Rptr. at 596–97; *Courville v. Kohn*, 12 LCR 455, 459 (Mass. Land Ct. 2004); *Nyman v. Anchor Dev., LLC*, 73 P.3d 357, 362 (Utah 2003).

154. 54 Cal. Rptr. 2d 284 (Ct. App. 1996).

155. *Id.* at 290.

of right could not be gained by prescription but rather by proving all the elements of adverse possession, which the claimant had failed to do in this particular case.¹⁵⁶

This treatment of exclusive easements shows that, when compelling policy reasons justify it, courts often choose not to adhere to the traditional approach that nonpossessory interests like easements can be acquired by prescription instead of by adverse possession. Courts are essentially trying to prevent a claimant from acquiring via prescription a right that they consider to be too broad, even if it is technically an easement.¹⁵⁷ In addition, as the California Supreme Court recently explained, the decision of “prohibiting the acquisition of an [exclusive] easement by prescription” is also based on the desire to ensure the broad application of the adverse possession statute.¹⁵⁸ What this suggests is that the mechanical application of the traditional approach can lead to undesirable results, thereby raising valid questions about its usefulness.

B. *Profits À Prendre*

Profits à prendre, often referred to as simply *profits*,¹⁵⁹ are nonpossessory rights to extract or remove substances or products generated by or present on another person’s property (i.e., the servient land).¹⁶⁰ This includes soil (and substances present in that soil), timber, wild game, and fish.¹⁶¹ The right to have one’s farm animals graze on someone else’s land is also typically characterized as a profit.¹⁶² Courts have struggled in applying the doctrines of prescription and adverse possession to profits, given the similarities

156. *See id.* at 289–92.

157. As explained above, an easement that allows for the exclusion of the owner of the servient land is still an easement as long as its holder may only use the parcel for specific designated purposes. *See supra* Section II.A.2.

158. *Romero v. Shih*, 541 P.3d 1112, 1121 (Cal.), *cert. denied*, 145 S. Ct. 144 (2024).

159. 18 WILLIAM V. DORSANEO III, TEXAS LITIGATION GUIDE § 281.02[1] (2025).

160. *Profit a Prendre*, WOLTERS KLUWER BOUVIER LAW DICTIONARY DESK EDITION (Stephen Michael Sheppard ed., 2012); 2 MICHAEL B. KENT, JR. ET AL., WEBSTER’S REAL ESTATE LAW IN NORTH CAROLINA § 15.36 (6th ed. 2025); 1 JAMES D. OLSON, MINNESOTA RESIDENTIAL REAL ESTATE § 4.03 (2025); *see also In re Real Estate of Griner*, No. 1939 G-160, 1995 Del. Ch. LEXIS 102, at *7 (Apr. 3, 1995) (using the term “servient” to refer to the land subject to the profit); *First Nat’l Bank of Bos. v. Konner*, 367 N.E.2d 1174, 1179 (Mass. 1977) (same); *Hinds v. Phillips Petroleum Co.*, 591 P.2d 697, 699 (Okla. 1979) (same).

161. *Profit a Prendre*, *supra* note 160; 2 KENT ET AL., *supra* note 160, § 15.36; 1 OLSON, *supra* note 160, § 4.03.

162. *See* 8 RONALD W. POLSTON, THOMPSON ON REAL PROPERTY § 65.04(e) (Thomas ed. 2025) [hereinafter POLSTON, THOMPSON ON REAL PROPERTY]; *Platt v. Pietras*, 382 So. 2d 414, 417 (Fla. Dist. Ct. App. 1980); *Burlingame v. Marjerrison*, 665 P.2d 1136, 1139 (Mont. 1983); *Deseret Livestock Co. v. Sharp*, 259 P.2d 607, 610 (Utah 1953).

that exist between this type of right, easements, and possessory estates. The next two Sections will address these issues.

1. Profits, Easements, and Possessory Estates

Profits and easements share some important commonalities. They both provide their holders with nonpossessory rights over the land of another.¹⁶³ The Restatement includes profits and easements under the umbrella category of *servitudes*,¹⁶⁴ which highlights additional similarities in terms of how they can be created (e.g., grant, estoppel, implication, and prescription)¹⁶⁵ and terminated (e.g., abandonment, estoppel, and prescription).¹⁶⁶ Profits, as well as easements, can be *in gross*, that is, tied to a particular person,¹⁶⁷ or *appurtenant* meaning connected to another property.¹⁶⁸ While profits and easements are often regarded as “virtually indistinguishable,”¹⁶⁹ the main differentiating feature is that only a profit allows its holder to take or remove something from the burdened land.¹⁷⁰ Thus, grazing rights, for example, are typically viewed as profits because not only do they allow their holders to have their livestock on the servient land, but also because the livestock are consuming a resource—that is, grass—that the land is producing.¹⁷¹

The distinction between a profit and a possessory estate, on the other hand, is fairly straightforward, at least in theory. A profit, due to its nonpossessory character, allows the holder to *use* the land

163. See *Profit a Prendre*, *supra* note 160; *Deseret Livestock*, 259 P.2d at 610; see also *supra* Section I.B.

164. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1(2) (A.L.I. 2000).

165. *Id.* § 2.1.

166. *Id.* § 7.1 cmt. a.

167. *Builders Supplies Co. of Goldsboro v. Gainey*, 189 S.E.2d 657, 660 (N.C. Ct. App.), *aff'd*, 192 S.E.2d 449 (N.C. 1972).

168. *Id.*; *Painter v. Pasadena Land & Water Co.*, 27 P. 539, 542 (Cal. 1891); see also *Costa v. Fawcett*, 21 Cal. Rptr. 143, 146 (Ct. App. 1962) (citing 28 C.J.S. *Easements* § 3(f)).

169. *Kritzman v. Reebel Revocable Fam. Tr.*, Nos. 221443, 221444, 2001 WL 1134899, at *3 (Mich. Ct. App. Sep. 21, 2001) (per curiam).

170. *Id.* (explaining that the key difference is that profits provide a “right to remove” (quoting *VanAlstine v. Swanson*, 417 N.W.2d 516, 520 (Mich. Ct. App. 1987))); *Figliuzzi v. Carcajou Shooting Club of Lake Koshkonong*, 516 N.W.2d 410, 413–14 (Wis. 1994) (noting how similar profits and easements are); DAVID W. CASE, MISSISSIPPI REAL PROPERTY LAW AND PRACTICE § 7.12 (2025) (“[T]his nonpossessory interest is distinct from an easement in that it involves the right to participate in profits derived from the servient land and to sever and remove physical substances from the land.”).

171. See *Platt v. Pietras*, 382 So. 2d 414, 417 (Fla. Dist. Ct. App. 1980) (calling the grazing of livestock “more than an easement—it is a privilege plus a profit”).

owned by another as an incident of the removal of substances.¹⁷² It does not, however, allow the profit holder to *possess* or *occupy* the land, as that is one of the key features of possessory estates.¹⁷³

In many instances the interactions between these two types of rights make things far more complicated. This is especially so when the profit allows a use of the servient land that is exclusive or where the use that the profit authorizes is particularly intense. For instance, the use of another's property for grazing may require fencing it to contain the cattle. This may have the practical effect of completely excluding the property owner from using any of their land that is subject to the profit.¹⁷⁴ Another example of a high-intensity use can arise when the profit authorizes someone to extract minerals from another's land. Large-scale extractive activities may involve a seemingly all-encompassing use of the land's surface, including the erection of buildings and other structures.¹⁷⁵

2. *Profits, Prescription, and Adverse Possession*

Because profits are nonpossessory rights, it would follow from the application of the general rule stated earlier that prescription, not adverse possession, is the framework that should be employed to determine whether someone who has behaved like a profit holder for a sufficiently long period of time has, in fact, been able to successfully acquire that right.¹⁷⁶ This is not, however, what one observes when examining the case law on this question. The following discussion reveals some of the issues with which courts have had to grapple in three different contexts: oil and gas, solid minerals, and grazing.

The treatment of this issue in the oil and gas context is particularly instructive. It is important to start by noting that there is significant variation when it comes to the nature of the rights that landowners have over the oil and gas located under their property. Two common approaches are (i) "ownership in place," where landowners are deemed to own the oil and gas located under their land, as they would in the case of solid minerals,¹⁷⁷ and (ii) "non-

172. See *White v. Riness*, No. 347924, 2020 WL 3397395, at *11–12 (Mich. Ct. App. June 18, 2020) (per curiam) (“[T]here is no right to use the property except as incident to the right of removal.”).

173. *Id.*; *David Lee Boykin Fam. Tr. v. Boykin*, 661 So. 2d 245, 250 (Ala. Civ. App. 1995) (noting that a profit “leaves the landowner’s general right of possession undisturbed” (quoting 8 THOMPSON ON REAL PROPERTY § 65.06(b) (Thomas ed. 1994))).

174. See *Platt*, 382 So. 2d at 416 (stating that the fencing in of property “excluded everyone else from its use”).

175. See *Oakley Valley Stone, Inc. v. Alastra*, 715 P.2d 935, 938 (Idaho 1985) (discussing the extensiveness of a mining operation).

176. See *supra* Section I.B.

177. 1 PATRICK H. MARTIN & BRUCE M. KRAMER, WILLIAMS & MEYERS, OIL AND GAS LAW § 203.3 (2025) [hereinafter WILLIAMS & MEYERS].

ownership,” where oil and gas is not owned until it has been captured, that is, produced or extracted from the ground.¹⁷⁸ An interesting wrinkle arises when oil and gas interests are severed from ownership of the surface. In ownership-in-place states, that severance can create a mineral estate (i.e., an estate covering all or part of the subsurface), which is a corporeal or possessory interest.¹⁷⁹ In non-ownership states, on the other hand, the severed interest is incorporeal or nonpossessory and is specifically characterized as a profit, that is, a right to enter the surface estate and, from there, extract oil and gas.¹⁸⁰

In light of the different nature of these severed interests, one would expect claims of ownership based on the continued *possession* of mineral estates to be examined under the rules of adverse possession.¹⁸¹ Conversely, prescription would seem the appropriate doctrine to analyze claims from those seeking to obtain profits by sustained *use*.¹⁸² In practice, however, these distinctions have been largely ignored. Most states label the acquisition of rights in oil and gas by the passage of time as “adverse possession,” regardless of whether such interest is possessory or nonpossessory in that particular jurisdiction.¹⁸³ This may result from the fact that some “courts have conferred [oil and gas profits] the status of an ‘estate’ in land despite their being nonpossessory.”¹⁸⁴

Moreover, in the vast majority of cases, the outcome does not change based on which theory of ownership applies.¹⁸⁵ These

178. *Id.* § 203.1; JOHN S. LOWE, OIL AND GAS LAW IN A NUTSHELL 35–36 (8th ed. 2024).

179. 1 EUGENE KUNTZ, A TREATISE ON THE LAW OF OIL AND GAS § 3.2[a] (2025) (“In states following the ownership theory, the severance of oil and gas rights from the surface ownership creates a mineral estate . . .”); 1 WILLIAMS & MEYERS, *supra* note 177, § 209. Not all states, however, follow this pattern. *Id.*

180. 3 KAREN J. GREENWELL ET AL., AMERICAN LAW OF MINING § 82.03[3] (2d ed. 2025); 1 KUNTZ, *supra* note 179, § 3.2[a]; 1 WILLIAMS & MEYERS, *supra* note 177, § 209.

