RELOCATING EASEMENTS AND FACILITATING DEVELOPMENT: IT'S TIME FOR CALIFORNIA TO ADOPT THE UNIFORM EASEMENT RELOCATION ACT

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INTRODUCTION

Practicing real estate lawyers all over the United States have long been familiar with a problem that can arise whenever a landowner-client seeks to develop land burdened by an easement: the current location of the easement prevents development of the land. However, if the easement can be moved—either to another location on the servient estate or even to another parcel—the development potential of the servient estate can be unlocked. Experienced counsel might advise the client to propose a new location for the easement, one that will serve the interest of the easement holder equally as well as the current location and further offer to relocate the easement and construct all necessary improvements at the servient owner's expense.

If the servient estate owner makes this kind of offer and the easement holder rejects it, what can the lawyer for the servient estate owner do? Until recently, in about half of the states, those that follow the so-called "mutual consent rule" for easement relocation, the servient estate owner must scuttle the development project unless it can entice the easement holder to consent—usually by making some kind of ransom payment.[03] In fifteen states and the Commonwealth of Puerto Rico, however, the servient estate owner could go to court and would have a reasonable chance of convincing a judge to approve a unilateral easement relocation based on either recent developments in the state's common law or an easement relocation statute.[04]

In 2020, the Uniform Law Commission (ULC), formerly known as the National Conference of Commissioners of Uniform State Laws, entered the field by approving and recommending a new uniform act, the Uniform Easement Relocation Act ("the U.E.R.A."), to state legislatures across the United States.[05] Since that time, six states (Arkansas, Nebraska, Oklahoma, Nebraska, Nevada, Utah, and Washington), have enacted the U.E.R.A.[06]

This Article offers a brief history of the legal background and law reform efforts preceding adoption of the U.E.R.A by the ULC. It also discusses California common law, which still adheres to the mutual consent

rule. The Article then explains the key provisions of the U.E.R.A and addresses some of the minor changes that several states have made to the scope of the act. Finally, the Article discusses the most frequently asserted objections to any change in the common law rule and the primary justifications for adoption of the U.E.R.A.[07]

The authors of this Article observe that California is in the process of rethinking many basic assumptions related to the legal environment for real estate development. In response to the state's acute affordable housing shortage, the legislature has recently enacted bold reforms to many areas of land use regulation. Some of these reforms revise the foundations of California environmental law to facilitate housing development.[08] Others encourage or mandate that local governments amend their zoning codes to facilitate new housing development by, for example, allowing "as of right" duplexes and accessory dwelling units on lots formerly restricted to single family zoning and making it easier to subdivide such lots into two smaller lots.[09] This Article encourages California to take another bold step and revise an outdated feature of its property law to facilitate development of land burdened by easements while still protecting the important property interests of easement holders.

I. BACKGROUND - THE LAW BEFORE THE U.E.R.A.

A. THE MUTUAL CONSENT RULE, ITS CRITICS, AND EXCEPTIONS

Beginning early in the nineteenth century, American courts regularly confronted disputes between servient estate owners and dominant estate owners (or other easement holders in the case of easements in gross) over the relocation of easements. In some early cases, a servient estate owner sought to relocate an easement.[10] In other cases, a dominant estate owner sought to relocate an easement.[11] Most of these initial decisions tended to focus on the practicality of the particular relocation under consideration, but occasionally courts offered a more formalistic approach emphasizing the physical permanence of an easement once its original location had been determined by agreement or use.[12] By the end of the nineteenth century, Leonard Jones' *Treatise on the Law of Easements* articulated a general rule, stated in relatively categorical terms: "A way once located cannot be changed by either party without the consent of the other."[13]

Over the course of the twentieth century, this categorical version of the mutual consent rule crystalized as courts rejected proposed or actual easement relocations that promised significant benefits for a servient estate owner,[14] or a dominant estate owner,[15] even though the relocation would cause no apparent harm to the easement holder or the servient estate. Two decisions played a particularly significant role in establishing the apparent orthodoxy of the mutual consent rule.

In *Stamatis v. Johnson*, the Arizona Supreme Court rejected a servient estate owner's proposal to relocate a prescriptive irrigation easement 26 feet to facilitate the construction of a residential subdivision.[16] In *Stamatis*, the servient owner estate offered to replace the irrigation ditch, which was located in the original right of way, with a modern, underground, concrete pipeline that would have furnished water in the same quantity and just as conveniently as the old ditch.[17] The court justified its application of the mutual consent rule by pointing to earlier twentieth century decisions,[18] and by asserting that the opposite approach, allowing the location of an easement to be varied when the benefits of relocation are substantial and the relocation would not harm the easement holder, would "incite litigation" and lower the value of and discourage investment in the parcels affected by the easement.[19]

In 1980, almost thirty years after *Stamatis*, the Maine Supreme Court in *Davis v. Bruk* reversed a trial court judgment permitting a servient estate owner to relocate, at her own expense, a vehicular right of way that passed so close to her house that traffic posed a risk of damage to the structure and put the servient owner and her guests in physical peril.[20] Here, the court justified its reliance on the mutual consent rule by citing earlier precedent,[21] and by claiming that any acceptance of moderation and flexibility in this area of law would introduce "uncertainty into land ownership," "proliferate litigation," deprive the dominant estate owner "of the security of his property rights in the servient estate," lead to "harassment," and confer an "economic windfall" on the servient owner.[22]

The solidification of this harsh, categorical rule did not lack critics. Justice Udall of the Arizona Supreme Court expressed his frustration with the majority decision in *Stamatis*. He observed that the court had effectively ordered the "reopening of an old, unsightly, wasteful, open irrigation ditch down the center of a 'blacktop public street' . . . just to satisfy the whim of the plaintiff," and added that the result "shocked my conscience.[23] According to Udall, the court could have easily exercised "its broad, equitable powers" and found a way to do "justice between the parties, without perpetuating for all times an archaic and dangerous instrumentality of irrigation."[24]

Perhaps in recognition of the harshness of the categorical mutual consent rule, some courts carved out exceptions permitting unilateral easement relocation if the relocated easement provides the same functional benefit to the easement holder, the servient estate owner absorbs all costs, and the relocation does not materially inconvenience the easement holder.[25] In *Brown v. Bradbury*, for example, the Colorado Supreme Court affirmed a unilateral easement relocation by relying on equity and earlier Colorado case law indicating that an irrigation ditch could be modified if it still provided "adequate and satisfactory means" for an easement holder to receive its water.[26] In *Cozby v. Armstrong*, a 1947 Texas decision, the court permitted the servient estate owner to divert a right of way that passed dangerously close to her house to a new but equally useful and actually more practical location for the dominant estate owner.[27]

Other courts sometimes drew on equitable balancing principles and effectively approved servient estate owners' unilateral easement relocations by denying injunctive relief to the easement holder when the degree of change in the location of the easement was modest, the interests of the servient estate owner were substantial, or the easement holder acquiesced to the relocation.[28] Kentucky courts also regularly allowed roadway easements to be modified unilaterally if the modification did not alter the termini of the easement and the relocation did not produce material inconvenience for the easement holder.[29] Finally, courts in several states permitted unilateral relocations of non-express easements to stand on similar equitable grounds, particularly in the case of easements created by implication,[30] or easements by necessity.[31]

B. STATE STATUTES PERMITTING UNLITERAL EASEMENT RELOCATION PRIOR TO THE U.E.R.A.

In some U.S. jurisdictions, statutes grant servient estate owners the ability to relocate an easement (or servitude) to permit development. The most important source of such authority is the Louisiana Civil Code. Grounded in its civil law tradition and borrowing from the 1804 French Civil Code (also known as the Code Napoleon),[32] the Louisiana Civil Code provides that a servitude may be relocated unilaterally by the servient estate owner if three conditions have been met: (1) the servitude's original location "has become more burdensome for the owner of the servient estate" or "prevents him from making useful improvements on his estate;" (2) the new location is "equally convenient" for the exercise of the servitude; and (3) "[a]ll expenses of relocation are borne by the owner of the servient estate."[33] The Civil Code of Puerto Rico has also long permitted servitude relocation on terms similar to the Civil Code of Louisiana.[34]

Several other states have also enacted statutes that permit unilateral relocation of certain kinds of easements. Two Idaho statutes, a New Mexico statute, and a relatively new Utah statute all allow a servient estate owner to relocate an irrigation easement at its own expense if the relocation can be achieved without impeding the water flow or injuring any water user or the dominant estate owner.[35] Another Idaho statute authorizes a servient estate owner to change the location of a private access road to any other part of the servient estate at the servient estate owner's expense if the change is "made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access."[36] Finally, a Virginia statute, originally enacted in 1992 and updated in 2019, authorizes Virginia courts to approve the relocation of an ingress and egress easement without easement holder consent, after notice and hearing, provided the court finds that "(i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than 10 years."[37]

C. CALIFORNIA LAW ON EASEMENT RELOCATION

California has historically followed the mutual consent rule, regardless of whether an easement was created by express grant or reservation, or by implication, necessity, or prescription. However, a few decisions reveal some cracks in the rule evidencing a drift toward more flexibility.

