The Trespass/Nuisance Divide and the Law of Easements

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Abstract

The law of easements is a mess. In one case, a property owner ends up with a landlocked parcel because, although he had a desperate need to traverse his neighbor's land to access a public road, the necessity did not arise from the severance of a unified parcel. In another, a landowner's basement frequently overflows with his neighbor's sewage but he has no recourse because, a court says, he purchased the house knowing that it came equipped with plumbing. Weighed down with formalities, the law seems to have lost sight of the fundamental issue: whether a landowner's need to access her property outweighs the burden imposed on a neighbor's right to exclude.

This Article contends that the courts have lost their focus because they have made a category mistake, treating easements as a species of the law of trespass when they ought to treat easements as a species of the law of nuisance. Under the law of trespass, any nonconsensual physical invasion of a landowner's property must be enjoined. Hence, in easement cases, courts use a repertoire of legal fictions to infer consent in situations where they find that one landowner's need for access outweighs the burden on the other landowner's right to exclude. Those fictions, however, greatly constrain the courts' ability to reach satisfactory results. By contrast, under the law of nuisance, courts weigh the productivity of one landowner's conduct against the burden it imposes on an aggrieved neighbor largely free of such constraints. As it happens, easements bear far more similarity to nuisance settings than trespass settings. Although easement cases are similar to trespass cases in that they involve a physical invasion of a landowner's property, they are functionally much closer to nuisance cases because they usually involve neighboring landowners whose property rights need to be balanced against each other. Treating easement cases as a species of nuisance would thus be consistent with an emerging judicial recognition that in disputes between neighbors, fixed ideas about the right to exclude must yield to a mutual accommodation of rights and responsibilities.

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INTRODUCTION

What's the story with easements? A straightforward question—have I acquired a right of way over my neighbor's land?—quickly becomes a gauntlet of confusing nomenclature and archaic formalities: Is this an easement in gross or an easement appurtenant? Has the grantor conveyed an easement or reserved one? Were these two parcels once under unified ownership? Is there reasonable necessity? and so on.

What is more, the results of easement cases are often unjust. A landowner who had been crossing his neighbor's property for fifty years without interruption or complaint to access a public road is declared a trespasser and his land becomes landlocked and worthless.[1] A homeowner whose basement frequently overflows with his neighbor's sewage finds himself with no recourse because, a court says, he purchased the house knowing that it came equipped with plumbing.[2]

As it turns out, both of these problems have the same source. The law of easements places two important policy goals in direct opposition: the right to exclude and the desire to enhance the productivity of

1 Othen v. Rosier, 226 S.W.2d 622, 624–28 (Tex. 1950).
2 Van Sandt v. Royster, 83 P.2d 698, 699, 703 (Kan. 1938).

scarce real property. However, because the right to exclude is a doctrinal trump card that is supposed to outweigh any other competing interest, courts cannot explicitly balance the two policies. Instead, they resort to elaborate legal fictions as a substitute for such balancing. For instance, if I sever a single parcel of land into two, thereby blocking one from accessing a public road, and then sell the landlocked parcel, courts will assume from that evidence alone that I *intended* to grant an easement over my property to the buyer as part of the deal for the landlocked parcel, thereby voluntarily ceding my own right to exclude in the interest of ensuring that my new neighbor's land can be used productively.[3] Because, under the hornbook law, the right to exclude is always paramount and may not be taken without my consent, the court cannot simply find that the need to make land productive outweighs my right to exclude.[4] So instead, the law pretends I gave my consent.

The law can work the opposite way as well. Even if my neighbor demonstrates that her property will become worthless without access to my land, she has no recourse unless the need for access arose out of a severance of a unified parcel, for otherwise I cannot be said to have consented to cede my right to exclude.[5] In short, easement doctrine is filled with obfuscations, and its outcomes are needlessly zero-sum. Rather than effecting an accommodation between landowners who both have legitimate interests in the use of their land, the doctrine generally sends one disputant home victorious and the other empty-handed.

At the heart of the problem is a category mistake—easements are treated as a species of the law of trespass when they should be treated

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3 This doctrine is referred to as "easement by necessity" or "easement of necessity." *See, e.g.*, Burrow v. Miller, 340 So. 2d 779, 780 (Ala. 1976); Hellberg v. Coffin Sheep Co., 404 P.2d 770, 773–74 (Wash. 1965); Restatement (Third) of Prop.: Servitudes § 2.15 (Am. Law Inst. 2000).

4 The majority of cases that award easements by necessity contain dicta that the easement by necessity is designed to relieve land from being landlocked rather than to vindicate the intent of the parties. *See, e.g.*, Frederick v. Consol. Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990); Kelly v. Burlington N. R.R., 927 P.2d 4, 8 (Mont. 1996). In all of these cases, however, the court only awarded an easement by necessity after finding that there had been a severance of a unified parcel that created the necessity. As discussed *infra* in text accompanying notes 38–43, if the true public policy basis of easements by necessity were to prevent property from being landlocked regardless of the parties' intentions, there would be no need for these formal requirements. The only relevance of these requirements is that they arguably establish an intent by the party severing the parcel to create an easement.

5 *See, e.g.*, Murphy v. Burch, 205 P.3d 289, 291 (Cal. 2009) (holding that although plaintiff's land was landlocked and required access over servient parcel, there was no easement by necessity because there was no necessity at the time the two parcels were severed).

as a species of the law of nuisance. The distinction between a trespass and a nuisance is subtle, but, as Thomas Merrill explains, extremely salient. A trespass is an intentional physical interference with another person's real property.[6] A nuisance is when a landowner's use of his or her own property interferes with a neighbor's property in a nonphysical way (such as by emitting smoke or noise vibrations).[7] According to Merrill, the law of trespass follows a "mechanical" rule of decision: any intentional physical occupation of another's property is considered a trespass, and once a trespass is found, an injunction issues in favor of the aggrieved landowner.[8] Nuisance cases, on the other hand, are decided under a "judgmental" decision rule. When one landowner's use of property interferes in a nontrespassory way with another's ability to enjoy her property, the court must then make a subjective determination as to whether the interferer's conduct is sufficiently serious to constitute a nuisance, and if so, it must then apply a balancing test to determine whether an injunction should issue or if the interferer should pay continuing damages to the aggrieved landowner.[9]

Merrill argues that there is an economic rationale for this distinction. Trespass situations tend to have what economists call "low transaction costs," meaning that it is relatively easy for a would-be trespasser to negotiate access because trespasses involve a small number of parties who are easily identifiable to each other and there is little risk that the parties will act strategically in the negotiations.[10] Nuisance cases, by contrast, are high-transaction-cost situations because they involve large numbers of parties who often cannot be identified in advance and many parties have incentives to hold out for a bigger payment rather than negotiate.[11] There is also a noneconomic rationale for the trespass/nuisance distinction. Nuisance cases involve disputes between neighboring landowners regarding whose property rights should take precedence, and therefore require courts to balance the competing property rights in question. Trespass cases usually involve a nonlandowner requesting access to someone's land, and hence there is no need to balance competing property rights.

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6 *See* Thomas W. Merrill, *Trespass, Nuisance, and the Cost of Determining Property Rights*, 14 J. LEGAL STUD. 13, 14, 16 n.13 (1985).

7 *Id.* at 14–15.

8 *Id.* at 19.

9 *See id.* at 19–20; *infra* text accompanying notes 87–90.

10 *See* Merrill, *supra* note 6, at 20–26, 32.

11 *See id.* at 17–18, 22, 31–35; *infra* text accompanying notes 95–99.

Because easement cases involve a physical invasion of real property and a small number of parties who are easily identifiable to one another, courts treat easements as though they are trespass cases. Functionally, however, easement cases are more similar to nuisance cases. Like nuisance cases and unlike most trespass cases, easement situations normally involve neighboring landowners, and thus require the balancing of competing property interests—one landowner's right to exclude and another's right to productive use of the property. Furthermore, because easements involve neighboring landowners, they are usually high-transaction-cost situations. As anyone with a neighbor knows, neighbors are stuck dealing with each other, creating what is called a "bilateral monopoly."[12] In an easement situation, where both neighbors want something from the other and each knows that the other has no one else with whom to negotiate for what they want, both have an incentive to hold out for a better deal.

Many of easement law's problems could be solved if we treated easements more like nuisances, using a flexible balancing test to weigh the competing interests of both neighbors rather than the rigid and confusing tests that are now used. As this Article elaborates, there are several areas of property law in which the courts have jettisoned the formalistic approach to the right to exclude and used just such a flexible balancing test where disputes between neighbors are involved, even in cases involving physical occupations. These areas of law suggest, as Stewart Sterk has argued, that the judiciary has a normative idea of how neighbors ought to treat one another. It is time that idea was applied to the law of easements.[13]

The argument this Article develops has implications beyond the law of easements, particularly for the growing debate over "judicial takings"—that is, as recently formulated by a plurality of the Supreme Court, whether a judicial decision that alters "established" property rights can be considered a taking of property under the Fifth Amendment.[14] Adjusting the law of easements in the manner this Article suggests could be considered a judicial taking under that standard, but it also calls into question the coherence of the standard. If the judiciary has made a category mistake in the law of easements, can it never

12 *See* RICHARD POSNER, ECONOMIC ANALYSIS OF LAW 71 (8th ed. 2011) (discussing bilateral monopoly); Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 58, 69–74 (1987) (discussing how bilateral monopolies can complicate negotiations); *infra* text accompanying notes 110–13.

13 *See* Sterk, *supra* note 12, at 88–103; *infra* text accompanying notes 117–24.

14 *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't of Envtl. Prot., 560 U.S. 702, 715, 725–28 (2010); *id.* at 715, 725–28 (plurality opinion).

correct that mistake? If there is a law of neighbors, does it contain rights that are "established," and at what point were those rights established? If we were to recognize that easements should fall within a "law of neighbors," would we be establishing something new or simply clarifying something already established but crudely articulated? One potential answer to these questions is, "Go to the legislature if you want the law changed," but that answer may be foreclosed because several courts have held that legislatures lack the power to alter property rights in the easement context, leaving the courts as the forum of last resort.[15] If the courts cannot act, then the law of easements is doomed to stay in its current state forever. Such an outcome would be a damning indictment of the plurality's standard for a judicial taking.

Part I of this Article describes the basic problem in easement law, using the classic case of *Van Sandt v. Royster*[16] as an example. Part II then reviews the trespass/nuisance distinction, and makes the case for why easements should be considered a species of nuisance rather than trespass. Part III examines a handful of analogous doctrinal areas that demonstrate how courts have begun seeing physical occupation cases involving neighboring landowners as less about a single landowner's right to exclude and more about the mutual rights and responsibilities of neighboring landowners. Part IV concludes with some observations about how the discussion of easement law bears on the issue of judicial takings.

I. A Sample Problem: *Van Sandt v. Royster*

This Part takes an in-depth look at the case of *Van Sandt v. Royster*, a venerable chestnut in the easement canon that is still typical of judicial thinking about easements. Although the case involves the seemingly mundane matter of access to a sewage drain, it implicates a central conflict in the law of property between the right to exclude and the right to use one's property productively. It also demonstrates how easement law has utterly failed to address this conflict. This Part, after a look at the case, evaluates its puzzling logic and concludes that what underlies the confusion in *Van Sandt* and many other easement cases is a doctrinal rule that the right to exclude takes precedence over any other competing interest. Decisions like *Van Sandt* attempt to circumvent the rule with a series of elaborate legal fictions through which the courts can balance the right to exclude with the right to use one's property productively, but the fictions are too inflexible to get

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15 *See infra* text accompanying notes 192–93.

16 83 P.2d 698 (Kan. 1938).

the balance quite right. As it turns out, and as the next Part addresses, the courts have tied themselves in knots unnecessarily. Rather than treating easements as a species of the law of trespass, in which the right to exclude is paramount, the courts should treat them as a species of the law of nuisance, in which the right to exclude *can* be balanced against the right to use property productively.