181. 1 WILLIAMS & MEYERS, *supra* note 177, § 210.7; *see* Lillibridge v. Lackawanna Coal Co., 22 A. 1035, 1036 (Pa. 1891).

182. 1 WILLIAMS & MEYERS, *supra* note 177, § 210.7; *see* Lillibridge, 22 A. at 1036.

183. *See* 8 POLSTON, THOMPSON ON REAL PROPERTY, *supra* note 162, § 65.04(c)(3) (“All jurisdictions, however (except perhaps Louisiana), describe the implications of adverse use under the heading of adverse possession.” (footnote omitted)); Batikov & Rech, *supra* note 76, § 15.02[2] (“[C]ourts tend to apply adverse possession regardless of the underlying mineral ownership theory.”).

184. Joseph A. Schremmer, *Reflections on the “Pore Space Estate,”* 10 ONE J. 727, 738 (2025).

185. 1 KUNTZ, *supra* note 179, § 10.4; 1 WILLIAMS & MEYERS, *supra* note 177, § 210.7; *see, e.g.,* White v. Miller, 139 N.Y.S. 660, 665 (Sup. Ct. 1912) (acknowledging the difference between the adverse possession and prescription claims in the context of a right to extract minerals but ultimately reaching the same conclusion under each doctrine based on an identical analysis). One court did acknowledge a situation in which the outcome might change, namely, when

observations cast serious doubt as to the utility of the distinction between adverse possession and prescription when dealing with certain types of oil and gas interests.

In one case dealing with solid minerals, however, a court encountered a situation where the adverse possession/prescription distinction was outcome-determinative. In that instance, the main issue that arose is very similar to that examined earlier in the exclusive prescriptive easement context.¹⁸⁶ In *Oakley Valley Stone, Inc. v. Alastra*,¹⁸⁷ Oakley had been mining quartzite on Alastra's property for over twenty years.¹⁸⁸ There was a large mining operation that employed five to ten miners, and Oakley placed housing as well as heavy equipment on the property.¹⁸⁹ It also modified and built roads on the parcel.¹⁹⁰ Initially, Oakley sought title to the property by adverse possession, but the lower court rejected that claim.¹⁹¹ It did so because Oakley had not met one of the adverse possession requirements in that jurisdiction, namely, having paid taxes on the property.¹⁹² Oakley responded that, in any case, it had acquired a profit to mine the quartzite by prescription.¹⁹³ The Supreme Court of Idaho disagreed and concluded that "a mining operation of this size and character amounts to nearly a complete taking of the land and is inconsistent with a prescriptive claim."¹⁹⁴

Two other cases that show a similar pattern involve parties who were claiming they had acquired profits for grazing by prescription. In *McDonald v. Board of Mississippi Levee Commissioners*,¹⁹⁵ the

the surface owner prevents the holder of the severed interest from extracting oil and gas. See *Gerhard v. Stephens*, 442 P.2d 692, 721 (Cal. 1968). In an ownership-in-place state, this would not affect the severed interest whereas, in a non-ownership state, where that interest would be a profit, the surface owner may succeed in terminating that nonpossessory right if the holder of the profit is prevented from accessing the servient property. *Id.* at 721-22. This theory, however, remains largely untested. See 1 KUNTZ, *supra* note 179, § 10.4 (discussing the situation in a hypothetical manner and citing only *Gerhard* as an example). Moreover, it ultimately relies on the fact that the surface owner is able to obtain that interest not purely as a result of applying the doctrine of prescription as a mechanism to acquire a right, but rather as a result of the termination of the profit by prescription. In other words, it seems highly doubtful that a third party (meaning someone who does not own the surface) would be able to acquire the profit by interfering with the holder's ability to access the servient land.

186. See *supra* Section II.A.3.

187. 715 P.2d 935 (Idaho 1985).

188. *Id.* at 936.

189. *Id.* at 938.

190. *Id.*

191. *Id.* at 937.

192. *Id.*

193. *Id.*

194. *Id.* at 938.

195. 646 F. Supp. 449 (N.D. Miss. 1986), *aff'd*, 832 F.2d 901 (5th Cir. 1987).

Board had obtained, by condemnation, an easement over the plaintiff's property to build and repair a levee in order to control overflow waters from the Mississippi River.¹⁹⁶ During more than thirty-four years, the Board also controlled grazing activities on the property by granting contracts to third parties.¹⁹⁷ The purpose of these contracts was to keep the vegetation at bay at a reduced cost.¹⁹⁸ The plaintiff, the owner of the property, brought suit against the Board, arguing that the latter did not have a "right to appropriate the grazing rights on the levee land."¹⁹⁹ One of the Board's responses was that they had acquired these rights by prescription.²⁰⁰ The court discussed a set of cases that disfavored profits in gross by prescription and concluded that it was inappropriate to grant the Board's request.²⁰¹ The court reasoned that this type of profit would "amount[] to a right of complete control of the [landowner's] property."²⁰² In other words, the court seemed to liken this type of profit to a fee simple absolute.

The second case illustrating this reluctance to allow the acquisition of a profit in gross for grazing purposes is *Platt v. Pietras*,²⁰³ where the party claiming the profit had fenced the property.²⁰⁴ The court explained that the claimant was exercising complete possession because both the owner and everyone else (other than the claimant) were excluded from using the property.²⁰⁵ This, according to the court, made the requested right akin to a fee, which may be acquired by adverse possession but not by prescription.²⁰⁶ The problem, again, was that the claimant had not paid taxes on the property, which precluded him from relying on adverse possession in this jurisdiction.²⁰⁷

What this analysis shows is that many courts view profits in gross as not acquirable by prescription due to their similarity to possessory estates.²⁰⁸ By requiring that these claims be based on

196. *Id.* at 454–55.

197. *Id.* at 456.

198. *Id.*

199. *Id.*

200. *Id.* at 466.

201. *See id.* at 468–69.

202. *Id.* at 469.

203. 382 So. 2d 414 (Fla. Dist. Ct. App. 1980).

204. *Id.* at 416.

205. *Id.*

206. *Id.* at 417.

207. *Id.*

208. Other examples include *Deseret Livestock Co. v. Sharp*, 259 P.2d 607, 610 (Utah 1953) (questioning the possibility of acquiring a profit in gross by prescription), and *Burlingame v. Marjerrison*, 665 P.2d 1136, 1139–40 (Mont. 1983) (reaching a similar conclusion with respect to profits for grazing, agriculture, and timber harvesting, although calling them "easements" in most of the opinion).

adverse possession instead, some of them ultimately failed in situations where they would have likely succeeded if they had been examined under the more claimant-friendly prescription framework. While this approach may be consistent with general notions of fairness, it questions the continued vitality of the traditional distinction between these two doctrines.

C. *Water Rights*

The acquisition of water rights by continued use exposes additional problems with the traditional distinction between prescription and adverse possession. These complications arise in large part due to the unique nature of water rights.²⁰⁹ This type of right typically includes the right to divert or withdraw water and use it reasonably or beneficially.²¹⁰

Two doctrines have provided the basis for the allocation of surface water in the United States. Under the first, riparianism, the right to use water from a water body was traditionally tied to the ownership of land abutting that water body—i.e., riparian land.²¹¹ The main principle governing water allocation in common law riparian jurisdictions is that riparian owners should share water resources equitably.²¹² Under the common law version of the second doctrine, prior appropriation, a person wishing to acquire a water right had to divert unappropriated water from a natural stream and put it to beneficial use.²¹³ Prior appropriation, as its name suggests, allocates water based on time priority.²¹⁴ What this means is that, in times of

209. See James L. Huffman, Hertha L. Lund & Christopher T. Scoones, *Constitutional Protections of Property Interests in Western Water*, 41 PUB. LAND & RES. L. REV. 27–38 (2019) (describing the unique character of water rights); Nicole L. Johnson, *Property Without Possession*, 24 YALE J. ON REGUL. 205, 209 (2007) (“Water rights are often considered an ‘advanced’ form of property rights . . .”).

210. 78 AM. JUR. 2D *Waters* § 28, Westlaw (database updated Nov. 2025) (discussing reasonable use); Vanessa Casado Pérez, *Too Simple Rules for a Complex World? Prior Appropriation Water Rights as Natural Rights*, 9 TEX. A&M J. PROP. L. 483, 485 (2023) (discussing beneficial use).

211. BARTON H. THOMPSON, JR. ET AL., LEGAL CONTROL OF WATER RESOURCES 29 (7th ed. 2025); Kelly A. Cole, Note, *A Market-Based Approach to the Protection of Instream Flow: Allowing a Charitable Contribution Deduction for the Donation of a Conservation Easement in Water Rights*, 6 HASTINGS W.-NW. J. ENV'T L. & POL'Y 325, 326 n.2 (2000).

212. THOMPSON ET AL., *supra* note 211, at 29.

213. Luis Inaraja Vera, *Water Law Transitions in the Era of Climate Change*, 102 WASH. U. L. REV. 479, 498 (2024); *Empire Lodge Homeowners' Ass'n v. Moyer*, 39 P.3d 1139, 1146 (Colo. 2001); *Cantlin v. Carter*, 397 P.2d 761, 765 (Idaho 1964). Water is unappropriated if no other user has a right to it. Inaraja Vera, *supra*, at 498.

214. Heather Payne, *A Fix for a Thirsty World—Making Direct and Indirect Reuse Legally Possible*, 42 WM. & MARY ENV'T L. & POL'Y REV. 201, 218 (2017).

scarcity, those who hold more recent (i.e., more junior) water rights will have to stop their diversions to ensure that more senior users can use water consistently with their water rights.²¹⁵ In many states—more so in appropriative jurisdictions—the common law versions of these two doctrines have been superseded by managerial systems, that is, frameworks whereby new water rights are granted by a water allocation agency.²¹⁶ In other words, those wishing to acquire a water right must file an application for a permit with the relevant state agency.²¹⁷ A not insignificant number of riparian states, however, still rely on the common law versions of riparianism to a notable extent.²¹⁸

A common theme found across jurisdictions is that water is publicly owned.²¹⁹ More specifically, either the state or the people of the state own water resources.²²⁰ Therefore, a water right does not confer ownership over the resource or part of it.²²¹ It rather gives its holder a right to use water for a specific purpose in a specific location,

215. *United States v. Klamath Drainage Dist.*, No. 22-cv-00962, 2023 WL 5899910, at *4 (D. Or. Sep. 11, 2023), *aff'd*, No. 23-3404, 2025 WL 262346 (9th Cir. Jan. 22, 2025); *People ex rel. Hal D. v. Nine Mile Canal Co.*, 828 F. Supp. 823, 824–25 (D. Colo. 1993).

216. DAVID H. GETCHES, SANDRA B. ZELLMER & ADELL L. AMOS, *WATER LAW IN A NUTSHELL* 68–69, 78 (5th ed. 2015); *see, e.g.*, OR. REV. STAT. § 537.225 (2025) (outlining the procedure by which a landowner can obtain a water right permit from the Water Resources Department).

217. *See* Robert E. Beck, *The Regulated Riparian Model Water Code: Blueprint for Twenty First Century Water Management*, 25 WM. & MARY ENV'T L. & POL'Y REV. 113, 130 (2000).