One of the oldest California precedents addressing relocation of an apparent easement is *Vargas v. Maderos*.[38] *Vargas* involved a "longstanding roadway" easement shown on a subdivision map at the time of purchase and apparently established by prescription or implication to permit the dominant estate owner access to a public highway.[39] Although the servient estate owner plowed over the original roadway such that it could no longer be used as a right of the way, the court observed that "the parties by mutual consent substituted therefor a newly located way," which was subsequently used by the dominant estate owner, and thus the court found that "the rights of the parties were transferred to the new location."[40] The same year, a California court approved the relocation of a prescriptive easement when its course was changed by the servient estate owner's tenant because the easement holder once again consented to the relocation.[41]

Many of the California relocation cases involve a prescriptive easement or a judicially established easement where both the historical location of the easement is at issue as well as a party's ability to relocate. For example, in *Wallace Ranch Water Co. v. Foothill Ditch Co.*, the California Supreme Court resolved a complex dispute over the

continuing existence of an irrigation ditch easement created by a judicial partition action.[42] After finding that the location of the easement was relocated by mutual consent of the servient and dominant estate owners through the means of dams and diversion of the water to a different location and abandonment of the former ditch, the court noted that "that mere relocation by mutual consent of a right of way or other easement does not alter the rights of the owner of the easement."[43]

The California Supreme Court revisited easement relocation in *Hannah v. Pogue*, a case in which the owner of a dam and a ditch (the dominant estate owner) attempted to relocate the ditch arguing that the scope of the easement, which had been created by prescription, was viewed too narrowly and should have been broadly interpreted to permit relocation.[44] The California Supreme Court demurred, however, holding that "[t]here is no right . . . to change the location of an easement over the land of another, even if it would cause no harm to the owner or would actually benefit him."[45]

The California Supreme Court continued to implement the mutual consent rule in *Youngstown Steel Products v. City of Los Angeles*, a case involving an "aerial only" grant of an easement for installation and maintenance of poles, wires and fixtures that was determined to be fixed by usage where the utility lines were installed.[46] The owner of the servient estate wanted to use its property in a manner that would interfere with the wires at the existing aerial location and sought to require the owner of the dominant estate to raise the wires.[47] As the precise location of the easement was not provided by grant, the Supreme County stated that "[w]here the right of way has been used at a particular location with the acquiescence of the servient owner, the parties have, in effect placed their own practical construction upon the grant, and the easement will be regarded as fixed at that place."[48] Furthermore, the court held that servient estate owner's attempt to compel the holder of the dominant estate to "relocate" the easement to a higher plane failed, noting that "[t]he parties, of course, could have made such an agreement [to change the easement location to accommodate the interest of the holder of the servient estate], but it is clear that they did not do so here."[49] In the end of the day, however, the court concluded that the parties had effectively agreed to relocate the easement to the new height by agreement.[50]

California appellate courts have followed the earlier holdings of the California Supreme Court and applied the mutual consent rule in a variety of circumstances that have prevented servient estate owners from developing their land.[51] (In Part II.B of this Article, we will revisit the facts of two of those decisions and see how they might have played out had the U.E.R.A. been in place.) However, in *Kosich v. Braz*, an appellate court acknowledged the mutual consent rule but contorted itself to minimize its impact.[52]

Kosich v. Braz involved a 12-foot-wide easement for roadway and utility purposes that had been reserved by the easement holder but which, due to the configuration of the easement, was hazardous and impractical to use in its original location, leading the dominant estate owners' vehicles often to pass beyond the 12-foot width of the easement.[53] After the servient estate owner erected a steel post and chain at a critical location, the dominant estate owner attempted to relocate the easement by arguing that relocation was necessary to effectuate the "original intent" of the parties.[54] Although a strict application of the mutual consent rule would have permitted the holder of the servient estate to maintain the post and fence, the court found that the parties' historical conduct evidenced implied mutual consent to an effective relocation consistent with the original intent of the express easement.[55]

Just as in *Kosich*, a number of California appellate courts seem to be willing to avoid the harshness of the mutual consent rule by finding an implied consent or acquiescence to relocation.[56] For example, in *Red Mountain, LLC v. Fallbrook Public Utility District*, a 2006 case involving an access easement to Red Mountain Dam, which was "obliterated" by the expansion of a reservoir, the trial court found, and the appellate court agreed, that the parties impliedly consented to the relocation of the easement through historical use and acquiescence.[57]

D. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES

Easement relocation law in the United States began to change much more dramatically after 2000 when the American Law Institute offered a new approach to easement relocation in the *Restatement (Third) of Property: Servitudes* (the Restatement) based largely on the civil law rule found in the Louisiana Civil Code.[58] Under Section 4.8(3) of the Restatement, a servient estate owner can relocate an easement, without the easement holder's consent, under the following conditions:

> (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner's expense, to permit normal use or development of the servient estate, but only if the changes do not
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> (a) significantly lessen the utility of the easement,

(b) increase the burdens on the owner of the easement in its use and enjoyment, or

(c) frustrate the purpose for which the easement was created.[59]

Judicial reactions to the Restatement rule were mixed. A number of state courts, including the state supreme courts of Colorado, South Dakota, and Massachusetts, and courts of appeal in Nebraska and Illinois, quickly adopted the Restatement approach to easement relocation and applied it in a robust manner.[60] Courts in New York and Nevada adopted the Restatement but limited its application to undefined easements.[61] Other state courts adopted the Restatement but limited its application even more narrowly: either to sub-surface easements,[62] prescriptive easements,[63] or easements by necessity.[64]

A handful of state courts also rejected the Restatement approach, repeating the rationales offered by the older mutual consent rule decisions.[65] Several legal scholars endorsed the Restatement approach to servitude relocation.[66] Others were critical.[67]

II. THE U.E.R.A.: A SHORT EXPOSITION AND TWO APPLICATIONS

The ULC launched its project to create a uniform act on easement relocation in 2010 with the hope of bringing coherence and clarity to the subject. The Drafting Committee worked with three specific goals in mind: first, create a uniform act based generally on the Restatement approach; second, exempt certain easements from the scope of the act to ensure it can be enacted; and third, create substantive and procedural safeguards to respond to judicial and academic criticisms of the Restatement.

The U.E.R.A., as promulgated by the ULC, features 17 sections.[68] In this part of the Article, we provide a brief exposition of the act's most important provisions, including those addressing the act's scope, the basic relocation right and substantive conditions for relocation, procedural protections, expenses, waiver, and legal transition. We then illustrate the promise of the U.E.R.A. by reviewing two older California cases decided under the mutual consent rule assuming the U.E.R.A. could be applied to the underlying factual scenarios.

A. KEY FEATURES OF THE U.E.R.A.

1. SCOPE

Section 3 addresses the scope of the U.E.R.A.t and features three key parts. First, section 3(a) specifies that the act applies to "an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method."[69] This section assures that the act will apply to *express* as well as *non-express easements* since both kinds of easements can create problems for development or alternative legitimate uses of servient estates.

Next, section 3(b) enumerates three specific categories of easements that cannot be relocated under the act: (1) public-utility easements; (2) conservation easements; and (3) negative easements.[70] Section 2(10) of the U.E.R.A. defines a "public-utility easement" broadly to mean "a nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility under federal law or law of this state or a municipality" and includes "an intrastate utility, an interstate utility, or a utility cooperative.[71]

A conservation easement is usually established to preserve in perpetuity the current physical condition of land and is be held by a governmental or non-profit entity that does not own any adjacent or nearby land that could serve as a dominant estate.[72] Because perpetuity is essential to preserve the favorable tax-deductible treatment of land donations for conservation easement purposes,[73] Section 3(b) of the U.E.R.A. exempts conservation easements from relocation and generally defines them in a manner consistent with the Uniform Conservation Easement Act (U.C.E.A.).[74]

The U.E.R.A. also excludes all negative easements from its scope.[75] Thus, an easement of light or view, an easement giving a dominant estate owner greater lateral support from an adjacent estate than otherwise provided by the common law, an easement giving a dominant estate owner the right to prevent a servient estate owner from altering the scenic character of land, a restrictive covenant prohibiting industrial or commercial use of an estate, or an environmental covenant restricting certain uses of land to mitigate prior environmental contamination (often associated with an environmental response project), would all be excluded from relocation under the act.[76] As discussed in Part III, three of the six states that have adopted the U.E.R.A.so far have either broadened "the public utility" carve out or excluded a few other categories of easements from the act's scope.

Finally, Section 3(c) provides that the U.E.R.A. does not prevent a servient estate owner and an easement holder from relocating an easement by mutual consent.[77] This is important because a servient estate owner and an easement holder can always—and often will—agree to relocate an easement on their own terms without using the act.[78] This subsection preserves this basic right.

2. THE RIGHT TO RELOCATE

Section 4 is the core of the U.E.R.A. It establishes the servient estate owner's fundamental right to relocate an easement eligible for relocation under Section 3 provided relocation does not materially: (1) lessen the utility of the easement; (2) increase the burden on the easement holder in its reasonable use and enjoyment of the easement; or (3) impair an "affirmative, easement-related purpose for which the easement was created."[79] These three conditions generally mirror section 4.8(3) of the Restatement. Section 4, however, adds four more substantive conditions for an easement relocation. The proposed relocation cannot materially: (4) impair the safety of the easement holder or others entitled to use and enjoy the easement, (5) disrupt the use and enjoyment of the easement, unless the servient estate owner substantially mitigates the disruption, (6) impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate; or (7) impair the value of a security-interest holder's collateral or other recorded real property interests.[80]

A detailed discussion of the entirety of this section is available elsewhere,[81] but several key features are worth mentioning here.