A. The Doctrine

Mrs. Laura Bailey owned a large plot of land in Chanute, Kansas.[17] The plot was bordered on the west by Highland Avenue, and Mrs. Bailey's home was located on the far eastern side of the plot.[18] In 1903 or 1904, for the purpose of providing her home with modern plumbing, Mrs. Bailey constructed a lateral sewage drain from her home across the western portion of her property to a public sewer at Highland Avenue.[19] Shortly thereafter, Mrs. Bailey subdivided a large chunk of her land lying between her home and Highland Avenue along the lateral sewage drain into two plots, and sold them to separate buyers.[20] The buyers immediately erected homes on their plots and connected their homes to the sewer on Highland Avenue via the sewage drain running underneath their properties.[21] Eventually, the plot directly adjacent to Highland Avenue was sold to the plaintiff Van Sandt, and the plot immediately to the east of Van Sandt's plot was sold to the defendant Louise Royster.[22] The practical result of all this was that sewage leaving the Roysters' household traveled through the lateral drain under the Van Sandt property to reach the Highland Avenue sewer.[23] The lawsuit was precipitated when Van Sandt found his basement flooded with sewage and discovered that the sewage drain underneath his property also serviced the Royster home.[24] Van Sandt claimed that Royster's use of his property constituted a trespass—a tortious physical invasion of his land. Royster countered that there was no trespass because she had an easement, an irrevocable

17 *Id.* at 699.

18 *Id.*

19 *Id.* Jesse Dukeminier et al., Property 778 Fig.11-3 (9th ed. 2018), contains a very helpful diagram of the property locations in *Van Sandt*.

20 *Van Sandt*, 83 P.2d at 699.

21 *Id.*

22 *Id.*

23 *Id.* at 699–700.

24 *Id.* at 699.

property right to run a sewer line under Van Sandt's property in order to access the sewer on Highland Avenue.[25]

The court resolved the case by holding that although no easement had ever been negotiated with regard to the Van Sandt property, Royster had nevertheless acquired an "easement by implication" across that property.[26] At common law, if an owner of a parcel of land uses one part of her land to benefit another part, then subdivides and sells one part while retaining the other, an easement may be implied in favor of the benefitted parcel based on the seller's use of the property prior to the sale, provided that continuance of the prior use is necessary for the enjoyment of the benefitted parcel and the prior use was apparent or known to the parties.[27] The idea is that in such a circumstance, the parties must have intended to include the conveyance of an easement in the transaction for the parcel of land, but for whatever reason neglected to explicitly include the grant of an easement in the documents transferring ownership of the land.[28]

According to the court, when Mrs. Bailey subdivided her parcel and sold the lot immediately adjacent to the sewer to Van Sandt's predecessor in interest, a Mr. John Jones, Jones was well aware that Mrs. Bailey had been previously using the lateral sewage drain under his lot to access the sewer, and that her use of that sewage drain was necessary for her to have access to plumbing, as there would be no other readily available means for Mrs. Bailey to access the Highland Avenue sewer.[29] As a result, the court held that when Jones purchased the plot, he impliedly purchased it subject to an easement in favor of Mrs. Bailey's parcel, notwithstanding that the title deed transferring title of the plot from Bailey to Jones was silent on the reservation of an easement.[30] From the court's point of view, it was reasonable to assume that Jones impliedly agreed to this condition because he must have understood when he purchased the plot that Mrs. Bailey would not have deliberately cut off her own access to the lateral sewage drain that she had herself constructed to provide her home with mod-

25 *See id.* at 698–700.

26 *See id.* at 702–03.

27 *See* Restatement (Third) of Prop.: Servitudes § 2.12 (Am. Law Inst. 2000); Joseph William Singer, Property 190 (3d ed. 2010).

28 *See* Singer, *supra* note 27, at 190 ("Courts imply easements from prior use to enforce the presumed intent of the parties that was imperfectly expressed in the formal documents in cases where omission of the easement was clearly a mistake.").

29 *See Van Sandt*, 83 P.2d at 700.

30 *Id.* at 702.

ern plumbing.[31] As to Van Sandt, the court held that he could not have been ignorant of the implied easement when he purchased because he "knew the house was equipped with modern plumbing and that the plumbing had to drain into a sewer."[32] Royster thus had an implied easement over Van Sandt's property based on Mrs. Bailey's pattern of prior use.

B. *A Critique of* Van Sandt *and the Law of Easements*

Van Sandt gives us much to puzzle over. The inference that Van Sandt was aware of the lateral easement because he knew that he had plumbing does not make sense. You do not necessarily presume from the existence of toilets that your neighbor is using your sewage line to access the sewer, much less that your basement will fill up with your neighbor's sewage.[33] Doctrinally, the whole idea of an "implied easement" is a curious one because it completely undermines the Statute of Frauds, which generally requires any kind of real estate transaction to be formalized in writing, as well as the parol evidence rule, which holds that where there is a writing (such as a deed), the court will not entertain extraneous evidence that modifies the writing. These doctrines are designed to avoid complicating title searches and prevent misunderstandings, litigation, and evidentiary difficulties that can occur in the absence of a paper trail. Undoubtedly, inferring the existence of an easement that is mentioned nowhere in the relevant title document is likely to confound title searches and sour relationships between neighbors. Indeed, the Restatement (Third) of Property: Servitudes, while acknowledging the easement by implication, states flatly that "[e]stablishing servitudes by implication is contrary to the policy behind the Statute of Frauds."[34]

In defense of the implied easement, *Van Sandt* and many other courts throughout the years have stressed that the doctrine is designed to effectuate the parties' intent.[35] In *Van Sandt*, for example, the court

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31 *See id.*

32 *Id.*

33 *See* CHRISTOPHER SERKIN, THE LAW OF PROPERTY 164–65 (2013) (describing the court's conclusion as "a bit of a stretch" because "[i]t is one thing to know you have toilets, and another to know there is a sewer easement running across the property").

34 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.11 cmt. c (AM. LAW INST. 2000).

35 *See, e.g.*, Harrington v. Lamarque, 677 N.E.2d 258, 261 (Mass. App. Ct. 1997) ("Implied easements . . . do not arise out of necessity alone. Their origin must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable." (quoting Dale v. Bedal, 25 N.E.2d 175, 176 (Mass. 1940))); Granite Props. Ltd. P'ship v. Manns, 487 N.E.2d 1230, 1238

stated the hornbook rule that an implied easement "arises as an inference of the intentions of the parties to a conveyance of land."[36] However, as Stewart Sterk notes, determining intent is not the law's highest goal; doctrines like the Statute of Frauds place other important policies ahead of ascertaining intent.[37] Moreover, as *Van Sandt* itself illustrates, it is unlikely that the doctrine does effectuate the parties' intent because in the absence of a writing, it is often difficult to determine what the parties' intentions actually were. Can we really infer an intent to purchase property burdened by an easement from Van Sandt's knowledge that he had toilets?

According to the Restatement, though courts often use the language of intent, the real justification for easements by implication is different: to avoid economic waste by making property productive.[38] Indeed, one factor that courts will consider in determining whether to infer an easement by prior use is whether the right of way over the burdened (or "servient") parcel is "reasonably necessary" for the owner of the benefitted (or "dominant") parcel to make productive use of her property.[39] In *Van Sandt*, for example, the court was persuaded that Mrs. Bailey had an implied easement in part because "[t]he easement was necessary to the comfortable enjoyment of" her property.[40] The judicial concern about ensuring productive use of land also appears to underlie courts' recognition of other forms of unwritten easements, including easements by estoppel (in which an easement may be obtained where, among other things, the party claiming the easement has made substantial expenditures in good faith reliance

(Ill. App. Ct. 1986) ("[I]mplied easements arise as an inference of the parties' intent as derived from the circumstances of a sale . . . ."); Sterk, *supra* note 12, at 63–64.

36 83 P.2d at 701.

37 *See* Sterk, *supra* note 12, at 57, 65 ("[E]very time the legal system introduces a formality—the statute of wills or the consideration requirement for contracts, for example—it indicates willingness to sacrifice intent in particular cases to other objectives.").

38 *See* Frederick v. Consol. Waste Servs., Inc., 573 A.2d 387, 389 (Me. 1990) ("Because of the strict necessity of having access to the landlocked parcel, an easement over the grantor's remaining land benefitting the landlocked lot is implied as a matter of law irrespective of the true intent of the common grantor."); Traders, Inc. v. Bartholomew, 459 A.2d 974, 978 (Vt. 1983) ("A way of necessity rests on public policy often thwarting the intent of the original grantor or grantee, and arises 'to meet a special emergency . . . in order that no land be left inaccessible for the purposes of cultivation.'" (alteration in original) (quoting Howley v. Chaffee, 93 A. 120, 122 (Vt. 1915))); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.11 cmt. c (noting that because of Statute of Frauds problems, easements by implication should only be permitted "to avoid economic waste"); *id.* cmt. e (noting that where intent is unclear, easements may be implied "as a matter of public policy to avoid economic waste").

39 *See, e.g.*, Dubin v. Robert Newhall Chesebrough Tr., 116 Cal. Rptr. 2d 872, 880 (Ct. App. 2002); *Harrington*, 677 N.E.2d at 261.

40 83 P.2d at 702.

on the belief that access to the servient property would not be withdrawn),[41] easements by prescription (in which the party claiming the easement must demonstrate, among other things, an "open and notorious" use of the servient property for a statutory period),[42] and easements by necessity (in which a conveyance of property has left a parcel landlocked and in need of access to the servient parcel).[43]

If the goal of easement law were solely to ensure that land was productively used, however, then courts should create an easement whenever there is a need for one.[44] But the courts have never gone so far as to infer an easement based on necessity alone. Indeed, even in cases where a landowner can demonstrate a serious and longstanding need to access an adjacent parcel, courts will typically not recognize an easement unless the two parcels were once under unified ownership and the subdivision created the need for access, or there was some other evidence that the parties intended to create an easement.[45] Likewise, easements by prescription and estoppel cannot be created

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41 *See, e.g.*, Holbrook v. Taylor, 532 S.W.2d 763, 764 (Ky. 1976); Jones v. Beavers, 269 S.E.2d 775, 778 (Va. 1980); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10.

42 *See, e.g.*, McDonald v. Harris, 978 P.2d 81, 83 (Alaska 1999); Wood v. Hoglund, 963 P.2d 383, 385–86 (Idaho 1998).

43 *See Frederick*, 573 A.2d at 389 (Me. 1990) ("Because of the strict necessity of having access to the landlocked parcel, an easement over the grantor's remaining land benefiting the landlocked lot is implied as a matter of law irrespective of the true intent of the common grantor."); *Traders, Inc.*, 459 A.2d at 978 ("A way of necessity rests on public policy often thwarting the intent of the original grantor or grantee, and arises 'to meet a special emergency . . . in order that no land be left inaccessible for the purposes of cultivation.'" (alteration in original) (quoting *Howley*, 93 A. at 122)). There is some debate about whether easements by necessity are a species of easement by implication and therefore inferred based on the parties' intentions, or created as a matter of public policy to relieve landlocked land. *See* SINGER, *supra* note 27, at 193–95 (recapping debate). As discussed in the following Section, easements by necessity clearly fall within the category of easements by implication because otherwise there would be no need for the requirement that the necessity arise from a severance. *See infra* Section I.C.

44 Many states have, in fact, enacted statutes that permit a landowner, upon demonstrating the requisite necessity, to simply condemn an easement across a neighbor's land (that is, acquire the easement and pay the neighbor a fair market price for it). *See, e.g.*, IOWA CODE § 6A.4 (2017); WASH. REV. CODE § 8.20.070 (2010). As discussed *infra* at note 192 and accompanying text, courts in several states have found their statutes to be an unconstitutional exercise of the eminent domain power.

45 *See, e.g.*, Murphy v. Burch, 205 P.3d 289, 298 (Cal. 2009) (holding that although plaintiff's land was landlocked and required access over servient parcel, there was no easement by necessity because the evidence did not establish that the common grantor, the federal government, intended to create an easement when it severed the parcel and sold the servient tenement); Othen v. Rosier, 226 S.W.2d 622, 626 (Tex. 1950) (although petitioner had been using access road across respondent's land for fifty years and had no other access route, there was no easement by necessity because at the time the servient parcel was severed and sold, the necessity did not exist, and therefore the respondent could not have intended to be burdened by an easement).

without some evidence that the servient landowner acquiesced to the continued use of the property, which would indicate an intent to permit an easement.[46]

C. The Right to Exclude and the Right to Productive Use

There seems to be a kind of identity crisis surrounding the implied easement—is it about discerning the intent of the parties, or is it about making land productive? In fact, it is about something else—balancing the dominant landowner's right to use her land productively with the servient landowner's right to exclude. Both of these rights are highly esteemed in the law of property. The right to exclude is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[47] The right to exclude others from using one's property is often seen as the very core of what it means to own property, for without the right to exclude, an owner generally has no effective way to make use of the property at all.[48] To be sure, in a case like *Van Sandt*, a sewage drain underneath one's land is usually unobtrusive, but the Supreme Court has made clear that the right to exclude is so treasured in our law that even a minor interference with that right must be considered a serious violation.[49] In any event, most of us would hardly consider a basement filling up with our neighbors' sewage a trivial matter! On the other hand, if the right to exclude is a fundamental policy consideration in property law, so is the desire to ensure that land—one of our scarcest resources—can be productively used rather than forced to sit idle.[50] In *Van Sandt*, Royster surely pur-

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46 *See* Harrington v. Lamarque, 677 N.E.2d 258, 261 (Mass. App. Ct. 1997) ("Implied easements . . . do not arise out of necessity alone. Their origin must be found in a presumed intention of the parties, to be gathered from the language of the instruments when read in the light of the circumstances attending their execution, the physical condition of the premises, and the knowledge which the parties had or with which they are chargeable.").