218. 1 JOSEPH W. DELLAPENNA, *WATERS AND WATER RIGHTS* § 9.03(a.01) (Amy K. Kelley & Jesse J. Richardson, Jr. eds., 3d ed. 2025) [hereinafter *WATERS AND WATER RIGHTS*] (“More or less comprehensive regulated riparian statutes are found in 19 of the 31 states east of Kansas City.”).

219. *See, e.g.*, *Archuleta v. Gomez*, 200 P.3d 333, 341 (Colo. 2009); *Mountain Meadow Ditch & Irrigation Co. v. Park Ditch & Reservoir Co.*, 277 P.2d 527, 528 (Colo. 1954); *Dep't of Ecology v. U.S. Bureau of Reclamation*, 827 P.2d 275, 278 (Wash. 1992) (en banc).

220. *E.g.*, ARIZ. REV. STAT. ANN. § 45-141(A) (2025) (“The waters of all sources . . . belong to the public . . .”); COLO. CONST. art. XVI, § 5 (“The water of every natural stream, not heretofore appropriated, within the state of Colorado, is hereby declared to be the property of the public, and the same is dedicated to the use of the people of the state, subject to appropriation as hereinafter provided.”); NEV. REV. STAT. § 533.025 (2025) (“The water of all sources of water supply within the boundaries of the State whether above or beneath the surface of the ground, belongs to the public.”); N.M. CONST. art. XVI, § 2 (“The unappropriated water of every natural stream, perennial or torrential, within the state of New Mexico, is hereby declared to belong to the public . . .”).

221. *Elk Grove Dev. Co. v. Four Corners Cnty. Water & Sewer Dist.*, 469 P.3d 153, 157–58 (Mont. 2020); *Nelson v. Brooks*, 329 P.3d 558, 567 (Mont. 2014).

subject to a number of additional conditions.²²² This has led some courts and scholars to refer to water rights as “usufructuary.”²²³

1. *Acquiring Water Rights Through Continued Use*

In light of the public nature of the resource, it is important to understand the role of three key parties whenever someone is attempting to acquire a water right by continued use. The party that has been using the resource may obtain a water right.²²⁴ If that claim is successful, the original water right holder either loses their right entirely or loses the ability to prevent the adverse user from interfering with that right.²²⁵ Moreover, the state or the people of the state will remain as the owners of the water because what is being transferred between the two other parties is only the right to *use* water, not its ownership.²²⁶

Also worthy of note is that, when a river, stream, or other moving body of water is implicated, this way of acquiring a right can typically only be used against downstream users.²²⁷ Given that adverse possession and prescription require adversity or interference with an existing right, upstream users will be the ones who may be in a position to divert water and prevent it from reaching those who are

222. See generally Cal. Water Curtailment Cases, 299 Cal. Rptr. 3d 352 (Ct. App. 2022), *modified on denial of reh'g*, (Sep. 29, 2022) (discussing the rights of several water rights holders and additional requirements imposed by the State Water Resources Control Board).

223. *E.g., id.* at 370; *Dyer v. Cranston Print-Works Co.*, 48 A. 791, 795 (R.I. 1901); *Moyle v. Salt Lake City*, 176 P.2d 882, 889 (Utah 1947); see also 78 AM. JUR. 2D, *supra* note 210, § 351 (acknowledging that “water rights are classified as usufructuary rights”); Duane Rudolph, *When Should Water Belong to the Public?*, 2019 MICH. ST. L. REV. 1389, 1389–407 (2019) (discussing the history of water rights being recognized as usufructuary).

224. See *Mielke v. Daly Ditches Irrigation Dist.*, 731 P.2d 927, 931 (Mont. 1987) (“[T]he right to the use of water for irrigation or other lawful purposes may be lost by one and *acquired* by another by prescription.” (emphasis added)).

225. See *Big Rock Mut. Water Co. v. Valyermo Ranch Co.*, 248 P. 264, 267 (Cal. Dist. Ct. App. 1926) (“It follows that the rights of an appropriator may be lost in whole or in part by the adverse possession and the user of the water by another amounting to prescription.”); *Kennebunk, Kennebunkport & Wells Water Dist. v. Me. Tpk. Auth.*, 84 A.2d 433, 437 (Me. 1951) (explaining that prescription results in a right against which the lower riparian can no longer obtain protection).

226. This results from the fact that what is acquired and lost is a water right to surface water, which, as noted above, is a right to use that resource. See *supra* notes 221–222 and accompanying text.

227. 1 WATERS AND WATER RIGHTS, *supra* note 218, § 7.04(c); Bruce S. McCoy, *The Role of Adverse Possession in Water Law*, 10 HARV. ENV'T L. REV. 257, 262 (1986).

located downstream.²²⁸ Situations where downstream users can interfere with the uses of those upstream are more infrequent.²²⁹

It should also be mentioned that, with the advent of permit systems, many courts and legislatures have decided to limit or eliminate the application of adverse possession and prescription to water rights, especially in prior appropriation jurisdictions.²³⁰ This has likely been motivated by the perception that these doctrines undermine effective water management by, among other things, creating uncertainty and modifying the allocative choices made by water agencies.²³¹ This has been accomplished in a number of ways. Some state legislatures have simply passed statutory provisions to that effect.²³² In other cases, courts have reached that same conclusion by noting that these doctrines are inconsistent with permit systems.²³³ In other words, both adverse possession and prescription clash with the idea that the only way to acquire water rights in these jurisdictions is by obtaining a permit from the agency or through an agency-authorized transfer.²³⁴ Yet another approach has been to limit the situations in which these doctrines can be applied (e.g., only within an irrigation ditch).²³⁵

228. 1 WATERS AND WATER RIGHTS, *supra* note 218, § 7.04(c).

229. There are some limited exceptions to this principle. *See id.* (“The notable exceptions involve backflooding behind an impoundment of water or physical trespasses by the lower riparian on the upper riparian’s land in order to take the water.” (footnote omitted)).

230. *E.g.*, ALASKA STAT. § 46.15.040(a) (2024); KAN. STAT. ANN. § 82a-705 (2024); MONT. CODE ANN. § 85-2-301(3) (2023); NEV. REV. STAT. § 533.060(5) (2024); OR. REV. STAT. § 540.720 (2023).

231. *See* 1 WATERS AND WATER RIGHTS, *supra* note 218, § 17.03(d); Corwin W. Johnson, *The Challenge to Prescriptive Water Rights*, 30 TEX. L. REV. 669, 678 (1952); McCoy, *supra* note 227, at 283.

232. *E.g.*, ALASKA STAT. § 46.15.040(a) (2024); MONT. CODE ANN. § 85-2-301(3) (2023); UTAH CODE ANN. § 73-3-1(6) (2025); WASH. REV. CODE § 90.14.220 (2025).

233. *See, e.g.*, *Turner v. Bassett*, 81 P.3d 564, 570 (N.M. Ct. App. 2003) (explaining that “[w]ater appropriation is, as a result, governed exclusively by the permit system administered by the State” and thus “water rights cannot be acquired by adverse possession”), *rev’d*, 111 P.3d 701 (N.M. 2005).

234. *See id.*

235. *See, e.g.*, *Archuleta v. Gomez*, 200 P.3d 333, 336–37 (Colo. 2009) (“Adverse possession law in Colorado prevents a claimant from adversely possessing water that is within a surface stream or tributary aquifer, but allows private water users within an irrigation ditch to adversely possess against each other behind the headgate . . .”).

2. *The Distinction Between Adverse Possession and Prescription in the Water Rights Context*

It should be clear, based on the principles discussed earlier, which doctrine—adverse possession or prescription—is a better fit to evaluate a claim that a person has acquired a right to divert and use water rights by continued use.²³⁶ Prescription provides the appropriate framework because a water right only confers its holder the ability to *use* that resource, with its ownership remaining with the state or the people of the state.²³⁷

An analysis of court decisions in this area of the law, however, shows a far more muddled picture. While courts in a substantial number of states do apply prescription in this context, this has not been a uniform approach. Some courts have used the terms “prescription” and “adverse possession” interchangeably, as can be seen, for example, in court opinions from courts in Arizona²³⁸ (before the legislature eliminated these doctrines in the water context) and Kentucky.²³⁹ When adjudicating these types of water rights disputes, courts have also used language that blurs the distinction between the two doctrines, such as “title by prescription.”²⁴⁰ One court has even stated that it is possible to both adversely possess riparian rights and to “obtain a prescriptive easement to use riparian rights”²⁴¹ but did not clarify whether applying one doctrine or the other may lead to different outcomes.

Even courts that have relied on prescription to assess these types of claims have often required the adverse user to show “exclusiveness,”²⁴² a requirement generally associated with adverse

236. See discussion *infra* Sections I.B, II.C.

237. See *supra* notes 219–226 and accompanying text.

238. See, e.g., *Gibbons v. Globe Dev., Nev., Inc.*, 553 P.2d 1198, 1199 (Ariz. 1976) (in banc) (“Appellants’ third theory of water rights is based upon alleged adverse use that resulted in giving them a prescriptive right. A water right may be obtained by adverse possession.” (citing *Gross v. MacCornack*, 255 P.2d 183 (Ariz. 1953))).

239. See, e.g., *Riley v. Jones*, 174 S.W.2d 530, 531 (Ky. 1943) (“[I]n order to establish title by prescription, the adverse possession must be actual, open, notorious, forcible, exclusive, and hostile . . .” (emphasis added)).

240. E.g., *id.*; *Mielke v. Daly Ditches Irrigation Dist.*, 731 P.2d 927, 931 (Mont. 1987).

241. *Scott v. Burwell’s Bay Improvement Ass’n*, 708 S.E.2d 858, 862 (Va. 2011).

242. See, e.g., *Mielke*, 731 P.2d at 932 (“All parties agree that the elements of proof required to sustain a claim of prescriptive water rights [include]: . . . [e]xclusive use by the claimant”); *MacRae v. Small*, 85 P. 503, 506 (Or. 1906) (“[T]he weight of evidence discloses that defendant’s irrigation of his meadow . . . from [the] creek broke the continuity of plaintiff’s enjoyment of the water, thereby depriving him of a prescriptive right thereto.”); *In re Drainage Area of Bear River*, 361 P.2d 407, 410 (Utah 1961) (“Adverse use of a water right . . . require[s] exclusive beneficial use”); *Malnati v. Ramstead*, 309 P.2d

possession but not with prescription.²⁴³ In this vein, one court highlighted this contrast and explained that

[a] water right . . . acquired [by prescription] . . . is similar to a prescriptive easement . . . in that in both cases only a right to use is acquired. However, adverse use of a water right requires an exclusive beneficial use by the adverse which is not required by a prescriptive easement.²⁴⁴

In short, this analysis provides an additional example—along with exclusive easements and profits—of an area where courts have often been inclined to not follow the traditional distinction between adverse possession and prescription. Even in many cases where they have apparently maintained the distinction, they have had to make some critical adjustments for the analysis to be coherent.

III. DECONSTRUCTING THE PROBLEMS WITH THE TRADITIONAL APPROACH

The previous discussion showed that the traditional approach raises serious issues and that courts often choose not to follow it. Part III will rely on that analysis and identify the underlying reasons why this rule is highly problematic in some cases and why it is confusing and unhelpful in others.