No Initial Showing of Necessity: Unlike the Restatement and Article 748 of the Louisiana Civil Code,[82] Section 4 of the U.E.R.A. does not require a servient estate owner seeking to relocate an easement to demonstrate any particular level of necessity for the proposed relocation.

Right to Relocate Only Belongs to Servient Estate Owner: Section 4 does follow the Restatement, however, in providing that the act's relocation right belongs solely to the servient estate owner, not the easement holder. A few civil law systems have granted a dominant estate owner a right to relocate a servitude on terms roughly similar to the servient estate owner's right to relocate a servitude under the French Civil Code.[83] However, the ULC chose not to follow that path for several reasons, the most important of which is that an easement holder already enjoys the right under the common law to respond to changing economic conditions and technological developments by seeking to change the manner, frequency, and intensity of an easement's use, as long as the change or intensification does not cause unreasonable damage to the servient estate or unreasonable interference with its enjoyment.[84]

Material Impact or Disruption: Section 4 of the U.E.R.A. ensures that relocation of an easement does not cause *material* harm to the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate. The adverb "materially," which modifies all of the substantive criteria articulated in Sections 4(1)-(7), is crucial and intentional. It permits a relocation to proceed even if a relocation will have some effect on one of those interests but that effect is *immaterial*, that is, negligible or trivial.[85] In short, the materiality qualification provides an essential and commonplace margin of elasticity for a court confronted by a proposed easement relocation.

Affirmative Easement-Related Purpose: The most important modification of the three conditions borrowed from Section 4.8(3) of the Restatement is found in Section 4(3) of the U.E.R.A, which clarifies that a court's focus should be on prevention of material impairment of "an *affirmative, easement-related purpose* for which the easement was created."[86] Building on the teaching of several judicial decisions adopting the Restatement this provision makes clear that an easement holder cannot block a proposed easement relocation simply by asserting that an easement was actually intended to give the easement holder a veto over development on the servient estate.[87] Section 4(3), of course, does not prevent a property owner from negotiating for and obtaining a binding agreement in the form of a negative easement or restrictive covenant that runs with the land to prevent a neighbor from using their land for some particular use—say commercial or industrial use—which would then be exempt from the act's scope.[88] But it does encourage landowners and their lawyers to be more transparent about their intentions when they negotiate for and draft easements and covenants.

Enhanced Protection for Easement Holder Interests: Sections 4(4) through 4(6) of the U.E.R.A. establish new substantive conditions for a unilateral easement relocation not found in the Restatement but still consistent with its spirit. For example, Section 4(5) assures that a relocation will not materially "during the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the servient estate owner substantially mitigates the duration and nature of the disruption."[89] This section will be important whenever an easement is currently in active use. In conjunction with Section 9 of the act, which entitles an easement holder to enter, use, and enjoy an easement in its original location until all improvements necessary for use and enjoyment in the new location are complete and a relocation affidavit has been filed in the public records,[90]

this provision addresses concerns about temporary disruptions during the process of relocating an easement and incomplete relocations.

Section 4(6) prevents an easement relocation that would materially "impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate."[91] This provision reinforces the first three parts of Section 4 in the context of an appurtenant easement by focusing on the impact of the relocation on the functional utility or value of the dominant estate. It could be relevant if the proposed relocation of an access easement altered access points on the dominant estate and required material changes to improvements already constructed on the dominant estate,[92] if a change in location of access points had a material and detrimental impact on the development potential—and thus the value—of the dominant estate,[93] or if relocation would result in a material increase in maintenance costs for an easement holder.[94]

***Other Parties Interests*:** Finally, Section 4(7) breaks new ground by preventing material impairment of the interest of a security-interest holder of record in the value of its collateral, a real-property interest of a lessee of record in the dominant estate, or a recorded real-property interest of any person in the servient or dominant estate.[95] So, for example, if a security-interest holder of record with an interest in either the servient estate or dominant estate could show that the value of its collateral will be materially impaired by a proposed relocation, the relocation would not be able to proceed.

3. PROCEDURAL PROTECTIONS

In response to some criticism of the Restatement and to conform to several decisions adopting the Restatement that stressed the importance of channeling non-consensual easement relocation through judicial proceedings,[96] Sections 5 and 6 of the act require a servient estate owner who seeks to relocate an easement to do so through a judicial proceeding. Section 5(a) requires a servient estate owner seeking to use the U.E.R.A. to file "a civil action."[97] The rest of Section 5 establishes the necessary parties to an easement relocation proceeding, provides for notice and service, including special rules for service of holders of severed, subsurface mineral interests, and specifies the contents of the complaint.[98] Section 6 details all of a court's obligations when an easement relocation action is filed, including special rules dealing with the contents of an order authorizing a relocation.[99] Section 6 also addresses the servient estate owner's obligation to record an order authorizing a relocation.[100]

4. EXPENSES

Section 7 follows the Restatement by requiring the servient estate owner to pay all "reasonable expenses" of relocation and illustrates what of some of those expenses might be.[101] Notably, Section 7 does not displace the general American rule for attorney fees, and, therefore, each party to a contested easement relocation proceeding will still be responsible for paying its own litigation-related attorney fees, in the absence of other applicable state law.[102]

5. AFFIDAVIT OF RELOCATION

Section 9 of the U.E.R.A. addresses another concern about the Restatement's approach to easement relocation—the possibility that a servient estate owner will commence the physical work necessary to relocate an easement but not finish the job. It responds in two ways. First, it requires the servient estate owner to record an affidavit attesting that all the work necessary to make the easement usable in its new location is complete **and** send a copy of the affidavit to the easement holder and other parties.[103] Second, it assures that the easement holder and others will have the right to use and enjoy the easement in its current location until all the work necessary for relocation is completed and the relocation affidavit is recorded.[104]

6. NON-WAIVER

Section 11 of the U.E.R.A. departs from the Restatement more fundamentally by making the act's core relocation right immune from waiver.[105] It does so by prohibiting the "waiver, exclusion, or restriction" of the relocation right established under the act and by prohibiting parties from drafting around Section 4 by requiring easement holder "consent to amend the terms of an easement."[106] The final subpart of Section 11 also rejects the narrow approach to easement relocation followed by courts in Nevada and New York that limited application of the Restatement to undefined easements,[107] by providing that the right to relocate an easement is not waived, excluded or restricted even if "the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication."[108]

7. LEGAL TRANSITION - RETROACTIVE EFFECT

The final crucial provision of the U.E.R.A. is Section 14, which states that the act "applies to an easement created before, on, or after" the act's effective date.[109] By providing for retroactive effect, Section 14 guarantees that the act will be useful in facilitating the relocation of easements created many years, decades, or now even centuries ago. Retroactive application of the act will not constitute an

uncompensated taking of a property interest under the Fifth Amendment of the U.S. Constitution, however, because the easement holder is not denied use and enjoyment of the easement. The U.E.R.A. maintains the easement but simply allows the servient estate owner to move it to a new location that provides the same functional benefit as the prior location, without any material diminution in the physical condition, use, or value of the dominant estate or improvements on that estate.[110] Interestingly, the Idaho Supreme Court has already determined that retroactive application of the Idaho statute allowing for relocation of a vehicular access easement under conditions roughly similar to the Restatement (and the U.E.R.A.) does not constitute a taking.[111]

B. RESTAGING TWO CALIFORNIA CASES UNDER THE U.E.R.A.

To get a better sense of what adoption of the U.E.R.A. would mean for California real estate development, we invite readers to consider the facts of two California decisions from the 1960s and 1970s that applied the mutual consent rule and rejected proposed easement relocations. Application of the U.E.R.A. may or may not have changed the ultimate outcome of either case, but it might well have led to a negotiated relocation opening the way for useful development of the respective parcels of land.

In *Tarr v. Watkins*, Ashia Tarr, the owner of an undeveloped vacant lot (lot 16) had granted in 1948 to the owners of a vacant neighboring lot (lot 17), a 15 foot non-exclusive easement for "road purposes."[112] This 1948 grant was apparently made without the receipt of any consideration. The owners of lot 17, the Bidens (no connection to the former President we presume) had left that lot vacant and unimproved and had never used the easement. Eventually Tarr made plans to build a house on her lot but discovered that the easement she had granted to the Bidens ran right through the part of her property which was suitable for building. Tarr proposed a relocation of the easement that would permit her to build a house on her property and "still provide the same road facilities over and across" her property to lot 17. The new route she proposed had essentially the same termini on the boundaries of her lot as the original easement but did narrow the easement's width to 10 feet in some portion of the route and moved the easement about 5 feet to the north and incorporated two modest turns.[113] Relying on the mutual consent rule as expressed in *Youngstown Steel Products*, the court of appeal rejected the plaintiff's judicial request to relocate the easement holding that the dominant estate owner was entitled to insist upon the same defined width of the easement even if this gave him "a wider way than necessary" and after finding that the proposed relocation would constitute a "substantial change."[114]

If the facts of *Tarr* were to arise after California's adoption of the U.E.R.A., she would have a strong case to propose a relocation that did not alter the width of the easement, avoided turns as much as possible, and perhaps moved the termini of the easement slightly to the north. Given that the dominant estate was still undeveloped, this minor change in termini probably would not have materially lessened the utility of the easement or increased burdens on the easement holder's use and enjoyment of the easement and probably would not have materially impaired the physical condition, use, or value of the dominant estate or any improvements on the dominant estate."[115] The dominant estate owner could have certainly contested these claims in the judicial proceeding but given the overall modest scope of the relocation (5 feet or less) and the absence of any development or actual use of the dominant estate, the lawyer for the Bidens would likely have counseled them to negotiate for an even more acceptable relocated route, perhaps with some improvements in grading or paving that might have actually improved the utility of the easement, or perhaps seek some other modest consideration.