47 Kaiser Aetna v. United States, 444 U.S. 164, 176 (1979).

48 *See* Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 435–36 (1982) (stating that deprivation of the right to exclude "forever denies the owner any power to control the use of the property"); J.E. Penner, The Idea of Property in Law 70–71, 75 (1997); Thomas W. Merrill, *Property and the Right to Exclude*, 77 Neb. L. Rev. 730, 730 (1998) (discussing why the right to exclude is an essential aspect of property rights).

49 *See Loretto*, 458 U.S. at 421–26, 433 (holding that a statute authorizing "a minor but permanent physical occupation of [a landowner's] property" is a compensable "taking" under the Fifth Amendment because "a physical invasion is a government intrusion of an unusually serious character").

50 The desire to incentivize the productive use of land is evident in several areas of property law. For instance, under the doctrine of adverse possession, a trespasser who makes productive use of property may, if certain conditions are met, obtain good title at the expense of the true owner who has not been using the property productively. *See* Stump v. Whibco, 715 A.2d 1006, 1015 (N.J. Super. Ct. App. Div. 1998) (noting that adverse possession doctrine is designed

chased her home with the reasonable expectation of having access to modern plumbing, which was only possible through lateral access across Van Sandt's property.[51] A home without plumbing would hardly be very marketable in today's world.

In other areas of law, such as nuisance, courts resolve the conflicting interests between landowners by balancing them—weighing, for example, the utility of a polluter's conduct against the burden on a neighbor's right to be free from pollution.[52] An analogous test would seem workable here, balancing the dominant landowner's need for access against the burden on the servient landowner's right to exclude. Furthermore, in the nuisance setting it is commonplace to accommodate both landowners' interests at the remedial stage by allowing the polluter to continue polluting provided that it pay damages to the aggrieved neighbor.[53] Here, we could award Van Sandt an injunction preventing Royster from trespassing across her property, but permit Royster, at her election, to purchase an easement for sewage access across Van Sandt's property at a sum set by the court. Van Sandt would be compensated for the loss of the right to exclude, and Royster's land would continue benefitting from modern plumbing. In the terminology favored by law professors everywhere, Van Sandt's right to exclude would be protected by a "liability rule" entitlement (an entitlement that can be liquidated by a payment of damages), rather than a "property rule" entitlement (an entitlement that cannot be liquidated without the landowner's consent).[54]

This explicit accommodation of the competing interests is absent in *Van Sandt*. There is no balancing test and no consideration of a liability rule solution. Rather, as we have seen, the court ruled in favor of the dominant landowner using a strangely formalistic approach that evinces no clear public policy objective. Furthermore, the court gave

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to encourage "active and efficient use of land"). Courts are generally suspicious of restraints on alienation—limitations on the transfer of property rights—because such restraints inhibit the functioning of a marketplace in property. *See* SINGER, *supra* note 27, at 327. And, as previously noted, courts will often consider the need to relieve land of being landlocked in deciding whether to infer the existence of an easement in the absence of a writing creating one. *See supra* note 4 and accompanying text.

51 *See* Van Sandt v. Royster, 83 P.2d 698, 700 (Kan. 1938).

52 *See infra* text accompanying notes 91–93.

53 *See infra* notes 92–95 and accompanying text.

54 The property rule/liability rule terminology traces to an exceedingly famous law review article, Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972), which has been the subject of voluminous literature.

the servient landowner nothing for the loss of the right to exclude.[55] On both scores, *Van Sandt*'s approach is typical of easement cases. Courts very rarely balance the competing interests or consider the liability rule approach in easement cases.[56]

The reason easement cases generally do not explicitly balance the competing interests in the manner of nuisance law is because of a doctrinal rule that any intentional physical occupation of land is considered an actionable trespass. As the next Part discusses further, where the law of nuisance consists of judgmental rules that give judges discretion in determining liability and an appropriate remedy for an interference with use and enjoyment of land, the law of trespass is governed by mechanical rules which dictate that liability—and an injunction—automatically follow upon a finding of an intentional physical occupation.[57] This principle means that the courts have no discretion to balance a servient landowner's interest in the right to exclude against a dominant landowner's need for access in cases where there has been a physical occupation. The right to exclude is supposed to be paramount.

The courts can give themselves the discretion that the law denies them, however, if they can discover some evidence that the servient landowner *consented* to grant an easement to the dominant one. In that event, the courts can plausibly claim that they are simply, perhaps *mechanically*, enforcing the intent of the parties in inferring the existence of an easement, rather than judgmentally balancing the interests of the two landowners.[58] Hence, in cases where courts believe that the right to use property productively *should* outweigh the right to exclude, they can achieve that result by liberally inferring that the servient landowner consented to confer an easement. Indeed, there is a strong relationship in easement cases between how great a need the dominant landowner has for access and how likely the court is to conclude that the servient landowner intended to consent to an easement.[59] In substance, if not in form, the courts *are* balancing the right

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55 *See Van Sandt*, 83 P.2d at 700.

56 Notable exceptions, which are discussed in greater detail below, include *Brown v. Voss*, 715 P.2d 514 (Wash. 1986), and *Ogle v. Trotter*, 495 S.W.2d 558 (Tenn. Ct. App. 1973).

57 *See infra* Part II for a discussion of the different doctrinal rules in the law of trespass and nuisance.

58 *See* Tolksdorf v. Griffith, 626 N.W.2d 163, 168–69 (Mich. 2001) (finding that when a court implies an easement based on the severance of a unified parcel, the assumption is that the burdened party assented to the easement, and "all the court is really doing is enforcing the original intent of the parties" (quoting White Pine Hunting Club v. Schalkofski, 237 N.W.2d 223, 225 (Mich. Ct. App. 1992) (Holbrook, J., dissenting))).

59 In cases of easements implied based on prior use, courts weigh the degree of necessity

to exclude with the right to use property productively, but they must do so within certain fixed boundaries out of respect for the right to exclude. In fact, commentators have characterized the easement by implication as a discretionary exercise involving the balancing of many factors. The Restatement, for example, notes that in determining whether to infer an easement by implication, courts should consider such factors as the landowners' expectations, avoiding unnecessary economic waste, ensuring fairness to the parties, the consideration paid, and so on.[60]

However, if it is true that the law of easements is intended to balance the interests of neighboring landowners, then it does a phenomenally poor job of that. For one thing, because the various tests used for establishing an unwritten easement are beholden to archaic legal fictions, they lack the flexibility necessary for a meaningful balancing inquiry. Hence, even if the dominant landowner has a dire need for access and the burden on the servient tenement is trivial, there can be no implied easement unless the two parcels were once unified and the need either existed prior to the severance or was created by the severance.[61] In one particularly egregious case, a landowner lost access to a right of way that he had been using for over fifty years, and that he desperately needed to access his property, because the necessity did not exist when the parcel was initially severed two generations earlier.[62]

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even though necessity has nothing to do with the pattern of prior use. *See, e.g.*, Dubin v. Robert Newhall Chesebrough Tr., 116 Cal. Rptr. 2d 872, 875–76, 880 (Ct. App. 2002); Harrington v. Lamarque, 677 N.E.2d 258, 261 (Mass. App. Ct. 1997). In cases of easement by necessity, the degree of necessity is often determinative in whether courts infer an easement, even though the degree of necessity says little about what the parties actually intended. *Compare* Parker v. Putney, 492 S.E.2d 159, 161 (Va. 1997) (recognizing easement by necessity where there was substantial necessity), *with* Burke v. Pierro, 986 A.2d 538, 544 (N.H. 2009) (finding no easement by necessity where landowners had not demonstrated inability to enjoy their property).

60 *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.11 cmt. f (AM. LAW INST. 2000); *see also* Martin v. Bicknell, 99 A.3d 705, 709 (D.C. 2014) (noting that implied easement standard is designed to balance the benefit to the dominant parcel against the burden on the servient parcel). Thomas Merrill considers the easement by implication to be an instance of a "judgmental rule," in which courts have wide discretion to fashion an appropriate result, rather than a "mechanical rule," in which courts have very little discretion. *See* Merrill, *supra* note 6, at 19, 37 n.85. This point is discussed further *infra* notes 68–102 and accompanying text.

61 *See* cases cited *supra* notes 45–46.

62 *See* Othen v. Rosier, 226 S.W.2d 622 (Tex. 1950). The plaintiff in *Othen* was particularly unlucky because the state of Texas did not recognize the doctrine of easement by estoppel, the requirements of which he likely would have satisfied, and he could not demonstrate an easement by prescription because his neighbors had given him permission to access the land. *Id.* at 627.

The highly formalistic nature of the inquiry creates a practical problem. As argued above, the most appropriate way to balance the interests of the two landowners would be, in cases where the dominant owner shows a sufficient degree of necessity, to permit her to purchase a right of way from the servient landowner, thus meeting the need for access while compensating the servient owner for the loss of the right to exclude. But this result is precluded by the formal requirement in easement law that there be some intent or acquiescence by the servient landowner in order to infer an easement. If, as the court inferred in *Van Sandt*, Mr. Jones's purchase of his plot from Mrs. Bailey was *intentionally* subject to the implied reservation of an easement in favor of Mrs. Bailey,[63] then presumably the reservation of the easement was reflected in the purchase price of Mr. Jones's plot (as the plot would likely be more highly valued without the easement than with it). If Mr. Jones paid a lower price for his plot in consideration of his agreement to the reserved easement, then the easement was acquired by Mrs. Bailey (and conveyed to the Roysters) as part of a free and fair contractual transaction in which Mr. Jones was fully compensated for the burden the easement imposed on his property.

Following the same logic, Mr. Jones presumably sold the property to Van Sandt at a discounted price as well because of the burden of the easement. Therefore, awarding Van Sandt damages to compensate him for the easement would unjustly enrich him by providing double compensation (at the expense of the Roysters, who presumably paid a premium price to Mrs. Bailey to purchase property benefitted by an easement but must now pay damages to the Van Sandts for that privilege). This entire logical sequence is dependent, of course, on the idea that the easement was part of the deal for the underlying parcel of real estate, which requires some intent or acquiescence on the part of the servient landowner. As we have seen, however, the evidence of intent in *Van Sandt* and other such cases is often pretty thin.[64] The result is that landowners like Van Sandt lose their right to exclude without any compensation based on fairly flimsy evidence of an intent to cede an easement.

As emphasized above, the reason courts are willing to infer the existence of an easement based on such meager evidence of intent is because that is the only way to circumvent the primacy of the right to exclude.[65] The courts are stuck between two undesirable positions: if

63 *See* Van Sandt v. Royster, 83 P.2d 698, 702–03 (Kan. 1938).

64 *See supra* Section I.B.

65 *See supra* notes 58–60 and accompanying text.

they liberally infer intent in order to ensure the dominant parcel has access, they cannot order compensation for the servient tenement's loss of the right to exclude, but if they determine that there was no intent, the dominant landowner is left with a landlocked parcel.

As it turns out, though, this is a false choice. It is only within the law of *trespass* that the right to exclude acts as a trump card.[66] In the law of nuisance, the right to exclude can be explicitly balanced against the right to use property productively without the need for legal fictions about consent, and in the event a nuisance is found, the burdened landowner can be compensated with damages.[67] As the following Part argues, though easements bear similarities to both trespass and nuisance cases, on balance they more closely resemble nuisance cases and should be treated accordingly. In fact, as Part III goes on to show, in recent years courts have begun to take just the approach this Article suggests in a variety of scenarios.