A. *Property Rights as a Continuum and the Shortcomings of the Traditional Approach*

Adverse possession is undoubtedly controversial.²⁴⁵ Some scholars have decried this doctrine as one that allows trespassers to become homeowners.²⁴⁶ Others have criticized it, arguing that its

754, 756 (Wash. 1957) (listing exclusive use as one of the requirements to obtain a water right by prescription).

243. See *supra* notes 110–113 and accompanying text.

244. *In re Drainage Area of Bear River*, 361 P.2d at 410 (footnote omitted).

245. Karl T. Muth & Ashley D. Cox, *Adverse Possession: A Modern Perspective*, 47 REAL EST. L.J. 6, 6 (2018) (“[T]here is perhaps no concept more controversial in the Anglo-American legal tradition than the doctrine of adverse possession.”); see also Ballantine, *supra* note 53, at 135 (“Title by adverse possession sounds . . . like title by theft or robbery . . .”); R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 333 (1983) (“The notion that there is something wrong in permitting a knowing trespasser to gain good title may have continued to exert an influence over judges . . .”).

246. See, e.g., Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL’Y & L. 271, 276 (2012) (“Shouldn’t we as a society, as scholars, leave it to the criminal justice system to deal with these trespassers?”); Brian Lester, *An Attempt to Quiet the Controversy: The Case for Automatically Equipping an Adverse Possessor with a Slander of Title Action*, 37 NEW ENG. L. REV. 249, 251 (2003) (“The infamous

purported justifications are flawed or unpersuasive.²⁴⁷ Many courts have taken issue with this doctrine, by portraying it as “disfavored” and attempting to limit its effects by applying its requirements strictly.²⁴⁸ Moreover, some state legislatures have added additional requirements to this doctrine, such as the payment of taxes on the property, which ultimately decreases claimants’ success rates.²⁴⁹

Prescription, on the other hand, should, in principle, be far less problematic. Courts and legislatures have generally lowered the bar for prescription compared to adverse possession by limiting the number of requirements that claimants must satisfy.²⁵⁰ This seems reasonable given that rights obtained through prescription are nonpossessory and, therefore, presumably more limited in scope than those acquirable by adverse possession.²⁵¹

real property doctrine of adverse possession rewards title to the wrongful occupier of another’s land.”).

247. *E.g.*, Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. 2639, 2644–45 (2021) (stating that “[p]roperty law’s reliance on adverse possession is warranted only to the extent that, as a practical matter, adverse possession is an effective tool for policing borders” but then “find[ing] adverse possession lacking” in this regard after thorough analysis); Stake, *supra* note 77, at 2421 (“A number of rationales for the doctrine have been advanced. On careful examination, however, the traditional rationales fall short. Some rest on shaky or outdated normative foundations. Others do not fit the doctrinal contours.”). *But see* Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1038 (2006) (“[O]nly the claimant who knew that she was encroaching—and who documented that awareness—should be able to take title to land through adverse possession.” (emphasis omitted) (footnote omitted)).

248. *See, e.g.*, *Pilot’s Mall, LLC v. Porrata*, No. UWY-CV-23-6069088-S, 2025 WL 1039808, at *4 (Conn. Super. Ct. Apr. 1, 2025) (“An exacting standard for proving adverse possession is necessary because the law disfavors adverse possession.”); *CSC Acquisition-NY, Inc. v. 404 Cnty. Rd. 39A, Inc.*, 947 N.Y.S.2d 556, 558 (App. Div. 2012) (applying a clear and convincing evidence standard “[s]ince adverse possession is disfavored” (quoting *Best & Co. Haircutters v. Semon*, 916 N.Y.S.2d 632, 634 (App. Div. 2011))); *Grace v. Koch*, 692 N.E.2d 1009, 1012 (Ohio 1998) (“Such a doctrine should be disfavored, and that is why the elements of adverse possession are stringent.”).

249. *Ford, supra* note 27, at 481 (“In jurisdictions where tax payment is an essential element of adverse possession, it is often the cause of defeating an otherwise meritorious claim.”); *Raley, supra* note 27, at 491–92 (explaining that the main reason for Arkansas’ addition of two new adverse possession requirements—one of which was the payment of taxes—was to make the doctrine stricter in response to a recent adverse possession dispute in that jurisdiction).

250. *See supra* Section I.C.

251. *Lach v. United States*, No. 08 cv 251, 2010 WL 5027145, at *4 (N.D. Ind. Dec. 2, 2010) (“An easement by prescription is more limited than adverse possession”); *Pyle v. Gall*, 531 P.3d 1189, 1196 (Kan. 2023) (“[T]he burden a prescripitor imposes on the land is less onerous than the challenge of the adverse possessor.”); *Judd v. Bowen*, 397 P.3d 686, 698 (Utah Ct. App. 2017) (explaining

But this binary model is coherent only so long as the rights to which it is applied are relatively homogenous. Specifically for nonpossessory rights, this also means that they must be limited. For the purposes of this discussion, a nonpossessory right is *limited* if it is not exclusive and allows its holder to carry out a small number of identified uses.²⁵² Therefore, a nonexclusive easement for a narrowly defined use, such as one authorizing A to cross B's property on foot, would be a perfect example of a limited nonpossessory right.

As Part II revealed, however, the two categories of rights to which courts apply the doctrines of adverse possession and prescription (i.e., possessory and nonpossessory) are far from homogenous. Nonpossessory rights, for instance, are not always limited. Some easements allow their holders to exclude not only third parties, but also the landowner.²⁵³ The same is generally true for certain types of surface water rights.²⁵⁴ Moreover, easements and profits can authorize a particular person to use the servient land for a narrow purpose (again, crossing the other person's land on foot) or they may contemplate one that is much broader, such as use as a "park."²⁵⁵ And for an example of a more intermediate scenario, some courts have interpreted the phrase "right of way" expansively to include not only ingress and egress, but also the installation of utilities and pipelines on the servient land.²⁵⁶

Another way of conceptualizing the heterogeneity of these types of rights is by realizing that they exist on a continuum. As the diagram below shows, the space where these rights exist has two axes, which represent the level of exclusiveness and breadth of the right, respectively.²⁵⁷ The following examples focus on interests in land.

that "rights acquirable by prescription" are "more limited" than "rights typically associated with adverse possession").

252. The Restatement relies on these same two criteria to determine whether certain language should be viewed as creating a possessory or nonpossessory right. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.2(f) (A.L.I. 2000) (discussing the exclusivity and extensiveness of use).

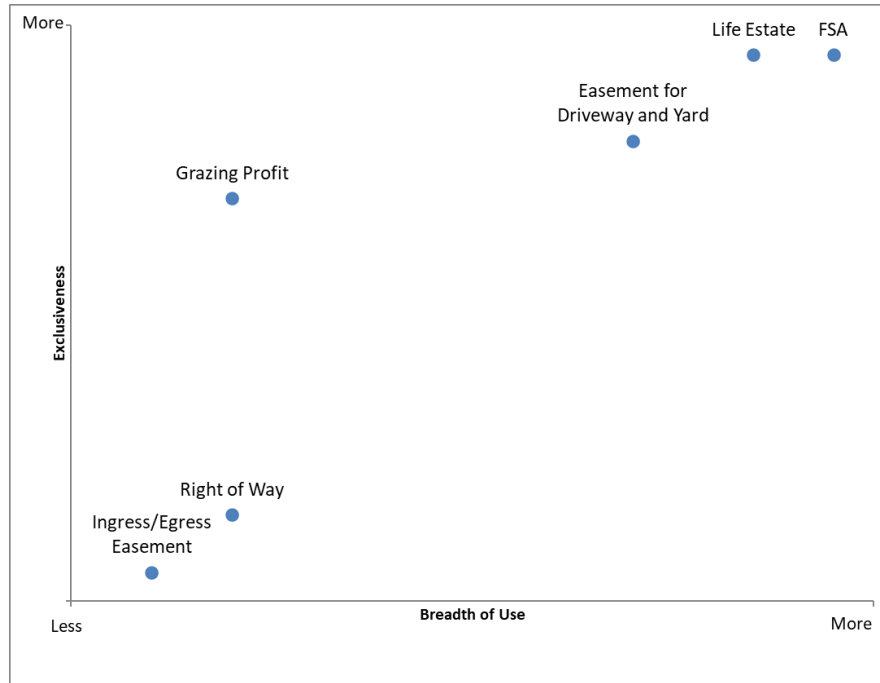
253. See *supra* Section II.A.

254. See *infra* Section III.B.3. The owner of the water in these cases is typically the state or the people of the state. See *supra* notes 219–220 and accompanying text.

255. *E.g.*, *Johnson v. Lake Cushman Maint. Co.*, 425 P.3d 560, 563 (Wash. Ct. App. 2018).

256. See, *e.g.*, *Francini v. Goodspeed Airport, LLC*, 134 A.3d 1278, 1288 (Conn. App. Ct. 2016) ("In this case, the grant of the right-of-way is in general terms . . . 'Such a grant is to be construed as broad enough to permit any use which is reasonably connected with the reasonable use of the land to which it is appurtenant.'" (quoting *Birdsey v. Kosienski*, 101 A.2d 274, 278 (Conn. 1953))), *aff'd*, 174 A.3d 779 (Conn. 2018).

257. Other important features that are less relevant to this discussion could include *time*.

FIGURE 1: THE CONTINUUM OF PROPERTY RIGHTS²⁵⁸

The diagram shows the relative location of different types of property rights.²⁵⁹ A fee simple absolute is located on the upper right corner as the right with the highest degree of exclusiveness and breadth. A life estate has a slightly lower level of breadth of use, as the doctrine of waste places some limits on how the property can be used.²⁶⁰ An easement for driveway and yard purposes, as noted earlier, would have a significant degree of exclusiveness and would allow its holder to put the servient land to a wide range of more specific uses (e.g., planting vegetation, multiple types of recreational activities).²⁶¹ A right of way that includes both the purposes of ingress and egress, as well as the ability to place pipelines and utility lines, would have low exclusiveness and moderate breadth of use. A grazing profit, however, is narrow with respect to the breadth of its use but is moderately exclusive—not many activities by the landowner are

258. This Figure was created by the author.

259. Figure 1 is not intended to situate these rights with precision but rather illustrate the part of the graphic where we would expect them to be based on their typical exclusiveness and breadth.

260. See *McIntyre v. Scarbrough*, 471 S.E.2d 199, 201 (Ga. 1996) (“A life tenant is entitled to the full use and enjoyment of the property if . . . [they] commit[] no acts which would permanently injure the remainder interest.”).

261. See *supra* notes 143–147 and accompanying text.

compatible with it.²⁶² Finally, an easement for ingress and egress would score very low on both metrics.²⁶³

This representation of property rights as a continuum highlights the shortcomings of the traditional approach. A nonpossessory right can have varied degrees of exclusiveness and breadth. As a result, a nonpossessory right that is both high in exclusiveness and broad in scope (e.g., driveway/yard example) can be much closer to a life estate or a fee simple absolute (both possessory in nature) than to many other types of nonpossessory rights, such as a pure ingress/egress easement. Therefore, the traditional approach, by relying on the label (possessory vs. nonpossessory) rather than on the nature of the right (more or less exclusive or broad), can lead to treating two very different rights alike and two very similar rights differently.