Next consider *Keith v. Superior Court*, an even more dramatic case in which a 337- house subdivision development in the Benedict Canyon area of Los Angeles was held up because of an easement.[116] In this case, an easement was created by grant in 1945 to provide access across a tract of land to two parcels that did not have frontage on a public street. A paved road was built along the route of the easement which allowed for the construction of two homes on the two adjacent dominant estates. Time passed and eventually a developer, Allied-Canon Company, sought to develop the servient estate. The developer obtained subdivision approval from the City of Los Angeles, but the approval was conditioned on the requirement of constructing a retention basin in a spot that would have interfered with current location of the access easement. The developer offered to buy the homes or the easement, but the dominant estate owners refused to sell. At this point, the servient estate owner started to build a new road and told the dominant estate owners it would relocate their easement to the new location involuntarily once the new road was complete. The dominant estate owners sued to enjoin any interference with their easement. Although the trial court refused to issue a preliminary injunction after it "weighed the equities," the court of appeal reversed and ordered the trial court to issue an injunction relying on the mutual consent rule.[117]

Had the U.R.E.A. been in place, what the court described as "an epic-war" between the parties might well have been avoided.[118] The developer would have known from the

outset that acting to relocate the easement without judicial approval or dominant owner consent would be impossible. Instead, the U.E.R.A. would have led the developer to propose as modest a relocation as possible that would still allow for development of the subdivision or it might have helped the developer to negotiate with the City for an adjustment of the retention basin condition to facilitate a good faith application for relocation of the easement under the act. The presence of the U.E.R.A would have channeled all the parties (servient estate owner, dominant estate owner, and the City) into more fruitful negotiations. If litigation were still required, the trial court would not have been left to improvise using a nebulous "balancing of the equities" analysis and instead would have been required to apply the seven factors outlined under Section 4 of the act and could have made sure, if it granted the request to relocate, that all works necessary for the dominant estate owners' use of the relocated easement were complete before they were actually required to use the new route.[119]

In summary, the U.E.R.A. does not guarantee that servient estate owners will always be able to relocate every inconveniently located easement. However, it will provide a carefully planned judicial pathway to resolve these kinds of disputes, and it will provide parties with much needed guidance about the parameters for a successful judicial request for relocation. As discussed in Part IV below, we also predict that adoption of the U.E.R.A. will lead to more predictability and certainty, will facilitate more development of servient estates, and will reduce the cost of obtaining easements.

III. MINOR TWEAKS TO U.E.R.A. IN STATES ADOPTING THE ACT

Three of the six states that have so far adopted the U.E.R.A. (Nebraska, Washington and Oklahoma) have done so without making any changes whatsoever to the act.[120] Three states, however, have made minor changes by expanding the carve-out for public-utility easements and by excluding other kinds of easements from relocation under of the act.

Arkansas, for instance, added easements held by certain classifications of railroads to the already excluded category of public-utility easements,[121] and also excluded a "telecommunication easement," an easement used by the State Highway Department for highway purposes, and an "easement or right of way held by a public entity" from relocation under the U.E.R.A.[122] Utah excluded a "water-conveyance easement," a "public-entity easement," an "easement held by a mine operator and used in connection with a vested mining use," and "an easement associated in any way with a highway or public transit facility" from the scope of the act.[123] Finally, Nevada excluded a "public-entity easement," an "easement associated with a public road," and an "easement created by a declaration in accordance with the provisions of chapter 116 of NRS [the Nevada version of Uniform Common Interest Ownership Act]" from relocation under the act and also defined a public entity to include not just a federal, state, or local government entity and agency but also a "special assessment district" and a "general improvement district."[124]

We understand why local political considerations in Arkansas or Utah might have necessitated carve-outs for railroad easements, water-conveyance easements, or certain mining easements, but it is somewhat puzzling to us why Utah and Nevada felt it was necessary to exclude a "public-entity easement," however broadly or narrowly defined, from the scope of the U.E.R.A. Public entities normally enjoy the power of eminent domain. If a servient estate owner were bold enough to seek a judicial relocation of a "public-entity easement" without the consent of the public entity involved and prevailed, wouldn't the public entity just initiate a condemnation proceeding to put the easement back in its prior location? Perhaps this particular carve out just reflects the political power of local government lobbying groups in state legislatures. In any event, we doubt this additional carve out will undermine the usefulness of the U.E.R.A. for its primary purpose—allowing servient estate owners a reasonable opportunity to relocate an old, privately held easement.

IV. JUSTIFICATIONS FOR ADOPTION OF THE U.E.R.A.

In a 2022 law review article, one of the authors of this Article acknowledged the primary policy arguments that judicial and academic critics of the Restatement have made in opposition to any kind of unilateral relocation right over the last 25 years and presented countervailing policy justifications for adopting the U.E.R.A.[125] The authors of this Article adhere to those views and continue to believe that the version of unilateral, but still easement-holder protective, relocation offered in the U.E.R.A. represents an economically desirable, welfare enhancing, socially constructive, and fair doctrinal advance in American property law.

A. SHORT-TERM CERTAINTY VERSUS LONG-TERM COOPERATION AND FLEXIBILITY

Both judicial and academic critics of unilateral easement relocation have complained that recognition of any kind of unilateral relocation right deviating from the mutual consent rule will lead to uncertainty, erode trust between the parties to an easement, and provoke unnecessary

litigation and even harassment of easement holders.[126] Many of these critics also faulted the Restatement for failing to require a servient estate owner to seek judicial approval of a proposed relocation, a failure that could lead the servient estate owner to rush to relocate a burdensome easement and discourage negotiation.[127]

We believe these concerns about uncertainty, lost opportunity for negotiation, and increasing litigation are overblown and countered by some of the key features of the U.E.R.A. First, the U.E.R.A.'s requirement that the servient estate owner bring a civil action to relocate an easement if the easement holder's consent cannot be obtained and the detailed rules for an easement relocation proceeding should alleviate fears of self-help relocations and potential harassment. In addition, the possibility that a court might approve a proposed relocation under the material impairment test offered under Section 4 will, we believe, incentivize both parties to engage in good faith negotiations to avoid costly litigation over minor or otherwise reasonable relocation proposals. An easement holder, in particular, may be more inclined to think carefully about withholding consent to a reasonable relocation request if it wants to obtain the servient estate owner's cooperation for some future adjustment in the manner, frequency, and intensity of use of the easement. Finally, even if the transition to judicially controlled easement relocation under the U.E.R.A. does produce some short-term uncertainty, the act will still produce significant long-term gains in utility, cooperation, and flexibility, especially when easement holders realize they can no longer wield bilateral monopoly power under the mutual consent rule to block all development of a servient estate or extract large ransom payments.

B. ECONOMIC FAIRNESS VERSUS AGGREGATE UTILITY AND SYSTEMIC GAINS FOR THE CALIFORNIA PROPERTY LAW SYSTEM

Judicial and academic critics of unilateral easement relocation have long complained that retroactive adoption of a unilateral relocation rule—either by common law adoption of the Restatement or through statute—might produce windfall gains for servient estate owners and windfall losses for easement holders based on initial bargaining and subsequent market transactions that factored in the allegedly immutable mutual consent rule.[128] These critics have thus argued that any adjustment to an easement's location should only occur through a market transaction.[129]

The first response to this windfall argument, of course, is that it is difficult to know whether original parties to any easement transaction or their successors ever gave much attention to an easement's precise location or the possibility of its subsequent relocation. Some experts in the field such as Professor Susan French of UCLA Law School, the Reporter for the Restatement, believe that most transacting parties likely gave little or no thought to these issues.[130]

In contrast, the big advantage of the U.E.R.A over the mutual consent rule and its grant of bilateral monopoly power to the easement holder becomes most apparent in the case of easements created many decades ago by long-since departed landowners and when changes in surrounding economic and social conditions have created opportunities—and indeed urgent need—for new development. In these situations, relocation of an easement under the still rigorous terms of the U.E.R.A. can unlock significant economic and social gains not only for the servient estate owner but also for other market participants, including future homeowners, tenant households, and business owners and customers, all of whom might be benefitted by the enhanced development of the servient estate.[131]

Two other systemic gains for California property law are likely to occur if the state legislature adopts the U.E.R.A. First, by making it possible for a servient estate owner to relocate an easement in the face of adamant easement holder opposition, the U.E.R.A., just like the Restatement rule, promises to "encourage the use of easements and lower their price by decreasing the risk [that] easements will unduly restrict future development of the servient estate."[132] In other words, landowners should be more willing to grant an easement knowing it can be relocated later, and, therefore, the cost for dominant estate owners and others to acquire easements should come down. In short, the U.E.R.A. could well lead to more easements at reduced cost and meanwhile produce greater flexibility and precision in private land use planning.