II. Trespass and Nuisance

As Thomas Merrill explains, the law draws an important distinction between trespass and nuisance cases. Consider two examples. In Example One, a landowner floods her neighbor's property with water. In Example Two, the same landowner releases harmful gases onto her neighbor's property. Although the impact on the neighboring landowner is similar in both cases—diminution in the value and enjoyment of the property—the first example is a "physical" invasion and therefore considered a trespass[68]; the latter is an interference with use and enjoyment that is not a physical invasion and therefore, potentially, a nuisance.[69] The difference in nomenclature is significant. Trespass is a strict liability offense.[70] Any intentional physical interference with a landowner's property, however minor or temporary, and regardless of fault, subjects the offending individual to liability.[71] Moreover, once liability for a trespass is established, an injunction follows automatically as a remedy, with a few rare exceptions discussed later.[72] On the other hand, a nonphysical interference only becomes a nuisance if a court determines (depending on the jurisdiction) that it either rises to a certain threshold of offensiveness or causes harms that outweigh its

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66 *See* Merrill, *supra* note 6, at 16.

67 *See id.* at 18.

68 *See id.* at 28–29.

69 *See id.*

70 Restatement (Second) of Torts § 158 (Am. Law Inst. 1965).

71 *See* Merrill, *supra* note 6, at 13, 16; *infra* text accompanying notes 78–86.

72 *See* Merrill, *supra* note 6, at 18; *infra* notes 136–43 and accompanying text.

benefits.[73] Moreover, even if a nuisance is found, courts will frequently then "balance the equities" in arriving at a remedy.[74] If the court determines that the defendant's conduct has a substantial public interest or that the benefit to the defendant outweighs the harm to the plaintiff, the court may order the defendant to pay damages to the plaintiff rather than enjoining the defendant's operation.[75] Merrill refers to trespass as a "mechanical" rule because it applies automatically with little room for judicial discretion, and nuisance as a "judgmental" one because it requires judges to engage in a subjective balancing of competing interests.[76]

Observers have wondered, with some justification, why "in this atomic age" a physical invasion ought to be distinguished from a non-physical one.[77] As the next two Sections explain, however, there are practical reasons why trespass is distinguished from nuisance. Those practical reasons, as we shall see, also tell us why easements should be treated more like nuisances than trespasses.

A. *The Law of Trespass*

An instructive case on the strict, mechanical approach to the law of trespass is *Jacque v. Steenberg Homes, Inc.*[78] In this case, the Steenberg Homes company needed to haul a mobile home to a location that could be most cheaply and conveniently accessed by crossing the Jacques' property.[79] The Steenberg Homes company attempted to negotiate with the Jacques, but the Jacques, who apparently had unpleasant experiences with people using their property in the past, refused on principle to allow access.[80] The Steenberg Homes company then went ahead and hauled the mobile home across the Jacques' property anyway.[81] The Jacques sued and won a judgment for intentional trespass, and the jury awarded $1 in nominal damages and $100,000 in punitive

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73 *See* Merrill, *supra* note 6, at 13, 17–18; *infra* notes 91–102 and accompanying text.

74 *See* Merrill, *supra* note 6, at 18.

75 *See id.* The classic case on this point is *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870, 875 (N.Y. 1970) (refusing to enjoin defendant's cement plant but awarding permanent damages to plaintiff).

76 *See supra* note 60.

77 Martin v. Reynolds Metals Co., 342 P.2d 790, 793–95 (Or. 1959) (finding trespass despite absence of physical invasion, but applying nuisance balancing test to determine liability), *cert. denied* 362 U.S. 918 (1960).

78 563 N.W.2d 154 (Wis. 1997).

79 *Id.* at 156–57.

80 *Id.* at 157.

81 *Id.*

damages.[82] The trial judge reversed the punitive damage award on the grounds that punitive damages could not be awarded in the absence of any actual damages, and the appeals court affirmed.[83] The Supreme Court of Wisconsin then reversed and reinstated the $100,000 punitive damage award.[84]

Jacque reveals two important insights about the law of trespass. First, as the court emphasized in its ruling, the punitive damage award was necessary to underscore the sanctity and incommensurability of the right to exclude in cases where there has been a physical occupation. The court noted the significance of the right to exclude and found that even if a landowner's property is not damaged by an intrusion, the landowner suffers a harm from every violation of the right to exclude simply because this most treasured legal right is being infringed.[85] Furthermore, the court stressed that the right to exclude is not adequately protected by requiring the trespasser to pay compensatory damages for the trespass because this result would make every property owner's right to exclude subject to a would-be trespasser's economic calculation as to whether the profit from trespassing outweighed the damages.[86] Only a punitive damage award could prevent potential trespassers from treating the violation of the right to exclude as a cost of doing business. In the economic parlance, the right to exclude must be protected by a property rule entitlement rather than a liability rule entitlement.

This observation leads to the second justification for the mechanical trespass rule in *Jacque*, although this one is not explicitly stated in the court's opinion. Drawing on economic analysis, scholars such as Thomas Merrill and Richard Posner have argued that in most trespass cases, it makes more sense for courts to use mechanical rather than judgmental rules of decision because in the typical trespass case there are few barriers to the parties negotiating among themselves outside the court system for access to the land in question, and mechanical rules have a tendency to facilitate such private negotiations, whereas judgmental rules frustrate them.[87] A trespass situation presents few

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82 *Id.* at 156.

83 *Id.*

84 *See id.* at 156.

85 *See id.* at 159–60.

86 *See id.* at 161.

87 In low-transaction-cost settings, "the law should require the parties to transact in the market, which it can do by making the present property owner's right absolute (or nearly so), so that anyone who thinks the property worth more has to negotiate with the owner." POSNER, *supra* note 12, at 71. In high-transaction-cost settings, the courts must "shift resources to a more

barriers to negotiation (or, as economists say, "low transaction costs") because trespasses usually involve a small number of parties who can easily identify each other ahead of time, and it is unlikely that the parties will behave strategically during the negotiations (such as holding out for more money) because strategic behavior by one party may drive the other to seek a different negotiating partner.[88] That is to say, if you try to charge me an extortionate sum to cross your property, I can simply leave the bargaining table and attempt to negotiate access with your neighbor instead.[89]

In situations like this one, where there are few barriers to negotiating, economic analysis suggests that courts should use a mechanical rule of decision rather than a judgmental one. Mechanical rules are clear because they leave little room for judicial discretion, whereas judgmental rules are deliberately less clear because they allow judges to adapt legal standards retrospectively to particular facts. Negotiations between parties are far easier if the rules are clear ahead of time because a clear set of rules enables the parties to negotiate with a mutual background understanding of what the applicable legal standards will be in the event of litigation. By contrast, if the rules are murky and subject to judicial discretion, parties have no set of entitlements to use as a baseline for negotiations.[90] This logic applies with special force to the question of the appropriate remedy. If a trespass is subject to a liability rule entitlement only, it completely obviates any negotiations between the parties beforehand because, as the *Jacque* court emphasized, the potential trespasser knows that she can simply commit the trespass and pay compensatory damages after the fact in lieu of negotiating for access.

valuable use" because "the market is by definition unable to perform this function in those settings." *Id.*; *see also* Merrill, *supra* note 6, at 21–22 (articulating factors that bear on transaction cost analysis).

88 *See* Posner, *supra* note 12, at 70–71, 77 (explaining that trespasses, unlike nuisances, involve low transaction costs, and therefore law should attempt to force negotiations); Merrill, *supra* note 6, at 31–35 (explaining why trespass cases are generally low-transaction-cost situations and nuisance cases generally involve high transaction costs).

89 Admittedly, the *Jacque* case itself is not a perfect illustration of this problem because the location of the Jacques' property made it uniquely valuable for the Steenberg Homes company. However, as Merrill helpfully notes, it is likely that most trespass cases in which there are low transaction costs settle, leaving the rarer cases in which transaction costs are high to actually be litigated. *See* Merrill, *supra* note 6, at 26.

90 *See* Merrill, *supra* note 6, at 23–24, 25–26 (discussing "entitlement-determination costs" of different decisional rules).

B. The Law of Nuisance

Unlike trespass, nuisance cases are resolved under a judgmental rather than a mechanical rule. For an interference with the use of land to rise to the level of a nuisance, it must be substantial and either intentional or unreasonable.[91] "Unreasonableness" is generally determined either by a threshold level of interference with the plaintiff's land[92] or by balancing the gravity of the harm caused by the defendant's conduct against its utility.[93] Courts usually apply a similar balancing test at the remedial stage,[94] and will award damages rather than issuing an injunction if the court determines that the defendant's conduct is socially useful and that it is feasible for the defendant to compensate the plaintiff for the harm suffered.[95]

According to Merrill, economic analysis explains why courts treat nuisance so differently from trespass.[96] As the last Section explained, most cases of a physical invasion are low-transaction-cost situations in which we could expect bargaining to take place between the parties to resolve the question of access, provided that the relevant entitlements are clearly established through a mechanical *per se* rule and that neither party is incentivized to circumvent the negotiations via the possibility of a liability rule entitlement. For this reason, as discussed, courts treat trespass as a strict liability offense and protect landowners from it with a property rule entitlement. By contrast, nuisance cases are often high-transaction-cost situations in which the barriers to negotiations are substantial.[97] Unlike physical invasions, which usually feature few parties who are easily identifiable to each other, nonphysical interferences with property—such as an emission of gas or dust particles—usually involve many parties, the identities of whom often cannot be known until the damage is already done. The classic example is the problem of industrial pollution. Suppose a landowner intends to conduct an activity that will emit some particles into the

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91 *See* RESTATEMENT (SECOND) OF TORTS §§ 821F, 822 (AM. LAW INST. 1979); Morgan v. High Penn Oil Co., 77 S.E.2d 682, 689 (N.C. 1953).

92 *See* Jost v. Dairyland Power Coop., 172 N.W.2d 647, 651 (Wis. 1969).

93 *See* RESTATEMENT (SECOND) OF TORTS § 826. Courts consider several factors under the harm/utility balancing test, including, on the harm side, the extent and value of the harm, the social value of the plaintiff's use, the ability of the plaintiff to avoid the harm, and the suitability of the locality in question, *id.* at § 827, and on the utility side, the social value of the defendant's conduct, its suitability to the location, and the defendant's ability to prevent the harm. *See id.* at § 828.

94 *See* Merrill, *supra* note 6, at 17–18.

95 *See, e.g.*, Boomer v. Atl. Cement Co., 257 N.E.2d 870, 873–74 (N.Y. 1970).

96 *See* Merrill, *supra* note 6, at 14.

97 *See, e.g.*, POSNER, *supra* note 12, at 78–79.

environment and cause a nuisance, and desires to negotiate a settlement with its neighbors before polluting. The landowner knows that, in all likelihood, the pollution will spread to many neighboring properties, and the landowner will therefore have to negotiate a settlement with all of the many neighbors. This stands in contrast to the trespass scenario, in which the trespasser would only need to negotiate a settlement with a single property owner. In the nuisance setting, if there is even one holdout who refuses to settle among the many potentially affected parties and that holdout is entitled to enjoin the nuisance, the entire negotiation fails.[98] The simple fact that a polluter must negotiate with several parties rather than just one thus elevates the risk of holdouts and complicates negotiations.

Holdouts are far more likely in the nuisance than the trespass setting for another reason as well. In the trespass setting, holdouts are minimized because either party can walk away from the deal. In a nuisance setting, however, all the parties are neighbors. The knowledge that the polluter is locked into negotiating with all the affected neighbors and has no other potential negotiating partners gives each neighbor an incentive to hold out for more economic gains, knowing that the defendant will be forced to shut down its business if it cannot reach a deal with all of the neighbors.[99] Finally, negotiations are further complicated in the nuisance setting because the polluter may not even know with whom to negotiate prior to the pollution commencing because it cannot foresee the entire universe of properties that may be affected by the pollution. This situation is again in contrast to a typical physical invasion, in which the identity of the property the would-be trespasser wishes to cross is well known. Thus, according to Merrill, bargaining over a potential nuisance is ordinarily very difficult, and a judgmental rule of decision, in which courts assess the relative benefits and burdens of the defendant's activity, is more appropriate.[100] And, with regard to the remedy in particular, a property rule entitlement to enjoin a nuisance would result in economic waste (such as a profitable enterprise going out of business) because a single neighbor would have the power to capture all the economic gains from the transaction simply by holding out.[101] Since market negotiations are infeasible in

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98 *See id.* at 78 (discussing holdout problem in the context of pollution); Calabresi & Melamed, *supra* note 54, at 1119 (same).