As discussed in Part II, many courts have avoided this result by simply preventing a claimant from being able to acquire an exclusive easement by prescription.²⁶⁴ One of the courts' main concerns was that the traditional approach allowed parties to bypass the more stringent adverse possession requirements.²⁶⁵ Thus, their solution was to treat exclusive easements as though they were possessory rights, such that those arguing that they had acquired this type of right by continued use would have to prove that they had met all the adverse possession elements.²⁶⁶

Isn't this, though, a perfectly appropriate solution to the problem? Unfortunately, it is not. This approach leaves the traditional approach in place and creates a specific exception for exclusive easements, namely, that they should be treated as possessory for prescription/adverse possession purposes. But this strategy creates new problems, some conceptual and some practical.

First, treating exclusive easements as possessory, specifically in this context, creates a confusing landscape. Exclusive easements are treated as possessory when they are being obtained by continued use (via adverse possession) but remain nonpossessory when they are acquired by grant or implication.²⁶⁷ This gives rise to additional complications. For example, are these exclusive interests obtained by adverse possession still considered easements? Relatedly, are they

262. *See supra* notes 195–207 and accompanying text.

263. While less relevant to this discussion, an easement held by the public at large that allows citizens to use a certain area for virtually any recreational activity would be located in the bottom right section of this figure. The breadth of use is substantial, but the right of each member of the public to exclude others is minimal or nonexistent.

264. *See supra* Section II.A.3.

265. *See supra* Section II.A.3.

266. *See supra* notes 152–156 and accompanying text.

267. As explained in Section II.A.2, *supra*, courts accept the creation of these types of easements by grant, reservation, or implication.

subject to the rules that apply to nonpossessory interests only, such as the possibility of loss by abandonment?²⁶⁸

Second, even just determining the scope of this exception can be very challenging. As explained earlier, courts have acknowledged that the phrase “exclusive easement” can have different meanings.²⁶⁹ These include easements that exclude everyone but the owner of the servient land and also easements that limit or completely prohibit the servient owner’s ability to use their property.²⁷⁰ To add an additional layer of complexity, determining whether a prescriptive easement is exclusive or not is often inferred based on the nature of the use.²⁷¹ This is more likely to lead to uncertainty and conflict than with express easements, where the degree of exclusiveness can typically be established by reading the relevant deed language.²⁷²

Another scholar has suggested, as a potential solution to this problem, requiring that a successful claimant pay compensation when acquiring a substantial nonpossessory right such as an exclusive easement.²⁷³ This option, however, also raises some consistency issues that become more salient in light of the representation in Figure 1. If courts allow claimants to routinely obtain traditional possessory rights such as a fee simple absolute through adverse possession without paying compensation,²⁷⁴ it is difficult to see why such payment should be required for rights that are more limited, both in terms of exclusiveness and in the breadth of their use.

B. An Illustration of the Doubtful Utility of the Traditional Approach: Appropriative Water Rights

Rules that rely on legal categories should ideally be useful in the sense that they have practical implications. Otherwise, they may be simply creating distinctions without consequence. Differentiating

268. See *Messersmith v. Mayor & Common Council of Riverdale*, 164 A.2d 523, 524–25 (Md. 1960) (noting that the “ownership of a possessory interest in real property . . . can never be lost solely by abandonment,” which is not the case for easements); *W. Gateway Storage Co. v. Treseder*, 567 P.2d 181, 182 (Utah 1977) (“It is well recognized that an easement or right of way may be abandoned.”).

269. See *supra* Section II.A.1.

270. See *supra* Section II.A.1.

271. See *supra* Section II.A.3.

272. *Coster v. Wingrove*, No. 24-ICA-467, 2025 WL 3174213, at *3–4 (W. Va. Ct. App. Nov. 13, 2025); see also Elliot L. Epstein & Ronald L. Bissonnette, *Easements Ain’t So Easy*, 15 ME. BAR J. 52, 53 (2000); *McCrossin v. CSX Transp., Inc.*, No. 24-CV-01018, 2025 WL 2322682, at *4 (W.D. Pa. Aug. 12, 2025).

273. See *Saxe*, *supra* note 120, at 200.

274. See *Grace v. Koch*, 692 N.E.2d 1009, 1012 (Ohio 1998) (“A successful adverse possession action results in a legal titleholder forfeiting ownership to an adverse holder without compensation.”); *Tran v. Macha*, 213 S.W.3d 913, 915 (Tex. 2006) (per curiam) (explaining that adverse possession allows “taking real estate from a record owner without express consent or compensation”).

between possessory and nonpossessory rights in the adverse possession and prescription context would be useful if, for example, it aided in determining the key elements that a claimant must prove. And this would be particularly helpful when one is dealing with less conventional property rights, such as those in natural resources.

In practice, though, we see many examples where the traditional approach does not provide any significant value. As explained in Part II, many courts have ignored this rule when dealing with these types of claims in the areas of water and oil and gas, probably due to the fact that outcomes do not change based on how a right is classified (i.e., possessory vs. nonpossessory).²⁷⁵

Rights to divert surface water provide a particularly good example of a situation where the traditional divide between adverse possession and prescription is too simplistic to be useful. In fact, it can even lead to unnecessary confusion.²⁷⁶

Courts that choose to follow the traditional framework should rely on the doctrine of prescription—not adverse possession—to examine claims that a party has acquired this type of right by continued use.²⁷⁷ It is widely accepted that holders of rights to divert surface water are entitled to use that resource but do not own it.²⁷⁸ Therefore, these rights *to use* are nonpossessory and may be acquired by prescription in states that have not limited or completely eliminated this possibility.²⁷⁹

If courts generally regard this traditional framework as useful or valuable, their decisions should show certain patterns that are consistent with this view. First, one would expect courts to follow the framework, that is, to rely on prescription to analyze these claims. As explained earlier, this is the most common approach, but some courts use the phrase “adverse possession” instead when examining these issues or use both terms interchangeably.²⁸⁰ Second, one would also expect the necessary elements that courts list to be consistent with

275. See *supra* Section II.C.2; see also notes 181–185 and accompanying text.

276. See *supra* note 240 and accompanying text.

277. See *supra* Section I.B. This does not, however, foreclose the possibility that someone may acquire riparian rights through adverse possession by possessing, not the water, but instead the riparian land to which riparian rights are attached.

278. See *supra* notes 221–223 and accompanying text.

279. See David B. Anderson, *Water Rights as Property in Tulare v. United States*, 38 MCGEORGE L. REV. 461, 483 (2007) (“[T]he appropriative right is, like the riparian right, a nonpossessory right in the watercourse ‘to appropriate a certain portion of it’” (quoting *Vernon Irrigation Co. v. City of Los Angeles*, 39 P. 762, 768 (Cal. 1895) (per curiam), *overruled by*, *Beckett v. City of Petaluma*, 153 P. 20 (Cal. 1915))); Jesse W. Barton, Note, *Tulare Lake Basin Water Storage District v. United States: Why It Was Correctly Decided and What This Means for Water Rights*, 25 ENVIRONS 109, 121 (2002) (“[A] water right is thus limited to a single right that is non-possessory”).

280. See *supra* Section II.C.2.

the specific doctrine they chose to analyze the claim. In other words, if this is a meaningful distinction and one that holds across different types of property rights, courts should, in the few instances where they rely on adverse possession, require the adverse possessor to have paid taxes on water rights when that element generally is necessary to acquire other rights by continued possession in the jurisdiction. Likewise, if courts are instead applying the doctrine of prescription, it would be reasonable to see evidence that judges apply a presumption of adversity and that they do not require claimants to show that their use was exclusive, as we see in the land context.²⁸¹

This is not, however, what the case law shows, as the following discussion will address. What we see instead is that the nature of the right has a much greater impact on the courts' analysis than the particular doctrine that the court chooses to use in each case.

1. *Payment of Taxes on "the Property"*

Starting with the issue of taxation, courts using adverse possession statutes have struggled when trying to apply this requirement to claims relating to surface water rights.²⁸² The main issue is that tax authorities do not assess water rights separately.²⁸³ Therefore, it is not possible to just mechanically apply the adverse possession requirement that the claimant paid taxes on the property acquired (in this case, the water right). Some courts have simply concluded that one may acquire water rights by adverse possession without proving the payment of taxes.²⁸⁴ Others have addressed the issue by instead requiring claimants to prove that they paid taxes on irrigated land.²⁸⁵ This sets a rather low bar, as the element would be met as long as the claimant paid taxes on "land assessed and recognized as irrigated."²⁸⁶

281. *See supra* Section I.C.

282. Other courts have held their ground in relying on prescription, refusing to apply an adverse possession statute that required the payment of taxes. *E.g.*, *Verwolf v. Low Line Irrigation Co.*, 227 P. 68, 70–71 (Mont. 1924).

283. *Id.* at 71 ("[A water right] is not subject to taxation independently of the land to which it is appurtenant . . ."); *Jackson v. Spanish Fork W. Field Irrigation Co.*, 223 P.2d 827, 833 (Utah 1950) (Wolfe, J., concurring) ("[N]o taxes are assessed against the water itself . . ."), *modified on reh'g*, 235 P.2d 918 (1951).

284. *See, e.g.*, *Monroe v. Pleasants*, 182 P. 330, 331 (Cal. Dist. Ct. App. 1919) (noting that "there is no evidence in the record that any taxes were or had ever been levied and assessed upon the water right in question" and then concluding that "the requirement of the payment of taxes as an element of adverse possession does not apply where no taxes have been assessed").

285. *Sedillo v. Wiggins*, No. 05CA1243, 2006 LX 36246, at *15 (Colo. App. Dec. 7, 2006) ("To acquire title to a water right by adverse possession under color of title, payment of taxes on the land as irrigated land would be necessary.").

286. *Id.*

2. *The Presumption of Adversity*

There is also no evidence that courts have consistently applied a presumption of adversity when dealing with prescription claims to surface water rights. As noted earlier, this presumption is common with prescription in other contexts.²⁸⁷ A court that was confronted with this question decided not to apply that presumption.²⁸⁸ Even one of the few courts that did recognize the presumption of adversity seemed to do so for reasons unrelated to the fact that the claim was based on prescription, as the court used the terms “prescription” and “adverse possession” interchangeably.²⁸⁹ The likely explanation is that courts have viewed prescription of water as requiring injury to the water holder’s rights, and this notion has been specifically tied to the element of adversity.²⁹⁰ Thus, presuming adversity would be at odds with the idea that there must be a clear showing of harm and interference.

3. *Exclusive Use*

The “exclusive use” element requires a more in-depth analysis. As explained in Part I, courts generally either do not list “exclusiveness” as a prescription requirement or include it but interpret it in a way that renders it ineffective.²⁹¹ Given that surface water rights are nonpossessory, it would be reasonable to expect courts to also largely disregard this element in their prescription analyses.

Courts in many states, however, have required a strong showing of exclusiveness when dealing with claims of prescription to surface water rights.²⁹² Unlike with easements, courts have interpreted this

287. *See supra* Section I.C.

288. *See State ex rel. Dep’t of Parks & Recreation v. Schoendorf*, No. H022039, 2002 WL 972147, at *6 (Cal. Ct. App. May 10, 2002) (explaining that the lower court rejected a presumption of adversity).

289. *See Nesbitt v. Jones*, 344 P.2d 949, 956–57 (Colo. 1959).