Second, California property law may also benefit in an adjacent area of property law—the law concerning prescriptive easements and other kinds of non-express easements. Prescriptive easement and implied easement disputes are ubiquitous in American law, and as our earlier summary of California easement relocation cases demonstrates, in California as well. Every year dozens of prescriptive easement disputes are resolved by reported judicial decisions.[133] Unreported prescriptive easement disputes are even more common. The same is no doubt true for other kinds of non-express easements such as easements by necessity and easements implied by prior use.[134] The U.E.R.A. promises to lower the temperature of disputes over non-express easements and make them easier to settle. Because the U.E.R.A. applies to all kinds of non-express easements, such as easements created by estoppel, implication, necessity, or prescription, as well as express

easements,[135] a purported servient estate owner should be more inclined to reach an agreement with a neighbor claiming a non-express easement because the disputed easement could still be moved if its location imperils future development of the servient estate.

C. MICRO-LEVEL DOCTRINAL SYMMETRY VERSUS BROADER FUNCTIONAL RECIPROCITY

Restatement critics have frequently contended that another reason to maintain the mutual consent rule is that it applies with equal force to both the easement holder and the servient estate owner.[136] This argument, seemingly grounded in notions of doctrinal symmetry, has appealed to a number of courts as well.[137] However, we believe that a broader and deeper view of doctrinal symmetry supports adoption of the U.E.R.A.

The U.E.R.A., just like the Restatement approach to easement relocation, actually rebalances the law of easements more profoundly by giving the servient estate owner a judicially controlled opportunity to respond to changing social and economic conditions that matches an important power that an easement holder already has to respond to similar changes.[138] Recall the well-established but muddy common law rule that an easement holder can "use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the [easement]," and that the easement holder can change the "manner, frequency, and intensity" of that use over time "to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by [the easement]."[139] As noted above, California adheres to essentially the same muddy rule of reason under the heading of "secondary easements."[140] American property law scholars have long debated exactly how much flexibility this rule of reason creates,[141] but the weight of evidence suggests it does give an easement holder a significant amount of flexibility in the face of changing conditions.[142] The U.E.R.A. thus introduces a measure of real functional reciprocity into the law of easements by giving the servient estate owner as well as the dominant estate owner the ability to respond to changed conditions as long as that response does not materially harm the easement holder.[143]

D. INVIOLABLE PROPERTY RIGHT VERSUS LONG-TERM, CONCURRENT RELATIONSHIP

Finally, supporters of the traditional common law mutual consent rule have often argued that an easement is no less dignified and significant a property right as a fee simple absolute and thus an easement holder's rights cannot be subject to any nonconsensual alteration even if alteration would not impose any material economic, social, or aesthetic harm to the easement holder.[144] Adoption of the Restatement or any unilateral relocation rule, they argue, would demote an easement from a robust, inviolable, fully possessory interest in land on a par with the fee simple into an inferior and malleable mere use right.[145]

The obvious flaw in this position is that outside the narrow debate over easement relocation an easement has always been understood to be more malleable, more contingent, and more transitory than a fee simple estate in land. Consider that an easement is, first and foremost, a *nonpossessory* interest in land,[146] meaning that the easement holder cannot possess the rest of the servient estate and cannot possess the land subject to the easement for purposes unrelated to the easement.[147] Consider also the frequently observed rule that an easement holder's right of use and enjoyment must be exercised in a manner that imposes the least possible interference with the servient estate owner's residual rights to use and develop the rest of the servient estate not burdened by the easement.[148] This principle, often called the *civiliter* principle in the Roman and French law of servitudes,[149] signals quite clearly that an easement does not provide its holder with anything like absolute dominion over the servient estate like a fee simple estate.

Finally, consider all the ways that an easement can be terminated, even when it is expressly denominated as perpetual.[150] It can be lost by abandonment or by non-use.[151] It can end when the specific purpose for which it was created no longer exists,[152] when a building that serves as a dominant or servient estate is destroyed,[153] when an easement holder of a non-commercial easement in gross dies,[154] when an easement holder engages in misuse or overburdens the servient estate,[155] when a servient estate is sold to a bona fide purchaser without notice,[156] or when an easement is created after a mortgage attaches to the servient estate and then a judicial or non-judicial foreclosure occurs and the easement holder is joined or otherwise given notice.[157] And the list goes on.[158] The inference is obvious: an easement is simply not as durable or temporally indefinite as a fee simple estate.[159]

In sum, the legitimacy of an easement as a staple form of property depends on its capacity to protect the easement holder's interest in *productive use* of the easement and the correlative recognition that the easement holder's use must not interfere with the servient estate owner's ability to put the servient estate to such use.[160] The U.E.R.A. acknowledges and protects both the easement holder and the servient estate owner's interest in productive use of their respective property rights.

V. CONCLUSION

California law is clearly moving in the direction of fostering development, and especially redevelopment, of land, to meet critical housing needs and other urgent needs of its residents. The U.E.R.A. represents a thoughtful, balanced approach to removing a common impediment to development and redevelopment while still protecting the rights of easement holders and other parties. Six states have recently adopted the U.E.R.A. to enhance the land development climate in their jurisdictions while still protecting property rights. The U.E.R.A. provides clear judicial guidance in easement relocation disputes and will encourage parties to reach amicable relocation agreements outside of court.

Some years ago, the Supreme Court of Appeal of South Africa was confronted with a case that gave it a chance to reconsider South Africa's law on servitude relocation.[161] After reviewing developments around the world, including the adoption of the Restatement in some U.S. states, and after considering the success of the civil law approach to relocation in Louisiana and many other civil and mixed jurisdictions around the world, that court fashioned a new rule for South Africa based on the Restatement and the civil law approach.[162] Summing up its reasoning, the court explained:

Properly regulated flexibility will not set an unhealthy procedure or encourage abuse. Nor will it cheapen the value of the registered title or prejudice third parties.[163]

If a leading South African court can see its way forward to a new rule on servitude relocation, perhaps California can do the same if, and when, it considers adoption of the U.E.R.A.

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03 See *infra* notes 10-22, 65 and accompanying text.

04 See *infra* notes 32-37, 60-64, and accompanying text. In other states, the law is less clear with courts allowing unilateral easement relocations only in narrow situations governed by a balancing of the equities doctrine. See *infra* notes 28-31 and accompanying text.

05 Unif. Easement Relocation Act (Unif. Law Comm'n 2020) (hereafter U.E.R.A). See https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails.

06 L.B. 501, 117th Leg., (Neb. 2021) (enacting Neb. Rev. Stat. § 76-2,138 et seq.); H.B. 132, 64th Leg., (Utah 2022) (enacting Utah Code Ann. § 57-13c-101 et seq.); H.B. 1408, 94th Leg., (2023 Ark.) (enacting Ark. Code Ann. § 18-11-701 et seq.); S.B. 5005, 68th Leg., (Wash. 2023) (enacting Wash. Rev. Code Ann. § 64.65.010 et seq.); A.B. 192, 83rd Leg. (Nev. 2025) (enacting a new chapter to Nev. Rev. Stat. § 10:112.1 et seq., effective October 1, 2025); H.B. 1060, 60th Leg., (Okla. 2025) (enacting Okla. Stat. tit. 60, §1501 et seq.)

07 For a more detailed examination of the common law and statutory law addressing easement relocation prior to adoption of the U.E.R.A., developments in other countries, a section by section exposition of the U.E.R.A., and a thorough discussion of objections to and justifications for the U.E.R.A, see John A. Lovett, *Easements and Change*, 74 BAYLOR L. REV. 1 (2022).

08 *See* A.B. 130, 2025-2026 Reg. Sess., Ch. 22 (Cal. 2025); S.B. 131, 2025-2026 Reg. Sess., Ch. 24 (Cal. 2025); Laura Rosenthal et al., *California Rolls Back its Landmark Environmental Law*, New York Times (June 30, 2025).

09 *See* S.B. 9, 2021-2022 Leg., Reg. Sess. (Cal. 2021), enacting Cal. Govt. Code §§ 65852.21, 66411.7 (permitting duplexes and subdivision of former single family lots in two lots). Cal. Govt. Code §§ 65852.2(a)(3)(A) (2023); 65852.2(c)(2)(C) (2023) (allowing ADUs). *See generally* Clayton Nall, *Plain-Bagel Streamlining? Notes from the California Housing Wars*, 75 Case W. Rsrv. L. Rev. 263 (2024) (analyzing recent California's zoning reform legislation).

10 *Wynkoop v. Burger*, 12 Johns 222, 223 (NY 1815); *Gore v. Fitch*, 54 Me. 41, 45 (1866).

11 *Jennison v. Walker*, 11 Gray 423 (Mass. 1858).

12 *Gore v. Fitch*, 54 Me. 41, 45 (1866) ("The day after its execution the rights of the grantee were the same as the plaintiff's rights today. Whatever was conveyed could not be reclaimed and new rights substituted.")

13 Leonard A. Jones, A Treatise on the Law of Easements § 352, at 283 (1898).

14 *Smith v. Jackson*, 104 S.E. 169, 170 (N.C. 1920); *Sakansky v. Wein*, 169 A. 1-2 (N.H. 1933).

15 *White Brothers & Crum Co. Ltd. V. Watson*, 117 P. 497 (Wash. 1911). In *White Brothers*, the Washington Supreme Court rejected a dominant estate owner's proposal to relocate and improve an irrigation easement over mountainous terrain after a severe flood had damaged the original flume and ditch and, moreover, refused to consider any equitable adjustment

of the location and any hardship imposed on either party. Id at. 498-99.