99 *See* POSNER, *supra* note 12, at 78 (noting that in the pollution scenario, every neighbor knows he or she "can extract an exorbitant price" and therefore "has an incentive to delay coming to terms with the factory, in the hope of being the holdout").

100 *See* Merrill, *supra* note 6, at 14.

101 *See* POSNER, *supra* note 12, at 78.

this situation, nuisance law permits courts to award damages to the affected neighbors, substituting a dollar amount fixed by the court in place of whatever price the parties would have negotiated independently if bargaining were possible in this situation.[102]

C. Applying the Trespass/Nuisance Distinction to Easements

Easement cases fall somewhere between the trespass scenario and the nuisance scenario. On one hand, they involve a physical invasion and usually feature a small number of parties who are known to each other. In that sense they are analogous to trespass cases. On the other hand, easement cases usually involve neighboring landowners with competing property interests who are likely to face negotiating difficulties. In that sense, they are similar to nuisance cases. As this Section explains, the latter similarity is decisive in aligning easement cases with the law of nuisance and in distinction to the law of trespass. Although easement cases may look like trespass cases in form, they are functionally more akin to nuisance cases.

The most salient feature that easement cases share with nuisance cases, and that distinguishes both types of cases from the typical trespass scenario, is that nuisance and easement cases generally involve neighboring landowners. In most trespass cases, such as *Jacque*, one party is a landowner and the other is a non-landowner who desires access to the landowner's property.[103] In contrast, nuisance cases by definition are disputes between neighboring landowners. A nuisance is defined as a nontrespassory invasion imposed by one landowner upon another,[104] as indicated by the Latin maxim *sic utere tuo ut alienum non laedas*: "one's enjoyment and use of his own property should be such as not to injure the rights of another in his property."[105] In order to even have standing to bring a nuisance lawsuit, one must be a landowner.[106] Likewise, implied easements always involve neighboring landowners because an implied easement can only arise from the severance of a parcel of land into two separate parcels—that is, the creation of two neighboring parcels of land out of

102 *See* Merrill, *supra* note 6, at 31–35 (distinguishing low-transaction-cost trespass situations from high-transaction-cost nuisance cases); Calabresi & Melamed, *supra* note 54, at 1105–07 (arguing that in situations where holdout or free-rider problems make negotiations difficult, liability rule is more effective than property rule entitlement).

103 563 N.W.2d 154, 156 (Wis. 1997).

104 Restatement (Second) of Torts § 821D (Am. Law Inst. 1979).

105 *E.g.*, E. Rauh & Sons Fertilizer Co. v. Shreffler, 139 F.2d 38, 41 (6th Cir. 1943).

106 *See* Restatement (Second) of Torts § 821E (articulating rule on who can recover for private nuisances and collecting cases).

what was once a single parcel.[107] In fact, the law of easements and the law of nuisance both make an important distinction between those cases that involve neighboring landowners and those that do not. Easement law distinguishes appurtenant easements (easements benefitting land) from easements in gross (easements benefitting an individual personally), whereas nuisance law distinguishes between private nuisance (an unreasonable interference with land) and public nuisance (an unreasonable interference with a right common to the public).[108] The distinction suggests, as this Section argues, that disputes between neighboring landowners pose distinctive questions of public policy. For that reason, the discussion that follows is limited to appurtenant easements and private nuisances.

1. Transaction Cost Analysis

The fact that appurtenant easements, like private nuisances, involve neighboring landowners is enormously significant in demonstrating the functional similarity between easement law and the law of nuisance. For one thing, although easement cases typically involve only two parties, and are to that extent more like trespass than nuisance situations, the fact that the two parties are *neighbors* transforms what is normally a situation with low barriers to bargaining (low transaction costs) into a situation of high barriers to bargaining (high transaction costs), more like a typical nuisance case. As mentioned earlier, a typical trespass case raises little risk of a holdout because the parties can seek other negotiating partners.[109] However, when the parties are neighboring landowners and where the only feasible access route for the dominant parcel is across the servient one, the parties are locked into negotiating with each other. In this situation, called a "bilateral monopoly," each neighbor may engage in strategic behavior, holding out for a better deal because each knows the other has no alternative negotiating options.[110] As Stewart Sterk explains, the world of real estate transactions is filled with examples in which bilateral monopolies have confounded efficient negotiations.[111]

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107 *See supra* text accompanying note 61.

108 *See* Restatement (Third) of Prop.: Servitudes § 4.5 (Am. Law Inst. 2000) (on distinction between easements appurtenant and easements in gross); Restatement (Second) of Torts §§ 821B, 821D (on distinction between private and public nuisance).

109 *See supra* Section II.B.

110 *See* Posner, *supra* note 12, at 78 (discussing bilateral monopoly); Sterk, *supra* note 12, at 69–74 (discussing how a bilateral monopoly can complicate negotiations).

111 *See* Sterk, *supra* note 12, at 72–74 (discussing studies and real-world examples).

In most of the situations where courts will infer an easement, there is clearly a bilateral monopoly problem. Easements implied by prior use and necessity both require a showing that the dominant parcel requires access to the servient one. Such a showing, by definition, means that the dominant landowner has no other negotiating partner, which places the servient landowner in a position to hold out for more. Easements by estoppel and prescription require that the owner of the dominant parcel undertake substantial expenditures in reliance on an expectation of continued access to the servient parcel.[112] In both cases, the dominant landowner's reliance (induced by the servient landowner) transforms a relationship in which there was no bilateral monopoly into one in which there is.[113]

According to Merrill, it is no coincidence that courts will imply easements in bilateral monopoly situations.[114] Although courts generally use mechanical rules of decision in trespass cases because most trespass cases involve low transaction costs, Merrill notes that there are several hard cases, such as implied easements, in which trespass situations involve high transaction costs, and in those cases courts will switch to a judgmental rule of decision.[115] While Merrill mentions the point only parenthetically, presumably he means that the various factors courts use in determining whether to imply an easement call for a degree of discretion sufficient to enable judges to assign the property right to the party that values it most, while sacrificing some of the clarity of a mechanical rule.

Assuming Merrill is right, however, the judicial approach to implied easements remains curious for two reasons. First, as the previous Part observed, in easement cases courts do not use the flexible balancing test available in nuisance cases; to the extent courts engage in balancing, they only do so within a relatively inflexible set of formalistic rules—a pattern of prior use, severance of a unified parcel, and so forth—that often makes it difficult for courts to arrive at satisfactory results. At best, the law of implied easements is a hybrid mechanical/judgmental rule, not the fully judgmental rule of nuisance law. Second, and more importantly, Merrill's analysis does not account for why courts apply a strict mechanical rule when dealing with *remedies*

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112 *See id.* at 77–79.

113 *See id.* at 76–79 (explaining how different easement scenarios present bilateral monopoly problems).

114 *See* Merrill, *supra* note 6, at 37. Richard Posner goes even farther and argues that the resolution of bilateral monopoly problems is a "major thrust of common law." POSNER, *supra* note 12, at 78.

115 *See* Merrill, *supra* note 6, at 37 n.85.

in easement cases—courts either find that there has been a trespass and issue an injunction, or deny injunctive relief on the grounds that the dominant landowner has established an easement. In either case, the prevailing party has a property rule entitlement.

That the courts treat easement cases in this hybrid way suggests that they recognize an important difference between easements and the typical trespass case, but still see easements as fundamentally a species of the law of trespass. That is to say, if the court finds a physical invasion, the sanctity of the right to exclude demands the issuance of an injunction. The only way to avoid that outcome is through some legal fiction, such as acquiescence or intent to grant an easement, that obviates the physical invasion and also obviates the possibility of compensating the servient landowner for the loss. Hence, it is evident that courts see the fact of a physical invasion as the salient feature of an easement, the feature that classifies it as a species of the law of trespass rather than nuisance.

2. *The Law of Neighborly Accommodation*

As this Article has argued, though, the fact of a physical invasion is far less important in easement cases than the fact that the parties are neighboring landowners. Even Richard Epstein, who forcefully defends a robust right to exclude against the claim that rights should be mediated for the sake of accommodating competing interests, acknowledges that the right to exclude must yield in situations involving neighboring landowners.[116] Epstein argues that the principal virtue of the right to exclude is that it sets the conditions for market exchange.[117] He recognizes, accordingly, that when there is a dispute between neighboring landowners, the right to exclude cannot facilitate market exchange because of bilateral monopoly and holdout problems.[118] Epstein praises the courts for expounding a principle of neighborly forbearance, a "common law rule of 'live and let live'" that "permits reciprocal, low-level interferences between neighbors."[119] In his important piece *Neighbors in American Land Law*, Stewart Sterk similarly argues that several areas of property law—including easements—evince a social norm of what it means to be a good neigh-

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116 *See* Richard A. Epstein, *Rights and "Rights Talk,"* 105 Harv. L. Rev. 1106, 1112–13 (1992) (book review).

117 *See id.* at 1109.

118 *See id.* at 1112–13; *see also* Richard Epstein, *Property and Necessity*, 13 Harv. J.L. & Pub. Pol'y 2, 6–7 (1990).

119 Epstein, *supra* note 116, at 1113.

bor.[120] The next Part reviews some of these other areas of law, but as observed here, the law of easements seems to be lagging quite a bit behind. The courts are reluctant to see the social norm of neighborliness as the key facet of easement cases.

If the courts were to train their focus on neighborliness, they might see yet another similarity between the law of easements and the law of nuisance that distinguishes both from the law of trespass. The fact that easement cases involve neighboring landowners means that in these cases, like in nuisance cases, there are two parties who are *both* asserting property rights against each other,[121] as opposed to the law of trespass, which typically involves only a single landowner's property rights.[122] In easement cases, then, like nuisance settings and unlike most trespass settings, courts must somehow *balance* the competing property rights of the two landowners. This balance is complicated because in most nuisance and easement cases, the conflict is between one landowner's right to exclude and another landowner's right to use his or her property productively.[123] Both of these rights are, as we have seen, highly esteemed within the law of property. The courts cannot resolve these conflicts by resorting to easy formalities, but must make some normative choice between the competing interests to determine which landowner should have the freedom to use her property and which should be constrained.

Insofar as this is the case, easements again look a great deal like nuisances. Ronald Coase's famous article on transaction costs made the astute observation that while nuisance cases are often thought of as whether A (a polluter) should be able to inflict harm upon B (A's neighbor), in reality they raise the question of whether A should be permitted to harm B by polluting, or B should be able to harm A by forcing A to *stop* polluting.[124] Either view of the case is appropriate because *both* A and B have a right to make use of their property. In deciding whose property interest to favor, nuisance law thus uses a flexible balancing test on both substantive and remedial issues that dignifies the interests of both property owners.[125] The law of easements should do the same.

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120 *See* Sterk, *supra* note 12, at 88–103.

121 *See supra* Section II.B.

122 *See supra* Section II.A.

123 *See, e.g.*, Van Sandt v. Royster, 83 P.2d 698, 698–700 (Kan. 1938).

124 R.H. Coase, *The Problem of Social Cost*, 3 J.L. & Econ. 1, 2 (1960).

125 *See supra* text accompanying notes 93–95.

3. *The Hybridity of Nuisance and Easement Law*

Indeed, on rare but significant occasions, courts have recognized that there is a kinship between nuisance and easement law irrespective of the fact that one involves a physical occupation and the other does not. The first instance is the celebrated case of *United States v. Causby*,[126] in which the Supreme Court was tasked with the question of whether U.S. government aircraft flying over private landowners' property constituted a taking of property under the Fifth Amendment. Traditionally, a landowner's property right was said to extend from the center of the earth to the heavens above.[127] An airplane flying 30,000 feet over one's home could thus be considered a physical occupation—a trespass—upon one's property. In *Causby*, the Supreme Court rejected that principle as a general matter, holding that it would hinder the development of modern air travel.[128] In other words, the Court found that the public need to access what had once been considered private land outweighed the landowner's right to exclude; in essence, it granted aircraft an easement over the private landowner's airspace. As commentators have further noted, the *Causby* result is consistent with economic analysis because airplane overflights present exactly the sort of high transaction costs that often arise in nuisance cases—a large number of parties and an incentive to hold out.[129] In short, the case was a hybrid of nuisance and trespass law, as easement cases often are.