290. 78 AM. JUR. 2D, *supra* note 210, § 367 (“Whether a use of water is adverse to a riparian owner or an appropriator depends solely on the question whether that use is an infringement of their rights.”); 94 C.J.S. *Waters* § 313, Westlaw (database updated May 2025) (“Mere use of one’s own rights in water without any invasion of the rights of others interested therein, in such a manner as gives the latter no right to interfere with the use made, affords no basis for a claim of prescription.” (citing *Head v. Merrick*, 203 P.2d 608 (Idaho 1949))); 62 CAL. JUR. 3D *Water* § 196, Westlaw (database updated Apr. 2025) (“A finding of adverse possession is not sufficient unless it shows a diversion of water of which the legal owner has a right to complain.” (citing cases supporting this proposition)).

291. *See supra* Section I.C.

292. *See, e.g., Gilbert v. Smith*, 552 P.2d 1220, 1225 (Idaho 1976) (“Prescriptive title to water . . . may be acquired by adverse use for five years. Such use must be open, hostile, *exclusive*, continuous and under claim of right.” (emphasis added) (citations omitted)); *Irion v. Hyde*, 81 P.2d 353, 355 (Mont. 1938) (“It is equally well settled that in order to acquire a water right by adverse

element strictly, giving it a meaning very similar to that under adverse possession of land. One court stressed that the claimant “must preclude and deprive the [original right holder] of the beneficial use of his water right”²⁹³ Another court explained that “the claimant must not have shared the use with the true owner, nor suffered any act of dominion by him, such as an interruption.”²⁹⁴ Yet another court concluded that the fact that the water had been shared with others was fatal to the prescription claim.²⁹⁵

Why are courts emphasizing exclusiveness in water cases? After all, as noted earlier, this is a significant deviation from prescription requirements in other areas.²⁹⁶ The answer lies in the fact that surface water rights inherently have a certain degree of exclusiveness. In other words, their holders have the ability to exclude others to the extent necessary to prevent them from interfering with their water rights.²⁹⁷

Whether the level of interference suffered by a water user is high enough to allow that person to exclude others from using that resource depends on the type of uses involved and on the legal nature of the water right itself. Focusing on the first factor, water use may be consumptive, non-consumptive, or a combination of the two. A consumptive use is one where the water that is diverted does not return to the water body from which it was taken or is “otherwise not available for immediate use.”²⁹⁸ This can happen, for example, when that water evaporates, is absorbed by crops, or is consumed by

user or prescription, it is essential that the proof must show that the use has been . . . exclusive”); *Wimer v. Simmons*, 39 P. 6, 11 (Or. 1895) (“To bar the right of the defendants, the use of the water by plaintiffs must have been under a claim of right, open, notorious, *exclusive*, adverse, and hostile” (emphasis added)); *In re Drainage Area of Bear River*, 361 P.2d 407, 410 (Utah 1961) (“[A]dverse use of a water right requires an exclusive beneficial use by the adverser”); *Malnati v. Ramstead*, 309 P.2d 754, 756 (Wash. 1957) (“[A] prescriptive right therein has been acquired by open, notorious, continuous, *exclusive*, hostile, and adverse user” (emphasis added)); *see also* 1 SCOTT S. SLATER, CALIFORNIA WATER LAW AND POLICY § 4.04 (2024) (“Other than being frequently named as an element of prescription, there is very little case law discussing the requirement of exclusivity.”).

293. *In re Drainage Area of Bear River*, 361 P.2d at 410.

294. *Malnati*, 309 P.2d at 756 (quoting 1 SAMUEL C. WIEL, WATER RIGHTS IN THE WESTERN STATES § 584, at 630–31 (3d ed. 1911)).

295. *Hill v. Merrimac Cattle Co.*, 687 P.2d 59, 66–67 (Mont. 1984); *see also* *Grimsley v. Est. of Spencer*, 670 P.2d 85, 89, 93 (Mont. 1983) (explaining that a prescription claim cannot be successful if the water is shared between the claimant and the water right holder).

296. *See supra* Section I.C.

297. Luis Inaraja Vera, *Takings Property and Appropriative Water Rights*, 44 CARDOZO L. REV. 271, 295, 308 (2022).

298. Water Res. Mission Area, *Water-Use Terminology*, U.S. GEOLOGICAL SURV. (Feb. 27, 2019), <https://perma.cc/D7ZA-796K>.

livestock.²⁹⁹ Conversely, a use is non-consumptive when the water either stays or is promptly returned to the part of the water course from which it was diverted.³⁰⁰ Instream uses such as fishing or boating are non-consumptive.³⁰¹ Certain uses, however, have consumptive and non-consumptive portions. For instance, a significant amount of water diverted for irrigation will be used by crops and evaporate, but some of it may seep into the ground and return to the river or stream.³⁰²

Consumptive uses can be far more disruptive.³⁰³ This type of use is sometimes referred to as subtractive, meaning that “consumption by one person precludes . . . use or consumption by another person.”³⁰⁴ In other words, the amount of water that is diverted is no longer available to others downstream.³⁰⁵ For this reason, consumptive uses, by reducing flows, can interfere with other uses (both consumptive and nonconsumptive) in what Carol Rose has referred to as “a zero-sum game.”³⁰⁶

The second factor—that is, the legal nature of the right—shapes a water right holder’s right to exclude others who interfere with her use of water. In a prior appropriation jurisdiction, appropriators can prevent others (except those with senior rights) from diverting water

299. *Id.*

300. “Maven” (Chris Austen), *Non-Consumptive Use*, MAVEN’S NOTEBOOK (July 29, 2013), <https://perma.cc/U7XG-6F5K>.

301. JASON ANTHONY ROBISON, LAW OF WATER RIGHTS AND RESOURCES § 3:77 (2025); see Diane K. Brownlee, Comment, *The Public Vote in the Game of Water Wars: An Unquenchable Thirst to Define and Implement “Public Values” in Western Water Laws*, 70 UMKC L. REV. 647, 667–68 (2002) (“Rather than remove water, instream or nonconsumptive uses receive benefits from the water while it is still in the stream.”). Some scholars have highlighted the distinction between consumptive and nonconsumptive use more broadly in the context of natural resources. See Jan G. Laitos & Rachael B. Reiss, *Recreation Wars for Our Natural Resources*, 34 ENV’T L. 1091, 1099–100 (2004); see also Josh Eagle, *Complex and Murky Spatial Planning*, 28 J. LAND USE & ENV’T L. 35, 41 n.30 (2012).

302. See WATER RESOURCES PROGRAM, WASH. STATE DEP’T OF ECOLOGY, PROGRAM GUIDANCE: DETERMINING IRRIGATION EFFICIENCY AND CONSUMPTIVE USE 6 (2024), <https://perma.cc/PD75-CEQP> (attempting to “quantify the consumptive/non-consumptive balance”). In some cases, the nonconsumptive portion of an agricultural right can be very high. Jan G. Laitos, *The Effect of Water Law on the Development of Oil Shale*, 58 DENV. L.J. 751, 759 (1981).

303. Non-consumptive uses, however, can still interfere with other uses, for example, if they lower water quality or if the distance between the point of diversion and when the water returns to the water body is significant.

304. Vincent Ostrom & Elinor Ostrom, *Public Goods and Public Choices*, in ALTERNATIVES FOR DELIVERING PUBLIC SERVICES: TOWARD IMPROVED PERFORMANCE 7, 11 (E.S. Savas ed., 1977).

305. Elinor Ostrom & Vincent Ostrom, *The Quest for Meaning in Public Choice*, 63 AM. J. ECON. & SOCIO. 105, 129–30 (2004).

306. Carol M. Rose, *Energy and Efficiency in the Realignment of Common-Law Water Rights*, 19 J. LEGAL STUD. 261, 290–91 (1990).

in times of scarcity.³⁰⁷ This applies to situations where, as a result of the interference, these appropriators are not able to enjoy the amount of that resource to which they are entitled based on their right.³⁰⁸ In a riparian jurisdiction that adheres to the natural flow doctrine, riparian proprietors would be able to prevent noticeable reductions in the amount or quality of the water that reaches their land.³⁰⁹ To provide yet another example of this variability, in a state that applies the reasonable use version of riparianism, interference with a riparian's water right would arise if someone else's water use results in unreasonable harm.³¹⁰

The preceding discussion would seem to explain why exclusiveness is such an important part of the prescription analysis in water cases. The argument would be that this is so because water rights are, to some degree, inherently exclusive.

This would miss, however, an important nuance. Ideally, the requirements that a particular party must meet (under prescription or adverse possession) would match the nature of the right that is being claimed.³¹¹ Thus, if one party is seeking to gain an exclusive right through continued use, that party should prove that the adverse use was also exclusive. And, often, the right that the adverse user or possessor is claiming will be identical to that which the other party is losing. For example, with adverse possession, one party can gain title to Greenacre while the initial owner will lose title to that same property.³¹²

307. See *Bailey v. Wilson*, No. CV-1902-348, 2020 Nev. Dist. LEXIS 267, at *32 (Dist. Ct. Apr. 27, 2020) (“The prior appropriation doctrine ensures that the senior appropriator who has put its water to beneficial use has a right to put all of the water under its permit/certificate to use and that right is senior to all water rights holders who are junior. This doctrine becomes critically important during times of water scarcity . . .”); *Ryan v. Tutty*, 78 P. 661, 663 (Wyo. 1904) (explaining that certain provisions were put in place to ensure that the priority system was respected, especially during times of scarcity).

308. See, e.g., *Bailey*, 2020 Nev. Dist. LEXIS 267, at *32.

309. See, e.g., *In re Flood Litig.*, 607 S.E.2d 863, 875 (W. Va. 2004).

310. See, e.g., *Shelly & Sands, Inc. v. Dement*, No. 22-cv-4144, 2024 WL 199625, at *4 (S.D. Ohio Jan. 18, 2024); *McCavit v. Lacher*, 447 P.3d 726, 733 (Alaska 2019); *Woods v. Brimm*, No. 2007018, 2010 WL 4071052, at *13 (Mass. Super. Ct. Aug. 2, 2010).

311. *Bagwell v. V-Heart Ranch, Inc. (In re Water Rts. of V-Heart Ranch, Inc.)*, 690 P.2d 1271, 1275–76 (Colo. 1984) (highlighting the importance of the adverse user's behavior being consistent with the use that is being claimed through prescription).

312. See *Graham v. Hawkins*, 202 So. 2d 74, 78 (Ala. 1967) (noting that adverse possession had led the original title holders to lose ownership); *Hart Rd. Corp. v. Roicrichlow*, No. 500397/2019, 2022 LX 24282, at *8 (N.Y. Sup. Ct. Sep. 19, 2022) (explaining that adverse possession results in the loss of ownership for title holders).

In the water context, this pattern is present in *prior appropriation* jurisdictions. Parties who have acquired a right to divert and use water in a prior appropriation jurisdiction have typically gained a right that was either identical or very similar to that held by the initial appropriator.³¹³ Stated differently, prescription (or adverse possession) in these cases operates as an involuntary transfer of the right.³¹⁴ Because appropriative rights entail a substantial level of exclusiveness, it is to be expected that courts would require exclusive use from those who acquire that type of right by prescription (or adverse possession).