16 *Stamatis v. Johnson*, 224 P.2d 201 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952).

17 Id. at 202-03.

18 Id. at 203 (citing and discussing *White Brothers White Bros. & Crum Co. Ltd. v. Watson*, 117 P. 497 (Wash. 1911), *Beville v. Allen*, 237 237 P. 184, 185 (Ariz. 1925), and *Hannah v. Pogue*, 147 P.2d 572, 575 (Cal. 1994)).

19 Id. at 203 (quoting 17 Am. Jur., Easements § 87 (1938)).

20 *Davis v. Bruk*, 411 A.2d 660, 661-62, 664-666 (Me. 1980).

21 Id. at 664-65 (quoting *Sakansky v. Wein*, 169 A. 1, 3 (N.H. 1933), and citing and discussing *Smith v. Jackson*, 104 S.E. 169, 170 (N.C. 1920)).

22 *Davis*, 411 A.2d at 665.

23 Id. at 204 (Udall, J. dissenting).

24 Id.

25 Jon W. Bruce, James W. Ely, Jr., and Edward T. Brading, The Law of Easements and Licenses in Land § 7:16 (2025).

26 *Brown v. Bradbury*, 135 P.2d 1013, 1014 (Col. 1943).

27 *Cozby v. Armstrong*, 205 S.W.2d 403, 405-08 (Tex. Ct. Civ. App. 1947).

28 Bruce & Ely, *supra* note 23, § 7:16

29 *Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. Ct. App. 2004); *Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909-910 (Ky. 1932). But see *Adams v. Pergrem*, 2007 WL 4277900, at *3 (Ky. Ct. App. Dec. 7, 2007) (incorrectly citing *Wells* in dicta as supporting mutual consent rule).

30 *Enos v. Casey Mountain, Inc.*, 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988); *Millison v. Laughlin*, 142 A.2d 810, 813-816 (Md. 1958); *Bubis v. Kassin*, 803 A.2d 146, 151-52 (N.J. App. Div. 2002).

31 *Bode v. Bode*, 494 N.W.2d 301, 305 & n. 2 (Minn. Ct. App 1992; *Huggins v. Wright*, 774 So.2d 408, 410, 412 (Miss. 2000); *Taylor v. Hays*, 551 So.2d 906, 908-10 (Miss. 1989).

32 C. Civ. (Fr.) art. 701 (Dalloz 2020 ed.). See also The Code Napoleon or French Civil Code, translated by a Barrister of the Inner Temple, Art. 701, at 192 (1824).

33 La. Civ. Code Ann. art. 748 (2020). For a detailed discussion of servitude relocation in Louisiana and another mixed jurisdiction with strong civil law roots, see John A. Lovett, *A New Way: Servitude Relocations in Scotland and Louisiana*, 9 Edin. L. Rev. 352 (2005). The Louisiana Civil Code allows the owner of an estate burdened by a legal servitude of passage benefitting an enclosed estate (the civil law analogue of an easement by necessity) to relocate the servitude "to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate." La. Civ. Code Ann. art. 695 (2020). For a leading statement of the policy rationales for servitude relocation under the Louisiana Civil Code, see *Denegre v. Louisiana Public Service Commission*, 242 So.2d 832, 835, 838-39 (La. 1970) (Tate. J., concurring).

34 P.R. Codigo Civ. art. 953 (2020); P.R. Codigo Civ. art. 953 (1930).

35 Idaho Code § 18-4308; Idaho Code § 42-1207; N.M. Stat. § 73-2-5; Utah Code § 73-1-15.5.

36 Idaho Code § 55-313.

37 Va. Code Ann. § 55.1-304 (formerly cited as Va. St. § 55-50) (Va. Acts 1992, c. 373; amended Va. Acts 2019, c. 712, eff. Oct. 1. 2019). Curiously, in two decisions rendered after the adoption of this statute, the Virginia Supreme Court referenced or applied the mutual consent rule without even acknowledging the existence of the statute. *Shooting Point, LLC, v. Wescoat*, 576 S.E.2d 497, 502 (Va. 2003); *Buxton v. Murch*, 457 S.E.2d 81, 84 (Va. 1995).

38 *Vargas v. Maderos*, 191 Cal. 1, 214 P. 849 (1923).

39 191 Cal. at 2-3.

40 Id. at 3.

41 *Ricioli v. Lynch*, 65 Cal. App. 53, 58, 223 P. 88, 90 (1923).

42 *Wallace Ranch Water Co. v. Foothill Ditch Co.*, 5 Cal. 2d 103, 53 P.2d 929 (1935).

43 5 Cal.2d. at 115-16.

44 *Hannah v. Pogue*, 23 Cal. 2d 849, 854, 147 P.3d 572 (1944).

45 23 Cal.2d at 855.

46 *Youngstown Steel Products Co. v. City of Los Angeles*, 38 Cal. 2d 407, 409-12, 240 P.2d 977 (1952).

47 38 Cal. 2d at 409.

48 Id. at 410.

49 Id. at 411.

50 Id. at 411 (observing that "[t]he portion of the judgment which declares that the defendants have a right to maintain the power lies at their present level, a height in excess of 61 feet [as opposed to the historical 51 ½ feet], is entirely proper, since the parties have relocated the right of way at the new level by agreement").

51 See, e.g., *Tarr v. Watkins*, 180 Cal. App. 2d 362, 364-65, 4 Cal. Rptr. 293, 294-95 (1960) (preventing servient estate owner from relocating non-exclusive, but unused, 15 foot access easement to a public highway to permit construction of a home on the servient estate, noting that proposed new easement location would have resulted in narrower width in part and some turns, and finally stating that, even though the relocated route may have been generally just as convenient as the existing route, "[o]nce the location of an easement has been finally established, whether by express terms of the grant or by use and acquiescence, it cannot be substantially changed without the consent of both parties"); *Keith v. Superior Court*, 26 Cal. App. 3d 521, 526, 103 Cal. Rptr. 314, 316-17 (1972) (enjoining servient estate owner from continuing with any construction work associated with proposed relocation of access easement to facilitate

development of 337 unit subdivision until servient estate owner could obtain consent for relocation, even though developer had attempted to purchase the existing easement or the easement holder's property and had been granted a permit for the development project which provided for the construction of a retention pond at the location of the existing easement and moving it to another location).

52 *Kosich v. Braz*, 247 Cal. App. 2d 737, 56 Cal. Rptr. 52 (1967).

53 247 Cal. App. 2d at 738.

54 Id.

55 Id. at 739-40. Also bearing on the decision in *Kosicj* was a public safety concern; the inability of fire trucks or utility service companies to access the dominant estate holder's house without the expanded easement location. Id. at 739.

56 *Zunino v. Gabriel*, 182 Cal. App. 2d 613, 618, 6 Cal. Rptr. 514, 518 (1960) (holding that 10 foot movement of a prescriptive easement did not cause a recommencement of the required prescriptive period but rather amounts to consensual relocation of the prescriptive easement, the rights to which attached to the new location); *Johnstone v. Bettencourt*, 195 Cal. App. 2d 538, 541-42, 16 Cal. Rptr 6 , 9 (1961) (holding, with respect to an express roadway easement created by a subdivision map where the actual traveled road deviated from the map location, that the parties effectively relocated the easement to the traveled road by implied mutual consent). As in *Kosich*, *Johnstone* involved a servient estate owner's attempt to return an easement to its original location after the dominant estate owner appeared to unilaterally relocate the easement. Id.

57 143 Cal. App. 4th 333, 352, 48 Cal. Rptr. 3d 875, 891 (2006).

58 Restatement (Third) of Property: Servitudes § 4.8(3) (2000).

59 Id. Subsections 1 and 2 of Restatement Section 4.8 address a different question – how to determine the *original* location and dimensions of a servitude when those features are not fixed by the instrument or circumstances surrounding creation of a servitude. Restatement, *supra* note 16, § 4.8(1)-(2). See also Id. cmt (b) (explaining that subsection (1) gives the servient owner "the power to locate a servitude *in the first instance*") (emphasis added).

60 *See, e.g., Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1235-39 (Colo. 2001); *Clinger v. Hartshorn*, 89 P.3d 462, 469 (Colo. Ct. App. 2003); *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057-59 (Mass. 2004); *Carlin v. Cohen*, 895 N.E.2d 793, 796-799 (Mass. App. Ct. 2008); *Burkhart v. Lillehaug*, 664 N.W.2d 41, 42-44 (S.D. 2003); *Stanga v. Husman*, 694 N.W.2d 716, 718-720 (S.D. 2005); *R & S Investments v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 879-881 (Neb. Ct. App. 2006).

61 *Lewis v. Young*, 705 N.E.2d 649, 653-54 (N.Y. 1998) (relying on tentative draft of Section 4.8(3)); *St. James Village, Inc. v. Cunningham*, 210 P.3d 190, 193-196 (Nev. 2009). But see Town of Ellettsville v. Despirito, 111 N.E.3d 987, 992-94 (Ind. 2018) (explaining that Restatement drafters probably did not intend for subsection 4.8(3) to be restricted to undefined, unfixed easements).