The *Causby* Court recognized this hybridity rather explicitly when it went on to hold that where airplane overflights are "so low and so frequent as to be a direct and immediate interference with the enjoyment and use of the land," that *does* constitute a taking.[130] Interestingly, the Court's standard—interference with enjoyment and use of land—is a *nuisance* standard, meaning that the Court did not consider even a very low overflight to constitute a physical invasion. Generally, an interference with use and enjoyment, as opposed to a physical occupation, does not give rise to a takings claim. Nevertheless, the Court characterized the nature of the interference as an "easement" or a "servitude," and on that basis found that there had

126 328 U.S. 256 (1946).

127 *See id.* at 260–61 (noting the "ancient doctrine that at common law ownership of the land extended to the periphery of the universe—*Cujus est solum ejus est usque ad coelum*").

128 *See id.* at 261.

129 *See, e.g.*, Merrill, *supra* note 6, at 35–36.

130 328 U.S. at 266.

been a taking for which the government owed compensation.[131] In other words, the case had some of the characteristics of a nuisance and some of the characteristics of an easement, so the Court took a functional approach and treated it as a hybrid of the two.

The famous case of *Boomer v. Atlantic Cement Company*[132] extended *Causby*'s logic from the government to private landowners. A landmark decision, *Boomer* opened the door for nuisance cases to be resolved with a "liability rule" approach by holding that damages rather than an injunction could be an appropriate remedy in nuisance cases where the defendant's operation has a significant public utility and payment of damages is feasible.[133] In reaching that result, the court cited *Causby* as precedent and argued that a continuing nuisance was a "servitude on land."[134] In essence, *Boomer* held that a private landowner could exercise the power of eminent domain over a neighbor's property in certain circumstances. Like in *Causby*, the court conceptualized the case as though it involved a physical occupation, although it did not, to create a precedent for awarding damages in lieu of an injunction. Thus, *Causby* and *Boomer* both recognize that nuisances and easements are variations on the same theme and, importantly, that damages can be an appropriate remedy to balance between the competing interests involved.

Admittedly, neither *Causby* nor *Boomer* recognizes that damages are an appropriate remedy where there is a physical occupation. (In *Causby*, indeed, the Court magically transformed what the law once considered a physical occupation into an interference with use and enjoyment.) The next Part, however, discusses a few areas of law in which courts have recognized the appropriateness of damages even where there is a physical occupation. More broadly, the next Part demonstrates how social norms of neighborliness are displacing fixed ideas about the right to exclude, again irrespective of whether there has been a physical invasion. Thus, this Article's proposal to treat easements as a species of nuisance law falls squarely within an emerging line of precedent.

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131 *See id.* at 261–62, 267. Unlike private landowners, the government has the power of eminent domain, which means that it can, for a public purpose, take landowners' property rights and pay damages.

132 257 N.E.2d 870 (N.Y. 1970).

133 *See id.* at 875.

134 *Id.* (referring to judgment of permanent damages to plaintiff in lieu of enjoining nuisance as "servitude on land" (citing *Causby*, 328 U.S. at 256, 261, 262, 267)).

III. Easements and the Law of Neighborly Accommodation

As *Causby* and *Boomer* illustrate, it is hardly a radical idea to treat easements as a species of nuisance law. This idea also finds support in several other doctrinal contexts, where courts are increasingly recognizing that relations between neighbors are governed by mutual accommodation rather than fixed property rights. Even in cases involving physical occupations, courts often use a flexible test to balance the rights of neighbors. A review of the doctrine reveals that, at least in disputes between neighbors, the logic of trespass is yielding to the logic of nuisance. This review will also demonstrate how the law of easements might be refashioned to look more like the law of nuisance.

A. Boundary Disputes

In the first type of case, a landowner has built improvements to her property that encroach slightly over the boundary with a neighbor's property, either because the improver was mistaken as to the location of the true boundary or because she had some reason to believe that the neighbor consented to permit the encroachment. In these cases, courts often deviate from the mechanical trespass rule of strict liability and weigh whether some action by the title owner constituted consent or acquiescence to an adjustment of the boundary line between the properties.[135] If the court finds insufficient evidence of consent to satisfy the doctrine, the court may rule in favor of the title owner on the trespass but then apply what is often called the "relative hardship" doctrine and determine whether damages are a more appropriate remedy than an injunction.[136] That is to say, even

135 *See* Sterk, *supra* note 12, at 61–62, 79–83 (discussing estoppel, acquiescence, and agreed-boundaries doctrines).

136 *See* Dolske v. Gormley, 375 P.2d 174, 179 (Cal. 1962) (applying relative hardship doctrine and denying injunction because improver acted in good faith, proportionate hardships favored the improver, there was no irreparable injury, and the true owner delayed in seeking the injunction); Johnson v. Killian, 27 So. 2d 345, 346–47 (Fla. 1946) (applying principle of "balancing relative conveniences" and denying injunction because encroachment was unintentional and slight, cost of removing it was great, and there was no irreparable damage); Terwelp v. Sass, 443 N.E.2d 804, 808 (Ill. App. Ct. 1982) (holding that although improver did not establish adverse possession of boundary strip, equity prevented injunction because encroachment was in good faith, cost of removing it was great, corresponding benefit to true owner was small, and damages were feasible remedy); Urban Site Venture II Ltd. P'ship v. Levering Assocs. Ltd. P'ship, 665 A.2d 1062, 1065 (Md. 1995) (stating that the court can refuse to issue an injunction where encroachment is innocent, balance of hardships favors improver, and damage to true owner's property is minimal); Wojahn v. Johnson, 297 N.W.2d 298, 305, 307–08 (Minn. 1980) (finding insufficient evidence of acquiescence to establish that improver acquired possession of strip, but remanding case to determine whether injunction is appropriate, noting that injunction can be

though there has been no consent by the title owner to relinquish the right to exclude, the courts may decide to protect that right with a liability rule rather than a property rule.

In one fairly typical case, *Arnold v. Melani*,[137] the Supreme Court of Washington held that there was insufficient evidence to establish an estoppel because the title owner had made no affirmative statements that induced the construction of the encroachment.[138] The court nevertheless declined to issue an injunction and awarded damages instead.[139] The court articulated several factors that weighed against issuance of an injunction, including (1) the improver had not acted negligently or in bad faith; (2) the damage to the landowner was minimal; (3) the encroachment did not limit the property's future use; (4) it would not be practical to remove the encroachment; and (5) the imbalance in hardships was enormous.[140] In the recent case of *Proctor v. Huntington*[141] (discussed further in the next Part), the Supreme Court of Washington expanded the scope of *Arnold* to cover cases in which the damage to the title owner's land was *not* minimal, but the imbalance in the equities was still substantial.[142] In doing so, the *Proctor* court recognized "the evolution of property law in Washington away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach."[143]

Much like nuisance cases, the boundary dispute cases apply a judgmental decision rule and engage in a very explicit, multifactorial balancing test. It makes sense that courts use a judgmental rule here because boundary disputes, like nuisances, involve balancing compet-

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denied where there is no irreparable injury, encroachment is innocent, and there is great disparity in hardships between neighbors); Lawrence v. Mullen, 40 A.D.2d 871, 871–72 (N.Y. App. Div. 1972) (holding denial of injunction appropriate because there was no evidence of willful trespass and a large disparity in burdens between the parties); Graven v. Backus, 163 N.W.2d 320, 325–26 (N.D. 1968) (applying "relative hardship" doctrine and denying injunction because the encroachment was innocent and not negligent, there was a huge disparity in hardships between the improver and the true owner, and the true owner's property was not irreparably damaged); Burns v. Goff, 262 S.E.2d 772, 775 (W. Va. 1980) (awarding damages instead of injunction because there was an innocent encroachment, removing it would be a hardship to improver, and there was no damage to true owner); SINGER, *supra* note 27, at 41–42; Sterk, *supra* note 12, at 61–62, 80 (discussing boundary encroachment cases).

137 449 P.2d 800 (Wash. 1968).

138 *See id.* at 803–06.

139 *See id.*

140 *See id.* at 805–06. Courts in many other states have articulated similar balancing tests. *See* cases cited *supra* note 136.

141 238 P.3d 1117 (Wash. 2010).

142 *See id.* at 1121–23.

143 *Id.* at 1123.

ing interests between neighbors and pose the kind of negotiating difficulties that often bedevil neighboring landowners—specifically, bilateral monopoly problems. Indeed, the factors that courts consider in choosing a remedy for boundary disputes bear directly upon whether there is a bilateral monopoly. A situation in which an improver has mistakenly made improvements that encroach slightly on a neighbor's property in a way that makes removal of the encroachment extremely expensive for the improver presents a classic bilateral monopoly. Neither party has any other negotiating partner with regard to the disputed strip of land, and the true owner is in a position where if she can enjoin the improver, she can use the threat of forcing the removal of the improvement to extract nearly its full value from the improver.

That the improver has acted under a mistaken belief is also relevant. Had the improver been aware of the boundary line before building the improvement, she could have attempted negotiations at a time when there was no bilateral monopoly, during which the threat of an extortionate demand would be tempered by the mutual knowledge that the improver could always withdraw from negotiations. For that reason, the knowing, or bad faith, trespasser cannot take advantage of the relative hardship doctrine.[144] But a mistaken improver has no opportunity to negotiate until after the fact, at which point there is a bilateral monopoly. The presence of the bilateral monopoly confounds negotiations and risks substantial economic waste, as the negotiating impasse may force the improver to remove costly improvements with little resulting social utility.[145] Thus, in boundary dispute cases, as in nuisance cases, it makes sense for courts to use a balancing test and consider a liability rule solution.

Of course, the same logic would dictate that courts use a balancing test and a liability rule solution in *easement* cases. Like boundary disputes, easement cases frequently involve bilateral monopoly problems.[146] In fact, boundary disputes look much more like easement than nuisance cases. Both boundary disputes and easements involve a physical invasion of a neighbor's property, whereas nuisance cases do not. Interestingly, despite the hornbook rule that the right to exclude is sacred, courts in boundary dispute cases are willing to balance one landowner's right to exclude against another's desire to avoid eco-

144 *See* Sterk, *supra* note 12, at 79–83 (discussing bad faith encroacher and collecting cases).

145 *See id.* (discussing the creation of a bilateral monopoly resulting from boundary encroachments).

146 *See id.*

nomic waste, and to compensate the loss of the right to exclude with damages.[147] Why are courts unwilling to do the same in easement cases?

Arguably, a distinction between boundary dispute and easement cases is that a boundary encroachment is a sufficiently obvious condition that its construction places a true owner on notice to investigate the location of the boundary line, whereas an easement is less obvious because it is not in continuous use.[148] There is some support in the doctrine for this idea. The majority of courts that have applied the relative hardship doctrine have noted in passing that the true owner was aware of the encroachment but did little to stop it or ascertain the location of the boundary line.[149] Though the courts have not elaborated on the significance of this observation, it is possible that the true owner's failure to assert her rights operates to signal some acquiescence to the improver—not a sufficient degree of acquiescence to trigger a transfer of title to the boundary strip under the relevant doctrines, but sufficient, implicitly, to minimize the liability rule's intrusion on the sanctity of the right to exclude. The use of a neighbor's property to access a road or sewer, by contrast, may not necessarily be so apparent—unless, of course, the requirements of the relevant easement doctrine are met, such as a pattern of prior use or some acquiescence by the servient landowner.

This distinction is not especially convincing. An owner may be aware of the construction of an improvement, but that does not necessarily mean that the owner is aware of the boundary line between her own and a neighbor's property. Meanwhile, a landowner regularly traversing a neighbor's property is every bit as apparent as an encroachment just over an invisible boundary line. It seems fairly clear

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147 *See* Sterk, *supra* note 12, at 80; *see also* David L. Callies & J. David Breemer, *The Right to Exclude Others from Private Property: A Fundamental Constitutional Right*, 3 Wash. U. J.L. & Pol'y 39, 39–41 (2000) (discussing the general reverence for the right to exclude).

148 *See* Singer, *supra* note 27, at 41 ("If the encroachment is innocent, one might conclude that the true owner of the land was negligent in allowing the construction to occur and thus partially the cause of the problem.").