But the newly acquired right and the right lost may not always be identical. With riparian rights, the adverse user gains the right to use water in a manner that harms one or multiple downstream users.³¹⁵ This limits the rights of the downstream users (taking away part of their right to exclude), but it does not eliminate the right to use water completely or transfer it to the adverse user. The adverse user, in turn, also acquires a limited right, as he will not have legal recourse to prevent upstream users from interfering with his right, thereby curtailing his right to exclude.³¹⁶

In conclusion, what this analysis centered on water rights shows is that the traditional distinction between prescription and adverse

313. Successful adverse claimants have obtained appropriative rights that, in some cases, had the same priority date as the original rights and, in others, had a priority date based on when the adverse use started. *See, e.g.*, *Sears v. Berryman*, 623 P.2d 455, 460 (Idaho 1981) (stating that the claimant “retain[ed] the same priority date as that enjoyed by the dispossessed party”); *Gallatin River Basin* (41H), No. 41H-116, 1991 Mont. Water LEXIS 5, at *11 (Water Ct. Feb. 25, 1991) (the newly acquired right “should have a priority date of the time the right was possessed adversely”).

314. This notion that adverse possession results in an involuntary transfer of a right is not new. *See, e.g.*, *Sprankling*, *supra* note 102, at 850 (asserting that adverse possession “results in the involuntary transfer of title”); Noel Elfant, Comment, *Compensation for the Involuntary Transfer of Property Between Private Parties: Application of a Liability Rule to the Law of Adverse Possession*, 79 NW. U. L. REV. 758, 779 (1984) (“In all cases of adverse possession, compensation should be allowed for the involuntary transfer of private property.”).

315. *Stratton v. West*, 201 S.W.2d 80, 80–81 (Tex. Civ. App. 1947) (“An upper riparian proprietor may, by prescription, acquire the right to use the water of a running stream, in a special way and in excess of the right arising from ownership of his land, to the injury and detriment of lower riparian proprietors”); *Martin v. Burr*, 228 S.W. 543, 545–46 (Tex. 1921) (citing *Haas v. Choussard*, 17 Tex. 588, 590 (1856); *Rhodes v. Whitehead*, 27 Tex. 304, 312, 315 (1863); *Baker, Fleming & Hubert v. Brown*, 55 Tex. 377, 381 (1881); *Mud Creek Irrigation, Agric. & Mfg. Co. v. Vivian*, 11 S.W. 1078, 1078 (Tex. 1889); *Cape v. Thompson*, 53 S.W. 368, 368 (Tex. Civ. App. 1899); *Santa Rosa Irrigation Co. v. Pecos River Irrigation Co.*, 92 S.W. 1014, 1016 (Tex. Civ. App. 1906)).

316. This is because water does not run upstream. *See supra* notes 227–228 and accompanying text.

possession is not particularly useful. It does not provide courts with helpful guidance on how to analyze claims to property rights based on continued use or possession. Which requirements claimants must satisfy to be successful in obtaining a right depends far more on the specific nature of that right than on the particular doctrine upon which the claimant relies. As the preceding discussion illustrated, depending on which right is implicated, adverse possession may or may not require the payment of taxes, and a person claiming it through prescription may or may not have to prove adversity—rather than relying on a presumption to that effect—as well as exclusive use.

IV. UNIFYING ADVERSE POSSESSION AND PRESCRIPTION

As Parts II and III revealed, the traditional approach distinguishing between adverse possession and prescription is problematic in many respects. It requires treating different rights alike and similar rights differently, which can lead to unjust outcomes.³¹⁷ Courts' responses to these challenges raise a host of additional issues.³¹⁸ Moreover, this rule has little to offer when it comes to assisting courts in dealing with complex property rights, such as water rights.³¹⁹ This Part proposes a different approach that eliminates the distinction between adverse possession and prescription and addresses some of its potential downsides.

A. *Acquisitive Prescription: A Proposal*

Many of the challenges this Article has identified would be significantly alleviated by combining prescription and adverse possession into a single doctrine—acquisitive prescription—and crafting specific sets of requirements for different types of rights.³²⁰ This is in line with the approach followed in many civil law jurisdictions.³²¹

317. *See infra* Section IV.A.1.

318. *See infra* Section IV.A.2.

319. *See infra* Section IV.B.

320. “Acquisitive prescription” is a phrase that some jurisdictions have adopted to refer to this single doctrine allowing the acquisition of rights by continued use or possession. *See, e.g.,* John A. Lovett, *Precairious Possession*, 77 LA. L. REV. 617, 618–19 (2017) (discussing Louisiana’s “venerable institution of acquisitive prescription”).

321. In Latin American countries, for example, the doctrine of “acquisitive prescription” generally applies to “real” or in-rem rights; that is, full ownership and limited rights such as easements. *See* Kerly Marivi Chango-Cartagena et al., *Análisis Comparativo de la Posesión, Usucapión y Prescripción en el Derecho Civil Latinoamericano* [*Comparative Analysis of Possession, Usucaption and Prescription in Latin American Civil Law*], 3 VERDAD Y DERECHO. REVISTA ARBITRADA DE CIENCIAS JURÍDICAS Y SOCIALES 418, 419 (2024) (Ecuador) (explaining that acquisitive prescription is a mechanism to consolidate in-rem rights); Francisco Ternera Barrios & Fabricio Mantilla Espinosa, *El Concepto de*

1. *Why One Doctrine Is Better than Two*

Merging the two existing doctrines is desirable because the current distinction is unnecessary in some cases and problematic in others.³²² As noted earlier, in the areas of water law and oil and gas law, the traditional approach is often not followed.³²³ Even when courts do follow it, choosing one doctrine over the other is seldom outcome-determinative and can even lead to unnecessary confusion.³²⁴ It is not uncommon for courts to frequently use the terms “adverse possession” and “prescription” interchangeably when dealing with these types of resources.³²⁵ In some instances, they chose one term over the other based on clarity and convenience, even after acknowledging that it is improper to do so from a purely technical standpoint.³²⁶ In light of this, unifying the two doctrines adds simplicity at a level where more complexity is not needed.

More importantly, this unification can improve some of the issues that have arisen in the land context, where courts have felt compelled to follow the distinction between prescription and adverse possession in ways that have resulted in suboptimal outcomes. The rigidity of this approach has led courts to apply the same analysis to a wide range of nonpossessory interests merely because they all fall within the scope of the doctrine of prescription.³²⁷ That same rigidity has also prompted courts to refuse to apply this framework altogether by, for example, choosing not to recognize exclusive prescriptive easements or treating them as though they were possessory rights.³²⁸

While the change to a single doctrine does not compel courts and legislatures to address these problems, it is an important step in the right direction. By eliminating the distinction between adverse

Derechos Reales [The Concept of Real Rights], 36 REVISTA DE DERECHO PRIVADO [R.D.P.] 117, 127 (2006) (Colom.) (referring to “servidumbre” (servitudes) as “otros derechos reales” (“other real [or in-rem] rights”), in addition to ownership).

322. Some jurisdictions may decide to take the more extreme approach of eliminating these doctrines altogether following some scholars’ recommendations. *See supra* notes 246–247. This Article, however, is agnostic on this issue and focuses on the desirability of eliminating the current distinction between prescription and adverse possession.

323. *See supra* Sections II.B.2, II.C.2.

324. *See supra* Sections II.B.2, II.C.2.

325. *See supra* text accompanying notes 55, 238–239, 289.

326. *See supra* note 18.

327. *See, e.g.,* *Warsaw v. Chi. Metallic Ceilings, Inc.*, 676 P.2d 584, 587 (Cal. 1984) (applying the standard prescriptive easement requirements to a particularly expansive and potentially exclusive easement); *Oakley Valley Stone, Inc. v. Alastra*, 715 P.2d 935, 938 (Idaho 1985) (identifying a single set of requirements for prescription, which applies to nonpossessory interests such as easements and profits); *Burlingame v. Marjerrison*, 665 P.2d 1136, 1139–40 (Mont. 1983) (stating that the lower court confused an easement and a profit in a case where its acquisition by prescription was at issue).

328. *See supra* Section II.A.3.

possession and prescription, the new question to answer becomes: Which requirements should claimants have to meet to acquire rights by continued use or possession? At this point, the constraints imposed by the traditional approach (i.e., the focus on whether the right is possessory or nonpossessory) will have been removed. Therefore, jurisdictions will be able to completely focus on what truly matters: ensuring that the elements that claimants are required to meet are well-thought-out and developed based on the differences between rights.

2. *Tailoring Requirements to the Claimed Right*

The following discussion provides some guidance to legislatures and courts on how to tailor their acquisitive prescription requirements to different rights. These recommendations are based on two principles. First, whether a jurisdiction requires a particular element or not can, of course, affect the stringency of the doctrine, that is, how easy it will be for claimants to acquire that right. Second, as discussed earlier, it is good practice to require that claimants show that their use or possession during the statutory period is consistent with the right they seek to acquire.³²⁹ This does not mean that a claimant may request an entirely new type of right.³³⁰ The idea is, rather, to acknowledge that existing rights can vary with respect to their exclusiveness and the breadth of uses they authorize, and that the claimant's activities or behavior should match the characteristics of the specific rights they request.

When it comes to exclusiveness, the second principle is especially instructive. Whether courts require claimants to meet this element or not should be based on the specific nature of the right. Thus, if they intend to acquire an exclusive easement, they should be able to prove that they used the relevant property exclusively. As explained above, one of the main complications surrounding this requirement is that there are different definitions and degrees of exclusiveness.³³¹ Therefore, generalizations may work well in some cases and fail in others, as not all exclusive rights are alike. A model that tries to map out all the possible levels of exclusiveness for each right would be too rigid and burdensome to craft. The best approach is one that simply matches the level of exclusiveness that claimants need to show to the

329. See *supra* note 311 and accompanying text.

330. Doing so would not be permissible under the *numerus clausus* principle. Yun-chien Chang & Henry E. Smith, *The Numerus Clausus Principle, Property Customs, and the Emergence of New Property Forms*, 100 IOWA L. REV. 2275, 2276 (2015) (“Under the *numerus clausus* principle, the number of basic property forms is closed, and . . . the principle pushes the ability to make changes to the property system solely to the legislature . . .” (footnote omitted)); Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 3, 16 (2000).

331. See *supra* Section II.A.1.

level of exclusiveness of the actual rights they are seeking. This is both flexible (it can be established on a right-by-right basis) and reasonably predictable.

As for adversity, under the traditional approach, courts often presume that it exists when examining prescription cases involving rights in land.³³² One of the practical effects of this approach is that, of course, it is easier to acquire rights to which this presumption applies. This can be particularly problematic, though, with rights that can easily be gained through prescription under the current model, but that are nonetheless fairly substantial, such as exclusive easements or profits that allow extensive use of the servient land.³³³ Therefore, jurisdictions that wish to be more restrictive when it comes to allowing acquisitive prescription should be cautious about allowing adversity to be presumed.

Another element that warrants discussion is actual possession or use. “Actual possession” is a standard element to acquire a right by adverse possession.³³⁴ Courts typically define it as possession or occupancy that is consistent with the nature of the property and, thus, with how an owner would use it.³³⁵ Interestingly, “actual *use*” is often not explicitly listed for prescription purposes.³³⁶ In practice, however, courts do require those claiming rights via prescription to show “some actual, physical use” of a specific part of the property, as it would be complicated to meet all the other requirements (e.g., open and notorious) without engaging in any use.³³⁷

The differences between these doctrines with respect to this requirement make sense, but only to a certain extent. The burden is higher with adverse possession because there are many potential uses/types of possession that fall short of what would be expected from an owner (e.g., one that is too narrow). In those cases, the

332. *See supra* Section I.C.