62 *Roy v. Woodstock Community Trust, Inc.*, 94 A.3d 530, 537-40 (Vt. 2014). But see *Sweezey v. Neel*, 904 A.2d 1050, 1057-58 (Vt. 2006) (rejecting Restatement approach for surface easements though allowing servient owner to "bend the easement" around a new addition to his house).

63 *McNaughton Properties, LP v. Barr*, 981 A.2d 222, 225-229 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997), to prescriptive easements).

64 *Goodwin v. Johnson*, 591 S.E.2d 34, 37-39 (S.C. Ct. App. 2003). See also *Sheppard v. Justin Enterprises*, 646 S.E.2d 177, 179 (S.C. App. 2007) (observing that South Carolina court have not adopted the Restatement with respect to express easements).

65 *See, e.g., Weston St. Hartford, LLC v. Zebra Realty*, LLC, 219 A.3d 844, 851–54 (Conn. App. Ct. 2019); *Town of Ellettsville v. DeSpirito*, 111 N.E.3d 987, 992–97 (Ind. 2018); *Stowell v. Andrews*, 194 A.3d 953, 964–66 (N.H. 2018); *Alligood v. LaSaracina*, 999 A.2d 836, 839 (Conn. App. Ct. 2010); *AKG Real Est., LLC v. Kosterman*, 717 N.W.2d 835, 842–47 (Wisc. 2006); *MacMeekin v. Low Income Hous. Inst., Inc.*, 45 P.3d 570, 578–79 (Wash. Ct. App. 2002); *Herren v. Pettengill*, 538 S.E.2d 735, 736 (Ga. 2000). For a detailed discussion of these decisions, see Lovett, *supra* note 7, at 38-40.

66 Susan French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 Real Pr. Prob. Tr. J. 1 (2003); 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 (2005) (conceptualizing the debate over the Restatement in light of the "property rule" and "liability rule" paradigm and arguing for a modified, "pliability rule" version of section 4.8(3)); Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 Am. U. L. Rev. 1525, 1568-69 (2007) (praising the Restatement).

67 John V. Orth, *Relocating Easements, A Response to Professor French*, 38 Real Prop. Prob. & Tr. J. 643, 653 (2003); Note, The Right of Owners of Servient Estates to Relocate Easements, 109 Harvard L. Rev. 1693 (1996); Bruce & Ely, *supra* note 25, § 7:17.

68 Unif. Easement Relocation Act (Unif. Law Comm'n 2020) (hereafter U.E.R.A).

69 U.E.R.A. § 3(a).

70 U.E.R.A. § 3(b).

71 U.E.R.A. § 2(10).

72 Korngold, *supra* note 66, at 1575; K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 Utah L. Rev. 773, 777–78 (2013); Bruce & Ely, *supra* note 25, § 12:2.

73 See generally Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 Va. L. Rev. 739 (2002); Richard Roddwig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . And Should It Be?*, 52 UIC J. Marshall L Rev. 677 (2019).

74 U.E.R.A. § 3(b). The definition of a conservation easement is found in U.E.R.A. § 2(2) and generally tracks the Uniform Conservation Easement Act (U.C.E.A.), § 1, 12 U.L.A. 170 (1996). For details, see U.E.R.A. § 3, cmt. 4

75 U.E.R.A. § 3(b)(1). A negative easement is defined to mean "a non-possessory property interest whose primary purpose is to impose on a servient estate owner a duty not to engage in a specified use of the estate." Id. § 2(8).

76 U.E.R.A. § 2, cmt. 7, § 3 cmt. 5. See also Unif. Environmental Covenants Act § 2(4) (Unif. Law Comm'n 2003) (defining an environmental covenant as "a servitude arising under an environmental response project that imposes activity and use limitations").

77 U.E.R.A. § 3(c).

78 Indeed, nothing in the act prevents a servient estate owner and an easement holder from agreeing to relocate an easement to another estate altogether, assuming the owner of that other estate consents and the relocation does not interfere with other existing property interests. U.E.R.A. § 3, cmt. 8.

79 U.E.R.A. § 4(1)-(3).

80 Id. § 4(4)-(7).

81 Lovett, *supra* note 7, part II.D.

82 Restatement, *supra* note 58, § 4.8(3) (allowing easement to be relocated "to permit normal use and development of the servient estate"); La. Civ. Code Ann. Art. 748 (allowing a servitude to be relocated when its current condition "prevents" the servient estate owner "from making useful improvements on his estate"). See also *Kline v. Bernardsville Ass'n Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993) (conditioning pre-Restatement equitable balancing approach to unilateral relocation on "a strong showing of necessity" on the part of the servient estate owner).

83 Compare C.C. (Italy) art. 1068 (trans. and eds. Mario Beltrano et al, Oceana 2010), and C.C. (Brazil) art. 1384 (2004), with C. Civ. (Fr.) art. 701 (Dalloz ed. 2020).

84 Restatement, *supra* note 58, § 4.10; Bruce & Ely, *supra* note 25, § 8:3; *infra* notes 140-144 and accompanying text.

85 U.E.R.A. § 4 cmt. 1.

86 U.E.R.A. § 4(3) (emphasis added). The other minor modifications in Sections 4(1)-(3) are discussed in U.E.R.A. § 4, cmt. 4, and Lovett, *supra* note 7, part II.D.

87 *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1058-59 (Mass. 2004) (observing that "an easement is created to serve a particular objective, not to grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose"); *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1237 (Colo. 2001) (noting that the mutual consent rule creates a "'bilateral monopoly' in that neither owner can transact with anyone else"); French, *supra* note 66, at 10, 15 (criticizing mutual consent rule for allowing an easement holder to "demand, and, in theory, expect to get almost all of the surplus value created by any relocation" and warning that the traditional rule is "inefficient because it provides no exit from an impasse situation and represents bad social policy by rewarding a noncooperating easement holder").

88 U.E.R.A. § 3(b)(1).

89 U.E.R.A. § 4(5).

90 U.E.R.A. § 9.

91 U.E.R.A. § 4(6).

92 See, e.g., *Manning v. Campbell*, 268 P.3d 1184, 1187-88 (Idaho 2012).

93 See *M.P.M. Builders*, 809 N.E.2d at 1057 (endorsing Restatement because of its focus on increase in "value" of dominant estate without diminishing "value" of servient estate).

94 See, e.g., *City of Boulder v. Farmer's Reservoir and Irrigation Co.*, 214 P.3d 563, 567-69 (Colo. App. 2009) (refusing to allow alteration of a ditch irrigation easement to facilitate a trail extension because the alteration would materially and adversely affect maintenance rights).

95 U.E.R.A. § 4(7).

96 *Roaring Fork Club*, 36 P.3 at 1237-38; *M.P.M. Builders*, 809 N.E.2d at 1059.

97 U.E.R.A. § 5(a).

98 U.E.R.A. § 5(b)-(c).

99 U.E.R.A. § 6(a)-(c).

100 U.E.R.A. § 6(d).

101 U.E.R.A. § 7.

102 U.E.R.A. § 7, cmt. 2.

103 U.E.R.A. § 9(a).

104 U.E.R.A. § 9(b). In the rare case of an easement that can be enjoyed without any improvements being constructed—say a pedestrian or recreational access easement unmarked by a path or trail—or an easement for which necessary improvements have yet to be constructed, Section 9(c) provides that the recording of the court's order authorizing a relocation will actually constitute the relocation. U.E.R.A. § 9(c).

105 See Restatement, *supra* note 58, § 4.8(3) (stating that "*[u]nless expressly denied by the terms of an easement, as defined in Section 1(2)*, the owner of the servient estate is entitled to make reasonable changes in the location and dimensions of an easement"); *M.P.M. Builders*, 809 N.E.2d at 1055 (suggesting that parties to an easement agreement could always opt-out of the Restatement approach by express contractual provision).

106 U.E.R.A. § 11(1)-(2), cmts. 1-3. These parts effectively adopt the German position on waiver and contractual limitation. BGB (Germany) § 1023(1)-(2).

107 *Lewis*, 705 N.E.2d at 653-54; *St. James Village*, 210 P.3d at 193-196.

108 U.E.R.A. § 11(3).

109 U.E.R.A. § 14

110 U.E.R.A. § 4(1)-(3), (6).

111 *Statewide Construction, Inc. v. Pietri*, 247 P.3d 650, 654-56 (Idaho 2011). See also Idaho Code § 55-313. As that court put it, any relocation authorized by the statue will "provide the dominant estate holders with the same beneficial interest they were entitled to under the easement by its original location." Id. at 657.

112 *Tarr v. Watkins*, 180 Cal. App. 2d 362, 363, 4 Cal. Rptr. 293 (1960).

113 Id. at 363-64.

114 Id. at 365.

115 See U.E.R.A. § 4(1)-(3), and (6).

116 *Keith v. Superior Court*, 26 Cal. App. 3d 521, 522-23, 103 Cal. Rptr. 314 (1972).

117 Id. at 523-25.

118 Id. at 524.

119 U.E.R.A. § 9(b).

120 See Neb. Rev. Stat. § 76-2,138 et seq.); Wash. Rev. Code Ann. § § 64.65.010 et seq.); Okla. Stat. tit. 60, §1501 et seq.).

121 Ark. Code Ann. § 18-11-702(10).

122 Ark. Code Ann. § 18-11-703(b)(1), (3)-(4).

123 Utah. Code Ann. § 57-13c-102(2)(a)-(c). The terms "public utility" and "public-utility easement," "public transit facility," and "water-conveyance easement" are all carefully defined to comport with other applicable provisions of Utah law. Id. § 57-13c-101(14), (15)-(16), (25).