149 *See* Dolske v. Gormley, 375 P.2d 174, 179 (Cal. 1962) (noting that true owner delayed a number of years after construction of encroachment in seeking injunction); Johnson v. Killian, 27 So. 2d 345, 347 (Fla. 1946) (noting that encroachment was in plain view for many years and true owner did nothing about it, such as having a survey done); Graven v. Backus, 163 N.W.2d 320, 326 (N.D. 1968) (noting that although there was no acquiescence by true owner, true owner slept on his rights by objecting to constructing of encroachment but failing to obtain a survey for many years); Arnold v. Melani, 449 P.2d 800, 803–04 (Wash. 1968) (noting that although there was no affirmative act of consent, landowners sat on their rights for a long period of time after being placed on notice of potential encroachment).

that the courts in boundary dispute cases are motivated by the desire to balance the competing interests of two neighboring landowners, and placing some onus on the true owner to monitor the boundary line gives them cover to do that without violating the sanctity of the right to exclude. Whatever the motivation, easement cases are sufficiently similar to boundary dispute cases such that an analogous set of flexible rules can be applied in easement cases to balance the interests of neighboring landowners. Before articulating what those rules might look like, the following Sections examine a few other areas in which courts have taken a flexible approach to disputes between neighbors.

B. Unilateral Extension of an Easement

As it happens, the law of easements itself provides some further precedent for the idea that easement cases should be treated more like nuisances and less like trespasses. *Brown v. Voss*[150] is the rare easement case in which a court actually did precisely what this Article suggests: it found that although the owners of the dominant tenement trespassed upon their neighbors' property in asserting a right of way, they could nevertheless convert the trespass into a lawful easement by paying damages to the neighbors.[151] In *Brown*, the Browns had an express easement over a parcel of land owned by the Vosses (parcel A) to access a parcel of land owned by the Browns (parcel B).[152] The Browns then purchased a parcel of land adjacent to parcel B (parcel C) and continued using the easement to access both parcels.[153] The Vosses claimed that the Browns unlawfully exceeded the scope of the easement by unilaterally extending it to access parcel C, and the court agreed.[154] Nevertheless, the court refused to issue an injunction against the Browns.[155] Instead, it balanced the equities and upheld the trial court's award of nominal damages, noting that the trial court has "broad discretionary power" to fashion a remedy "to fit the *particular facts, circumstances, and equities of the case before it*."[156] Among the factors the trial court had properly considered in denying injunctive relief were that the Browns acted reasonably in developing their property, there was no damage to the Vosses' property, there was no increase in intensity of use of the easement or other burden on the

150 715 P.2d 514 (Wash. 1986).
151 *See id.* at 514.
152 *See id.* at 515–16.
153 *See id.*
154 *Id.* at 517.
155 *Id.* at 517–18.
156 *Id.* at 517.

servient estate, the balance of hardships greatly favored the Browns, and the Vosses "sat by for more than a year while [the Browns] expended more than $11,000 on their project."[157]

As in the boundary dispute cases, the *Brown* court was willing to use a balancing test to weigh the competing interests of neighboring landowners. In addition, the factors that the *Brown* court considered in determining an appropriate remedy were, like the factors in the boundary dispute cases, evidently designed to ferret out and resolve any bilateral monopoly problems. Once the Browns expended a significant sum of money on parcel C, they could no longer exit the relationship with the Vosses because the easement was necessary to access their land, and the fact that the Vosses "sat by" while the Browns spent so much money indicates that the Vosses were acting strategically, inducing the Browns to enter into a situation where the Vosses would have monopoly power and could then extort a higher price for access.

Insofar as *Brown* involves neighbors with competing interests who are locked into a bilateral monopoly, it looks like a garden variety easement case. Indeed, on its facts, *Brown* is pretty close to an easement by estoppel, in which the dominant landowner makes expenditures in reliance on some action by the servient landowner that communicates an assurance of future access.[158] Why, then, do courts typically not consider awarding damages in cases of easement by estoppel, or other easements?

Admittedly, *Brown* is somewhat different from a typical easement case because the Browns already had an express easement over the Vosses' property and the unilateral expansion of the easement did not increase the overall intensity of use. The right to exclude, which looms so large in ordinary easement cases, was simply not a factor here because the Vosses had already expressly consented to give up the right to exclude. The case was more in the nature of a breach of contract than interference with a property right, and to that extent damages were perhaps a more suitable remedy.

In a broader sense, though, *Brown* may signal that easement law is shifting towards a more contractual view of the relationship between neighbors in which principles of mutual accommodation trump

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157 *Id.* at 518.

158 *See, e.g.*, Jones v. Beavers, 269 S.E.2d 775, 778 (Va. 1980); Holbrook v. Taylor, 532 S.W.2d 763, 766 (Ky. 1976); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.10 (AM. LAW INST. 2000).

fixed property rights.[159] This movement is evident in the recently promulgated Restatement (Third) of Property: Servitudes, under which the owner of a servient tenement may unilaterally relocate an existing easement if it does not negatively impact the dominant landowner's property.[160] One effect of this new rule, as John Lovett astutely describes it, has been to transform the whole idea of easements from a formalistic concept in which landowners have fixed property rights into a recognition that neighboring landowners have a "carefully balanced set of rights and responsibilities."[161] Lovett cites a recent case from the Colorado Supreme Court relying on the new Restatement provision, which concluded that where neighboring landowners have competing interests, those interests "should be accommodated, if possible, and that inflexible notions of dominant and servient estates do little to advance that accommodation."[162] Lovett argues that under the same logic, the Restatement should embrace the *Brown* rule and recognize the possibility of awarding damages for the unilateral expansion of an easement.[163] Indeed, we could go further and say that under the Restatement's new approach, the law should embrace the possibility of awarding damages in all easement cases as a recognition that easements require balancing the competing interests of neighbors rather than vindicating the fixed property rights of a single landowner.

C. The Public Trust Doctrine

The final relevant movement, although again an imperfect analogy, is the public trust doctrine as articulated by the Supreme Court of New Jersey in the famous case of *Matthews v. Bayhead Improvement Ass'n*[164] and its progeny.[165] The public trust doctrine has long held that

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159 *See* Lee J. Strang, *Damages as the Appropriate Remedy for "Abuse" of an Easement: Moving Toward Efficiency, Consistency and Fairness in Property Law*, 15 GEO. MASON L. REV. 933, 934 (2008) (viewing *Brown* as part of a movement within property law toward "contract-based concepts and remedies").

160 *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8 (noting that reasonable relocations are permissible where they do not "significantly lessen the utility of the easement, . . . increase the burdens on the owner of the easement[,] . . . or . . . frustrate the purpose for which the easement was created").

161 *See* John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 36 (2005).

162 *See id.* (quoting Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1235 (Colo. 2001)).

163 *See id.* at 8, 72–77.

164 471 A.2d 355 (N.J. 1984).

165 The most notable recent case reaffirming and extending *Matthews* is *Raleigh Avenue Beach Ass'n v. Atlantis Beach Club*, 879 A.2d 112, 113 (N.J. 2005).

certain lands, most prominently the lands touched by the tidal waters (often known as the "foreshore" or "wet sand" portion of beaches) are incapable of private ownership because they are held in trust by the state for the benefit of the public at large.[166] Nevertheless, in many states, including New Jersey, beachfront lands adjacent to the foreshore (the "dry sand" portion of oceanfront beaches) have been held as private property for many years.[167] The awkward result is that while the public has a right to use the oceans and land touched by the oceans, it has no means of reaching those places because the only access routes are across privately held lands and private landowners have a right to exclude. In many ways, the situation is analogous to an easement case, in which effective access to one's property requires the right to traverse another landowner's property. Indeed, one possible resolution to the problem of beach access would be the doctrine of "public prescriptive easement," under which the usage of a private landowner's property by the public for a period of time, pursuant to a claim of public right, can give the public a vested property right to continued access.[168]

Nevertheless, in *Matthews* and its subsequent progeny, the New Jersey Supreme Court eschewed the law of easements and held that the public trust doctrine itself required private landowners to make their lands available under certain circumstances to ensure public access to the beach and ocean.[169] The court used a multifactorial analysis that considered (1) the availability of other public beaches nearby, (2) the "[l]ocation of the dry sand area in relation to the foreshore," (3) public demand, and (4) usage of the land by the owner.[170] As we have seen in each of our previous examples, these factors appear designed to balance the need for access (here, a public rather than a private need) with the landowner's right to exclude, as well as to circumvent any negotiating difficulties between the parties. The first three factors focus on the degree of necessity for public access to the land. To the extent there is a great need for public access to the foreshore and no alternative access route, negotiations between members of the public and the landowner are likely to be exceedingly difficult

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166 *See, e.g.*, *Matthews*, 471 A.2d at 360; Arnold v. Mundy, 6 N.J.L. 1, 71–72 (1821).

167 *Cf. Matthews*, 471 A.2d at 363–66 (noting that, historically, the public's right to enjoy "dry sand areas was specifically and appropriately limited to those beaches owned by a municipality").

168 DUKEMINIER ET AL., *supra* note 19, at 846–47 (discussing public prescriptive easement doctrine in the context of beach access).

169 471 A.2d at 365.

170 *Id.*

because the landowner is in a monopoly position. The last factor focuses on the extent to which the landowner has actually asserted a right to exclude. If the pattern of prior use suggests that the landowner has not been particularly vigilant in policing her right to exclude, then it is a fair assumption that she is invoking that right in order to extort a better payoff for public access, not because she values the right to exclude in principle. In practice, the New Jersey courts have only found that the public trust doctrine requires a landowner to provide public access in situations where the landowner had a history of providing beach access to the public or some portion of the public.[171] Under such circumstances, it is reasonable to conclude that the landowner has a diminished interest in the right to exclude.

What is perhaps most notable about *Matthews* is that it completely jettisons all of the formal requirements of easement law, such as the requirement of a unity of ownership (for implied easements), reasonable reliance (easements by estoppel), and hostility (easements by prescription),[172] in favor of a flexible test that actually balances the need for public access against the private landowner's right to exclude. Indeed, *Matthews* expressly eschewed reliance on the law of easements, noting that "[a]rchaic judicial responses are not an answer to a modern social problem" and that the problem of beach access requires a doctrine like public trust that is not "fixed or static" but that is "molded and extended to meet changing conditions and needs of the public it was created to benefit."[173]

As flexible as the *Matthews* test is on the merits, however, it reverts to being fixed and static on the issue of the remedy. There is no hint in *Matthews* or any of its progeny that the landowner should actually be compensated for the loss of the right to exclude. Instead, *Matthews* found, at least implicitly, that the landowner simply had no right to exclude within its common law bundle of sticks because the contours of that bundle were subject to the public trust doctrine.[174] Thus, it would make no sense to compensate the landowner for losing some-

171 *See* Raleigh Ave. Beach Ass'n v. Atlantis Beach Club, 879 A.2d 112, 122–24 (N.J. 2005) (finding private landowner was required to permit public access because of past practice of permitting public access); *Matthews*, 471 A.2d at 365–66 (finding landowner was required to provide public access because landowner was a quasi-public entity that provided free beach access for certain members of the public).

172 *See* Restatement (Third) of Prop.: Servitudes §§ 2.10–2.16 (Am. Law Inst. 2000).

173 471 A.2d at 365 (quoting Borough of Neptune City v. Borough of Avon-by-the-Sea, 294 A.2d 47, 54 (N.J. 1972)).

174 *See id.* at 365–66 (holding that public trust doctrine prohibits landowners from excluding public in certain circumstances).

thing that it never really had. In practice, of course, something had been taken from the landowner. The day before *Matthews*, the landowner had a right to exclude. The day after, it did not. Like the law of easements, *Matthews* uses a legal fiction to circumvent the right to exclude rather than balancing it against the competing interest, and thereby obviates the possibility of a liability rule solution. It appears that the *Matthews* court, like the courts in so many easement disputes, saw the matter as a trespass case in which, if the court were to recognize that the right to exclude had been violated by a physical invasion, it would be required to rule in favor of the servient landowner and issue an injunction. Instead, the court conjured a legal fiction to surmount the right to exclude.