333. *See supra* Sections II.A–II.B.

334. William Edwin Taylor, *Actual Possession in Adverse Possession of Land*, 25 IOWA L. REV. 78, 78 (1939) (providing “actual” as the first element of adverse possession and citing many additional primary and secondary sources in support).

335. *E.g.*, *Smith v. Hayden*, 772 P.2d 47, 52 (Colo. 1989) (“Actual occupancy means the ordinary use to which the land is capable and such as an owner would make of it.” (quoting *Anderson v. Cold Spring Tungsten, Inc.*, 458 P.2d 756, 759 (Colo. 1969))); *Allie v. Russo*, 276 N.W.2d 730, 737 (Wis. 1979) (citing *Burkhardt v. Smith*, 115 N.W.2d 540, 544 (Wis. 1962)).

336. Merely a minority of states specifically list it, and the rest consider it under the “open and notorious” element. SPRANKLING, *supra* note 106, at 558 (“Only a few courts expressly require *actual use*. . . . [M]ost courts seem to subsume this requirement with open and notorious use.”).

337. *See id.* Even when expressly listed, courts have difficulty distinguishing “actual use” from other requirements. *See, e.g.*, *Barnett v. Myerow*, 130 N.E.3d 817, 826 (Mass. App. Ct. 2019) (discussing “actual use” in relation to the continuous use requirement).

claimant may succeed in obtaining a right to use (under prescription), but not title. But this dichotomous view runs into the same issues identified above more broadly, that is, it is not recognizing that rights exist on a continuum with regard to their exclusiveness and breadth of their use.³³⁸

For this reason, a unified doctrine of acquisitive prescription should include a requirement focusing on the nature of the use, whether it is labeled “actual use/possession” or similar phrases that some courts have already employed, such as “the manner or purpose” of the use/possession.³³⁹ This begs the question of whether, under the proposed approach, differentiating between “use” and “possession” is appropriate at all. While it is true that the new model rejects the possessory-vs-nonpossessory distinction, it does so only insofar as it has been used to support the existence of two separate doctrines governing the acquisition of rights by the passage of time. This Article does not make the claim that distinguishing between use and possession is not useful in other contexts and for other purposes.

In fact, courts may choose to rely on this distinction when examining an acquisitive prescription claim to the extent that it sheds light on how extensive the claimant’s activities are. This is so because, as with other requirements, courts should modulate the stringency of the actual use/possession element based on how expansive and robust the claimed right is. With an ingress/egress easement or a water right for irrigation, for example, the claimant should be able to prevail on this element by proving a fairly narrow use.³⁴⁰ If, on the other hand, a claimant seeks a right broader in scope, such as a multi-purpose easement or a fee simple, the court should require proof of a broader range of uses.

Whether the next element, payment of taxes, should be included as a requirement depends on the preferences of the particular jurisdiction. As explained earlier, one of the main reasons why some states have added this additional element is that it makes the acquisition of title via adverse possession less common.³⁴¹ Therefore,

338. See *supra* Section III.A.

339. Moore v. Equitrans, L.P., 49 F. Supp. 3d 456, 472 (N.D. W. Va. 2014) (quoting O’Dell v. Stegall, 703 S.E.2d 561, 579 (W. Va. 2010)); Crim v. Riffle, No. 24-ICA-44, 2024 WL 5003295, at *3 (W. Va. Ct. App. Dec. 6, 2024) (quoting Stegall, 703 S.E.2d at 579).

340. Courts may require claimants to prove, with precision, where such use occurred. See, e.g., Stegall, 703 S.E.2d at 591 (“[A] person claiming a prescriptive easement must prove the reasonably precise location of the starting and ending points of the land that was used adversely, the line that the use followed across the land, and the width of the land that was adversely used.”). With water rights, courts may also place the burden on the claimant to prove the use in question was a beneficial one. See, e.g., Archuleta v. Gomez, 200 P.3d 333, 344 (Colo. 2009) (“[A]n adverse possession claimant must demonstrate actual beneficial use of the deeded owner’s water right . . .”).

341. See *supra* note 249 and accompanying text.

the decision to include it as a necessary element under acquisitive prescription should reflect the jurisdictions' preferences on how easy or burdensome it should be to obtain certain rights by continued use or possession. One option is for this element to be required to acquire *any* right via acquisitive prescription. Alternatively, it may be reserved only for claims seeking ownership but not for other rights.

Moreover, courts or legislatures that view expansive easements or profits as rights that parties should not be able to acquire easily by continued use may include this requirement to achieve that goal. This would be a better approach than what courts have had to do under the current system, that is, treating a nonpossessory right as though it were possessory.³⁴²

For instance, state legislators could choose to require the payment of taxes as a requirement to secure rights that courts have regarded as close to title, such as exclusive easements and profits or those including a wide range of uses.³⁴³

B. Transition Relief as a Feature of the Proposal

Changing an established rule can raise some concerns, even if, as discussed above, the advantages of the new rule are substantial. Especially with property rights, the need for stability is key, meaning that frequent change is undesirable because it jeopardizes citizens' ability to plan and organize their affairs.³⁴⁴ Relatedly, the benefits generated by a property system increase as it becomes more stable.³⁴⁵ Moreover, changes in property rights, when effected by a legislature or a court, may potentially also trigger the obligation to pay compensation under the Takings Clause of the Constitution.³⁴⁶

In this case, even if the proposal outlined above were implemented retroactively, the impact on property rights would be

342. See *supra* text accompanying notes 266–272 (explaining the downsides of that approach).

343. See *supra* Sections II.A.3, II.B.2.

344. Hanoch Dagan & Michael Heller, *Property Transitions*, in A LIBERAL THEORY OF PROPERTY 210, 212 (2021) (“[P]roperty’s stability requirement, which is crucial for supporting our ability to plan, demands resistance to *constant* change, but not to *any* change.”); Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1098 (2007) (acknowledging the importance of stability in property systems).

345. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORN. L. REV. 531, 552 (2005).

346. See DAVID A. DANA & THOMAS W. MERRILL, PROPERTY: TAKINGS 1–4 (2002) (explaining the Takings Clause and its effect on property rights); Timothy M. Mulvaney, *The New Judicial Takings Construct*, 120 YALE L.J. ONLINE 247 (2011), <https://perma.cc/7U2R-ZG5C> (stating that “[t]he plurality opinion in *Stop the Beach Renourishment* . . . extends the reach of takings protections beyond legislative and executive actions to decisions of the judiciary”). See generally RICHARD A. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN (1985).

very limited. What would a retroactive application of the proposed approach look like? One could argue that any specific changes in the requirements to acquire property rights by passage of time should be applied without delay. In other words, the change would affect those who, when the new rule goes into effect, had already started their use or possession of someone else's property, but had not yet done so for the entire statutory period. Because the acquisition of the property right is not yet complete, but the process to that end has already begun, this would be an example of limited retroactivity, also known as nominal prospectivity.³⁴⁷

Not all reforms, however, are or should be retroactive. It is not uncommon for policymakers to provide transition relief, that is, to put into place certain mechanisms that either eliminate retroactive effects or soften the impacts of a retroactive legal change.³⁴⁸ Legacy clauses (also referred to as “grandfathering”) fall under the first category, as they remove certain parties from the scope of the reform altogether.³⁴⁹ Mechanisms such as delayed implementation and compensation, on the other hand, either provide a time-limited exemption or monetary relief to those affected, respectively.³⁵⁰

With the legal change proposed in this Article, a legacy clause would be appropriate. This would allow parties who initiated their use or possession prior to the rule change to be subject to the previous regime. By providing this favorable treatment to those who might otherwise be worse off as a result of the legal change, any fairness or Takings concerns would be addressed.³⁵¹ In addition, this approach does not have substantial downsides. While it is true that it restricts the scope of the reform, this reduction is both limited and temporary. It is limited because not all existing requirements to acquire water rights by the passage of time will need to be modified. Reforms are more likely to focus on the elements necessary to obtain rights to use, and especially those that are exclusive or broad, such as easements, profits, and water rights.³⁵² In other words, they would affect cases that are currently governed by the doctrine of prescription. The effect

347. Michael J. Graetz, *Legal Transitions: The Case of Retroactivity in Income Tax Revision*, 126 U. PA. L. REV. 47, 49 (1977); Inaraja Vera, *supra* note 213, at 492 (referring to this form of retroactivity as “less retroactive” (emphasis omitted)).

348. Jonathan S. Masur & Jonathan Remy Nash, *The Institutional Dynamics of Transition Relief*, 85 N.Y.U. L. REV. 391, 393 (2010).

349. Luis Inaraja Vera, *Voluntary Regulation*, 49 HARV. ENV'T L. REV. 403, 457 (2025).

350. *Id.* at 457–58; Louis Kaplow, *Transition Policy: A Conceptual Framework*, 13 J. CONTEMP. LEGAL ISSUES 161, 187 (2003).

351. Their rights would be unaffected by the reform and, therefore, nothing would be taken away. See John D. Echeverria, Koontz: *The Very Worst Takings Decision Ever?*, 22 N.Y.U. ENV'T L.J. 1, 25 (2014); Susan Rose-Ackerman, *Against Ad Hocery: A Comment on Michelman*, 88 COLUM. L. REV. 1697, 1708 (1988).

352. See Section IV.A.

of the legacy clause is also temporary because it would only apply to prescription that has already started. Thus, the duration of the transition relief cannot be longer than the statutory period to acquire the right.³⁵³

CONCLUSION

Doctrinal distinctions do not always succeed in improving the structure of an area of the law. Subsequent experience may show that they are overly simplistic in ways that lead to problematic outcomes. As this Article has shown, this is the case with the traditional framework that differentiates between adverse possession and prescription. Courts often disregard this framework when deciding cases involving natural resources, such as water and oil and gas. In the land context, attempts to abide by it while also avoiding unfairness have resulted in serious complications.

This is caused by the fact that this framework urges courts to choose between two options, and this creates a rigid dichotomy that fails to account for all the actual variability present in property rights. This Article has suggested reforms to address these issues. First, it is unnecessary to have two separate doctrines that govern the acquisition of rights by continued use or possession. Unifying them into one—acquisitive prescription—will reduce confusion and other problems. Second, more complexity should be added where it will lead to improved outcomes. State legislatures can accomplish that by more carefully tailoring the requirements that claimants must meet to the nature of the rights they are seeking. To be sure, this will entail creating not just two, but multiple sets of elements, each focusing on a particular type of right. To that end, this Article has provided some concrete guidance for courts and legislatures to engage in this process.

353. Since the proposal is more likely to affect prescription rules, it is worth noting that the statutory period for prescription is shorter than for adverse possession in certain states, which further supports the idea that the transition relief will have a very limited temporal duration. *See, e.g.*, JERRY L. ANDERSON & DANIEL B. BOGART, *PROPERTY LAW: PRACTICE, PROBLEMS, AND PERSPECTIVES* 669 (2014) (demonstrating that, in Georgia, the statutory period to acquire a right by prescription is seven years whereas it is twenty years under adverse possession).