124 Nev. Rev. Stat. § 10.112.22(2)(a) and (c); Id. § 10.112.12.3.

125 Lovett, *supra* note 7 , Part III.

126 Note, *supra* note 67, at 1694-95, 1700-01; Bruce & Ely, *supra* note 25, §§ 7:13; 7:16; *Orth*, *supra* note 67, at 647; *Herren v. Pettengil*, 538 S.E.2d 735, 736-37; *MacMeekin v. Low Income Hous. Inst. Inc.*, 45 P.3d 570, 576 (Wash. Ct. App. 2002).

127 Note, *supra* note 67, at 1700-01; Orth, *supra* note 67, at 647; *Town of Ellettsville v. Despirito*, 111 N.E.3d 987, 996-97 (Ind. 2010) (citing and quoting Note, *supra* note 67, at 1701).

128 *Stamatis*, 224 P.2d at 203; *Herren*, 538 S.E.2d at 736; *Davis*, 411 at 665; Bruce & Ely, *supra* note 25, § 7:13; Orth, *supra* note 67, at 646-50; Note, *supra* note 67, at 1695.

129 Herren, 538 S.E.2d at 736; *Town of Ellettsville v. Despirito*, 111 N.E.3d 987, 992-95 (Ind. 2010).

130 French, *supra* note 66, at 8-9.

131 As economists like to say, in these situations the relocation will be *Pareto efficient or Pareto superior*; that is, the servient estate owner will be better off but the easement holder will not actually be any worse off. See Robin Paul Malloy, Law in a Market Context 189 (2004) ("A change in the status quo is considered to be Pareto superior if it makes at least one person better off without making anyone else worse off."). See also French, *supra* note 66, at 5 (making same point); Roaring Fork Club, 36 P.3d. at 1236 (observing that Restatement rule "maximizes overall utility of the land" because the "burdened estate profits from an increase in value while the benefitted estate suffers no loss").
We acknowledge that some critics of the Restatement and the U.E.R.A. are still likely to object to this *Pareto*-efficiency argument by contending that the mere fact that a relocation under the U.E.R.A. can occur without a market transaction implies there must be some value to the easement holder in the easement's original or current location, thus preventing a *Pareto*-optimal result. We have three responses to this critique. First, if any nonconsensual change in property relations is automatically ruled out of bounds on the grounds of not qualifying for strict *Pareto*-optimality, property law becomes a rather static, zero-sum affair and no change is ever possible without a market transaction. This would be quite a restrictive, status-quo oriented view of property law. Second, there is another way of thinking about efficiency. Even if some theoretical loss in value resulting from the nonconsensual nature of a judicially supervised easement relocation does materialize, a relocation occurring under the U.E.R.A. should still be *Kalder-Hicks* efficient; that is, it should lead to a net or aggregate gain in overall utility because the gain in utility to the servient estate owner will be significantly higher than the loss in utility suffered by the easement holder resulting from the mere involuntary nature of the relocation. Malloy, *supra*, at 190 (explaining that under "the Kaldor-Hicks theory, a reallocation of recourses is efficient . . . as long as the increased benefit to one party (the winner) more than offsets the decrease in utility (or cost) to the other party (the loser)"). Finally, as suggested above, a strict *Pareto* view of efficiency prevents the law from taking account of third parties who might benefit from a reallocation of property rights. In the case of an easement relocation, these include, for instance, future homeowners, residential and commercial tenants, and other persons who could benefit from development of a servient estate if we loosen the strict rule of unanimity demanded by *Pareto* efficiency. When these third person gains are factored into the efficiency calculus, the aggregate gain in utility is likely to be even greater.

132 Restatement, *supra* note 58, § 4.8, cmt. f.

133 See John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 Marquette L. Rev. 939 (2021) (presenting a 50 state study focused on one constant controversy in prescriptive easement law—the question of whether alleged prescriptive use is subject to a presumption of adversity or permissive use).

134 For detailed discussion of these and other kinds of implied easements, see Gerald Korngold, Private Land Use Arrangements: Easements, Covenants and Equitable Servitudes §§ 3:07 – 3:22 (3rd ed. 2016).

135 U.E.R.A. § 3(a).

136 Orth, *supra* note 67, at 652-53; Bruce & Ely, *supra* note 25, § 7:13; Note, *supra* note 67, at 1695.

137 *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950); *Fla. Power Corp. v. Hicks*, 156 So.2d 408, 410 (Fla. Dist. Ct. App. 1963); *Sakansky v. Wien*, 169 A. 1, 3 (N.H. 1933).

138 French, *supra* note 66, at 10-11.

139 Restatement, *supra* note 58, § 4.10 (2000). See also Bruce & Ely, *supra* note 25, § 8:3 ("Reasonable use [of an easement] is not fixed at a particular point, but may vary from time to time. . . . Absent specific provision to the contrary, the concept of reasonableness includes a consideration of changes in the surrounding area and technological developments. These factors provide a degree of elasticity in the scope of express easements."); French, *supra* note 66, at 15.

140 See *Dolnikov v. Ekizian*, 222 Cal. App.4th 419, 428-31, 165 Cal. Rptr. 3d 658, 664-67 (2013), discussed *supra* note 85.

141 Compare Orth, *supra* note 67, at 652 (arguing that common law rule allowing reasonable changes in use of an easement only meant more frequent use—for example of a right of way—but did not permit an "overburden" or "use of an easement beyond its scope"), with Korngold, *supra* note 135, § 4.08, at 178-179 (explaining that reasonableness standards used by courts to deal with changes in use of an easement are vague, judicial application is unpredictable, and courts typically balance multiple interests, including the original intent of the parties to the extent it can be determined, permitting efficient use of the dominant estate, and minimizing interference with productive use of the servient estate).

142 Korngold, *supra* note 135, § 4.08, at 180 (finding that, despite various formulations for the rule allowing changes in manner, frequency and intensity of use, courts display a bias in favor of allowing new productive uses of an easement, as long as the new use "seems in the least way related to prior use"). Indeed, even prominent critics of the Restatement acknowledge that the traditional common law rule allowing an easement holder to alter the manner, frequency, or intensity of an easement's use is subject to an open-textured reasonableness standard. Bruce & Ely, *supra* note 25, at § 8:13 (observing that the "scope of an easement may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate," noting that "courts balance the dominant owner's right to enjoy the easement and take advantage of technological innovations with the servient owner's right to make all use of the servient land that does not interfere with the servitude," and advising that "[s]ince these rights are relative, courts must strive to protect the interests of both parties").

143 We note that several leading state court decisions have found this doctrinal symmetry justification for recognizing unilateral easement relocation rights persuasive. *Roaring Fork Club*, 36 P.3d at 1237; *M.P.M. Builders*, A.2d at 1057.

144 Orth, *supra* note 67, at 649 (quoting 2 William Blackstone, Commentaries on the Laws of England 2 (1765)).

145 Orth, *supra* note 67, at 648-49, 653-54.

146 Bruce & Ely, *supra* note 25, § 1:1; Restatement, *supra* note 4, § 1.2(1) ("An easement creates a non-possessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the used authorized by the easement.").

147 Bruce & Ely, *supra* note 25, § 1:1. As the Restatement itself explains, an easement only "authorizes limited uses of the burdened property for a particular purpose." Restatement, *supra* note 58, § 1.2, cmt. d.

148 See Restatement, *supra* note 58, § 4.10 ("Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment."); Bruce & Ely, *supra* note 25, § 8:13 (same)

149 Lovett, *supra* note 7, at 38-43.

150 Bruce & Ely, *supra* note 25, § 10:1 (observing "numerous other ways," other than when an easement is subject to an express term or is defeasible upon the happening of a certain event, "that easements, both perpetual and non-perpetual, may be terminated").

151 Bruce & Ely, *supra* note 25, §§ 10:18-10:19; Restatement, *supra* note 58, § 7.4.

152 Bruce & Ely, *supra* note 25, § 10:8.

153 Bruce & Ely, *supra* note 25, § 10:10-10:13.

154 Bruce & Ely, *supra* note 25, § 10:16.

155 Bruce & Ely, *supra* note 25, § 10:26.

156 Bruce & Ely, *supra* note 25, § 10:31-37.

157 Bruce & Ely, *supra* note 25, § 10:41.

158 Bruce & Ely, *supra* note 25, § 10:21-24 (termination by estoppel); § 10:25 (termination by prescription); § 10:27-30 (termination by merger). See also Korngold, *supra* note 135, § 6.01-6.16 (reviewing various termination doctrines).

159 See Korngold, *supra* note 135, § 6.02, at 272 (commenting that the multiplicity of easement termination doctrines are "based on public policy considerations" as "the law seeks to terminate obsolete, useless ties that would impair the productivity of the servient land without bringing a corresponding increase in the benefits to the dominant parcel").

160 Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C. L. Rev. 413, 439-40 (2017) (making a natural rights argument for *productive use* as a core justification for and limitation on property rights).

161 *Linvestment CC v. Hammersley*, 3 S.A. L. Rep. 283, 286-93 (Sup. Ct. App. 2008).

162 Id. 291-293 (citing Lovett, *supra* note 7).

163 Id. at 293.