It is ironic that *Matthews* would dispense with the legal fictions and formalities of easement law in balancing the competing interests of the parties on the merits, only to resort to formalism once it considered the appropriate remedy. The court could have taken its own reasoning to the logical conclusion and found that, as in *Brown* and the boundary dispute cases, fixed principles about the right to exclude must yield to a flexible rule of neighborly accommodation. Perhaps the reason *Matthews* failed to do so was a practical one. Had the court found that the landowner was entitled to some compensation for the burden on the right to exclude, who would have paid? The court could not have asked the individual plaintiff to pay the full price for public access to private land. And if it required the state to pay, the court would essentially be exercising the eminent domain power rather than its equitable power, but courts do not have the power of eminent domain. By refusing to award damages, the court avoided dealing with these thorny issues.

Most easement cases, aside from the rare public prescriptive easement, do not involve public access to private land and therefore do not present this problem. Thus, there is no reason why the law of easements could not forthrightly balance the rights of competing neighbors after the fashion of the law of nuisance, the boundary dispute cases, and the *Brown v. Voss* decision. Under this Article's proposal, courts would follow *Matthews* and largely dispense with the traditional requirements needed to establish an easement, and instead use a balancing test to determine whether the dominant landowner's need for access outweighs the burden on the servient landowner's right to exclude. Drawing on the balancing tests reviewed in this Part, such factors would include the degree of necessity for access, the economic value of the improvements on the dominant landowner's land,

the burden on the servient landowner's right to exclude, and the expectations of the parties. In determining the expectations of the parties, courts might take into consideration some of the traditional requirements for an easement, such as whether there was a partition of a unified parcel, whether there was some evidence of acquiescence or permission to access the servient land, and so on. The same balancing test would be used at the remedial stage to determine the appropriate remedy, with the added consideration of the feasibility of compensating the servient landowner with damages. This proposal is not only sensible and fair, but also consistent with precedent establishing a principle of neighborly reciprocity and recognizing the synergy between nuisance and easement law. Nevertheless, the proposal also raises an important constitutional question, with which the next Part concludes.

IV. The Judicial Takings Problem

This Part offers some observations on how the preceding discussion may influence an important, ongoing debate regarding "judicial takings." Although it is possible that this Article's proposal could be considered a judicial taking as that doctrine has been theorized by a plurality of the Supreme Court, this Part concludes that the proposal would likely not constitute a judicial taking. In fact, the discussion below raises more questions about the viability of the plurality's approach to judicial takings than it does about this Article's proposal. Considering that the plurality's approach is dicta and has never been adopted by a majority of the Supreme Court, it should not pose a barrier to state courts adopting the proposal, even assuming the proposal is in conflict with the plurality opinion.

It has long been settled that when the state, via the executive or legislative branch, authorizes a physical occupation of a landowner's property, depriving the landowner of her right to exclude, that action is considered a "taking" under the Fifth Amendment, and the state is required to compensate the landowner for the loss of the right to exclude.[175] A number of commentators have asked why judicial decisions such as *Matthews*, which also authorize physical occupations, do not deprive the landowner's right to exclude and therefore constitute takings.[176] In a recent decision, *Stop the Beach Renourishment, Inc. v. Florida Department of Environmental Protection*,[177] a plurality of the

175 *See, e.g.*, Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 441 (1982).

176 *See, e.g.*, Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449, 1491 (1990).

177 560 U.S. 702 (2010) (plurality opinion).

Supreme Court acknowledged that a judicial taking could indeed occur when a court alters the common law to eliminate an established property right.[178] The plurality opinion said relatively little about how to determine whether a right is "established" or whether it has been "eliminated," questions that scholars have spent the past few years attempting to answer.[179] Those questions are especially relevant here because it could be argued that this Article's proposed adjustment to easement law, by authorizing a physical occupation of the servient landowner's property without that landowner's consent, eliminates an established right. Conversely, if courts were to follow this Article's suggestion and award damages to the servient landowner even in those cases where the traditional elements of an implied easement were met, the dominant landowner could claim that his or her "established" common law right to a free easement had been taken.[180]

Any attempt to discern whether these rights were "established," however, would likely prove futile, and the futility of the inquiry throws into doubt the coherence of the plurality's judicial takings test. Peter Byrne argues, for example, that it is nearly impossible for federal courts to determine exactly what constitutes an "established" property right, much less when an "established" right has been eliminated.[181] As an illustration, Byrne examines one of the boundary dispute cases discussed above, the Washington Supreme Court's decision in *Proctor v. Huntington*.[182] *Proctor* held that, in appropriate boundary dispute cases, courts could replace the title owner's property rule entitlement to an injunction with a liability rule entitlement to damages.[183] The court reasoned, consistent with the last Part's argument, that "property law in Washington [has evolved] away from rigid adherence to an injunction rule and toward a more reasoned, flexible approach."[184] Byrne notes, however, that *Proctor* raises doubts about the plurality's "established rights" standard.[185] As he shows, *Proctor*'s conclusion that Washington law had "evolved" in the manner the majority suggested was debatable, because a four-justice dissent argued

178 *See id.* at 715, 725–28.

179 *See, e.g.*, J. Peter Byrne, *Stop the* Stop the Beach *Plurality!*, 38 Ecology L.Q. 619 (2011); Lee Anne Fennell, *Picturing Takings*, 88 Notre Dame L. Rev. 57 (2012).

180 *Cf.* D. Benjamin Barros, *Easements, Necessity and the Role of Legal Change in Judicial Takings Claims*, 21 Widener L.J. 797, 807 (2012) (arguing that judicial decision overturning a statute giving a landowner a right to a free easement constituted a taking).

181 *See* Byrne, *supra* note 179, at 629–31.

182 238 P.3d 1117 (Wash. 2010); *see* Byrne, *supra* note 179, at 627–28.

183 238 P.3d at 1121.

184 *Id.* at 1123.

185 Byrne, *supra* note 179, at 627–28.

that Washington's previous precedents revealed no such evolution in favor of liability rule entitlements.[186] Byrne also notes that Washington's precedents were in some conflict on this issue.[187] So did the majority eliminate an established right, or simply clarify the "established" state of the law? The answer would depend on one's judgment of how far along the law is in an evolutionary process from rigid to flexible rules. This Article's proposal raises a similar question. It has cited ample evidence that property law is moving in the direction of recognizing that rights between neighbors should be adjudicated using flexible rather than mechanical rules, but has the law moved far enough in that direction to be "established?" And if the question is debatable, should federal courts be substituting their judgment for that of state courts on the matter?

A related question is, even if the right to exclude is itself an established right, whether a property rule entitlement in the right to exclude is also an established right, or merely a remedy for the violation of the right. Byrne argues that it is a remedy, and therefore concludes that substituting a liability rule entitlement for a property rule entitlement is not a taking.[188] Of course, the courts have not settled whether a property rule entitlement is a right or a remedy because, until *Stop the Beach*, common law courts rarely concerned themselves with the question of whether something was an established right. The entire body of property law from feudal times until today constitutes one unfinished project to "establish" the legal principles governing the use and disposition of property. As such, it is almost impossible to look back over the corpus of property law and identify a fixed set of established rights.

A final reason why the judicial takings inquiry is inapt in the easement context is that it would completely prevent the law from evolving or adapting to change, and in the process would do little to protect landowners whose rights to exclude had been "taken." The plurality in *Stop the Beach* denied that the law had any particular need to change over time: "It is no more essential that judges be free to overrule prior cases that establish property entitlements than that state legislators be free to revise pre-existing statutes that confer property entitlements, or agency-heads pre-existing regulations that do so."[189] However, state legislators *can* change property entitlements us-

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186 *Id.* at 630.

187 *Id.*

188 *See id.* at 628–29, 628 n.51.

189 *Id.* at 727 (plurality opinion).

ing the power of eminent domain, provided they pay just compensation. The plurality acknowledged as much in stating that if a court ruling were invalidated as a judicial taking, the state legislature would then be free to enact a statute providing for a compensated taking of the same property.[190] For example, if a court were to adopt this Article's proposal and liberally permit the condemnation of easements based on a showing of necessity, and a reviewing court subsequently determined that ruling to constitute a judicial taking, the state legislature could then pass a statute authorizing the condemnation of easements based on a showing of necessity. Indeed, many states have enacted such statutes.[191]

Herein lies the problem. Several state courts have found that these "condemned easement" statutes are themselves unconstitutional because they exceed the state's power of eminent domain by authorizing a condemnation for private rather than public benefit.[192] Of course, courts permit private condemnations all the time whenever they award damages instead of an injunction, but this is considered a use of their equitable powers to fashion a remedy rather than an exercise of the eminent domain power. If such private condemnations were to be declared judicial takings, it would mean that neither the legislatures nor the courts could ever act to adjust property rights in the easement context, even if the aggrieved party were compensated for whatever was taken. Courts could not forthrightly act to adapt easement law because that would be considered a judicial taking, and legislatures could not act because there is no public purpose. And this state of affairs would hardly work to vindicate the sanctity of landowners' rights to exclude. In easement cases, state courts would continue using obfuscating legal fictions to circumvent the right to exclude rather than openly "taking" that right, and would therefore continue to deny compensation to the burdened landowners.

The discussion so far demonstrates not only the difficulty of applying the *Stop the Beach* plurality's "established rights" standard to

190 *See id.* at 723–24 (plurality opinion).

191 *See, e.g.*, IOWA CODE ANN. § 6A.4 (2008); WASH. REV. CODE § 8.20.070 (2010).

192 *See* Sadler v. Langham, 34 Ala. 311, 332 (1859); Bankhead v. Brown, 25 Iowa 540, 550 (1868); Clark v. Bd. of Comm'rs, 77 P. 284, 285–86 (Kan. 1904); Tolksdorf v. Griffith, 626 N.W.2d 163, 165 (Mich. 2000); Welton v. Dickson, 57 N.W. 559, 562 (Neb. 1894); Witham v. Osburn, 4 Or. 318, 324 (1873); *In re* Opening a Private Rd., 5 A.3d 246, 258 (Pa. 2010) (holding state statute permitting private condemnation of easement in cases of necessity would be invalid if private party, rather than public at large, was primary beneficiary); Estate of Waggoner v. Gleghorn, 378 S.W.2d 47, 50 (Tex. 1964); Varner v. Martin, 21 W.Va. 534, 567 (1883); Osborn v. Hart, 24 Wis. 89, 91 (1869).

easement cases, but also how the plurality misunderstands the relationship between state courts and state legislatures. Although the decisions striking down condemned easement statutes are of debatable wisdom—ensuring land's productivity arguably *is* a significant public interest—there is admittedly a difference in kind between the sort of public interest involved in making private land productive and the public interest involved in, say, revitalizing an urban downtown or erecting an airport. In the latter case, it is anticipated that the public as a whole will receive significant benefits in the form of a new public resource or revitalized job base, whereas in the former case the principal benefitted parties would be those private landowners who purchased the landlocked parcel. This private benefit would presumably "trickle down" to the public in the form of a more robust market in real property.

The difference in the type of public benefit involved in the two examples just discussed corresponds exactly to the difference between the legislative and the judicial role. The common law adjudicative process by its nature combines the retrospective and individualized process of resolving disputes between private parties with the broad and prospective task of setting precedent that will reap societal benefits. Legislatures, on the other hand, are in the business of enacting legislation that affects the public as a whole in a fully prospective way, so it is awkward, to say the least, when legislatures enact laws that are individualized and retrospective.[193] For that reason, courts are far better suited to adjust rights between the parties in the easement context than legislatures are, and that seems to be the point of the decisions striking down condemned easement statutes. The *Stop the Beach* plurality's judicial takings test essentially says the opposite, and therefore misapprehends the nature of the relationship between state courts and the legislature.

Of course, as mentioned at the outset of this Part, the plurality's judicial takings test is mere dicta, and does not represent the thinking of a majority of the Supreme Court. State courts are not bound to apply the plurality's test. Even if they were, the plurality's standard would not pose a barrier to state courts adopting this Article's propo-

193 Administrative law distinguishes legislative decisions, which are broad and prospective, from judicial decisions, which are narrow and retrospective. *Compare* Londoner v. City of Denver, 210 U.S. 373 (1908) (requiring notice and opportunity to be heard where administrative process disproportionately affected few landowners), *with* Bi-Metallic Inv. Co. v. State Bd. of Equalization, 239 U.S. 441 (1915) (dispensing with requirement of notice and opportunity to be heard where administrative action affected the public generally).

sal because it cannot be said with any certainty that landowners have an "established right" to a property rule entitlement in the easement context.

Conclusion

Easement law is a confusing mess, but it does not have to be. Logic and precedent dictate that easement cases be treated more like nuisance cases, in which courts balance the competing interests of landowners free from archaic formalities.