

DRAFT

Damages as the Appropriate Remedy for “Abuse” of an Easement: Moving Toward Consistency, Efficiency, and Fairness in Property Law

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I. Introduction

The current majority position—what I will label the American rule²—is that the proper remedy for “abuse” or “misuse”³ of an easement is an injunction. In this Article, I argue that courts should move away from this position and adopt instead a rule permitting courts to award damages when two conditions are met: (1) where the dominant tenant’s servicing of nondominant land does not pose an unreasonable burden on the servient estate;⁴ and (2) the cost to the dominant tenant of ceasing his servicing of nondominant land is substantially greater than the benefit to the servient tenant.⁵

I call this the *Brown* rule after the Washington Supreme Court case, *Brown v. Voss*, where it found its most prominent statement.⁶ A remedy of damages instead of an injunction, under these circumstances, fits well with earlier case law, builds on courts’ equitable authority and concomitant case law, accords with the broader movement in property law from property to contract concepts and remedies, and is more efficient and fair.

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² As described below, this will distinguish the current majority position of American states from what I label the English rule under which courts would hold that the dominant tenant had forfeited the easement because of his misuse.

³ By “abuse” or “misuse” of an easement I mean when the owner of the dominant estate, that is, the estate that benefits from the easement, uses the easement to service (*i.e.*, benefit) land outside of the dominant estate. For example, if A has the right to drive across B’s property, to use it as a driveway, A’s land is the dominant estate and B’s is the servient estate. If A later purchased an adjacent lot and began to use his easement across B’s land to service the newly-purchased lot, then A has abused or misused his easement.

⁴ As measured against the standard contemplated by the parties at the inception of the easement.

⁵ An earlier commentator on this area of the law argued that courts should adopt only the first prong of my proposal. Robert Kratovil, *Easement Law and Service of Nondominant Tenements: Time for a Change*, 24 SANTA CLARA L. REV. 649 (1984). Kratovil argued that courts should permit a dominant tenant to service nondominant land so long as it did not result in an “unreasonable increase of burden.” *Id.* at 649 (internal quotations omitted). My proposal, which includes a second prong, better fits the existing case law and is normatively more attractive than Kratovil’s, as explained below.

My proposal better fits the case law because no courts have adopted solely the “unreasonable increase of burden” prong, as advocated by Kratovil. Instead, courts have relied on their equitable discretion to refuse to enjoin dominant tenant misuse of an easement, and instead award damages. In other words, courts continue to hold that the servient tenant retains the legal entitlement, contrary to Kratovil’s proposal. Second, courts only award damages in lieu of injunctive relief when the cost to the dominant tenant of ceasing his abuse is substantially greater than the benefit to the servient tenant, as I propose.

My proposal is also more normatively attractive than Kratovil’s because, as explained below, it better fits the surrounding law, and is more efficient and fair.

⁶ *Brown v. Voss*, 715 P.2d 426 (Wash. 1986).

I first review the history of easements and argue that, at least in the United States, the common law rule was that courts would enjoin a dominant tenant's use of an easement to service nondominant land. Only in the relatively rare circumstance where legitimate use of a dominant estate could not be separated from abuse of the easement, courts would permanently enjoin—in effect, extinguish—use of the easement. The common law did not authorize courts to extinguish an easement in the normal course, simply because of its abuse by the dominant estate holder.

I will show, however, that there was much confusion among courts, counsel, and scholars on what the proper remedy was. This resulted from the continued influence of English law in this area. Consequently, I will label the remedy of an injunction for abuse of an easement the American rule, and the rule that requires forfeiture for abuse of an easement I will label the English rule.

Recently, the American rule has been challenged. Some courts have ruled that, instead, the proper remedy under certain conditions is damages. I argue below that this movement in the courts, exemplified by *Brown*, is consistent with and further supports claims that property law has been moving away from property-based concepts and remedies and toward contract-based concepts and remedies. I will also show that there is in the United States a broader tradition than is commonly realized of courts employing their equitable discretion to grant damages instead of injunctive relief. Lastly, I will argue that damages is more efficient and fair than injunctive relief, at least under the two conditions I outlined above.

II. Background Legal Rules Governing the Scope of Easements Appurtenant

Servitudes are the class of property law doctrines that traditionally included easements, real covenants, and equitable servitudes.⁷ Most states continue to follow the common law tripartite division of servitudes, despite the *Restatement (Third) of Property: Servitudes'* attempted unification of servitude law.⁸

An easement is the right to enter, to use land possessed by another for a specified purpose.⁹ The land benefited by an easement is the dominant estate, and the land burdened by an easement is the servient estate.¹⁰ The person with the right to enter and use the land of another is the dominant tenant, while the person

⁷ See, e.g., STOEBUCK & WHITMAN, *THE LAW OF REAL PROPERTY* 434-514 (3d ed. 2000) (including easements, real covenants, and equitable servitudes in the chapter on servitudes).

⁸ See *RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES* at ix (Forward) (“The large ideas in this *Restatement* are very different from those that governed its predecessor. Easements, profits, irrevocable licenses, real covenants, and equitable servitudes are here treated as integral parts of a single body of law, rather than as discrete doctrines governed by independent rules.”)

⁹ HERBERT HOVENKAMP & SHELDON F. KURTZ, *PRINCIPLES OF PROPERTY LAW* 327 (6th ed. 2005). Negative easements “take from the owner of the servient estate the right to do some things . . . she would have a right to do on her land.” *Id.* at 329.

¹⁰ John V. Orth, *The Burden of an Easement*, 40 *REAL PROP. PROB. & TR. J.* 639, 640 (2006).

whose property is burdened is the servient tenant.¹¹ The most familiar example of an easement is where one property owner, the servient tenant, grants the right to drive over his property to another property owner, the dominant tenant. The dominant tenant has the right to use the servient tenant's property for purposes of a driveway, but the dominant tenant continues to hold the fee to the land.

As with any human relationship, conflicts arise. For purposes of this Article, the conflicts I am concerned with are those over the burden of the easement. The two primary aspects of burden are: (1) the intensity and type of the use of the easement; and (2) the scope of the estate served by the easement.¹²

The dominant tenant may increase the intensity of his use of the easement so long as the use remains "reasonably anticipated."¹³ The purpose of the limitation on changed intensity of use is to ensure that the dominant tenant's use of the easement does not interfere with the servient tenant's continued legitimate use of his property.¹⁴ The dominant tenant may not, consequently, use the easement for a use that is different in character from the authorized use. For example, if the authorized use is a right-of-way, the dominant tenant may not use the easement for parking.¹⁵

The second limitation on the burden of the easement is that the dominant tenant may use the easement to service only the dominant tenement: the land that was designated at the creation of the easement to be served by the easement.¹⁶ For instance, the dominant tenant may not use a driveway easement to serve land adjacent to the dominant estate that he acquired after the easement's creation.¹⁷

This second limitation, like the first, is justified by the argument that a contrary rule would permit the dominant tenant to "purchase an indefinite number of adjoining acres, and annex the right to them."¹⁸ In other words, the limitation is necessary to ensure that the dominant tenant's use does not interfere with the servient tenant's legitimate use of his property. Another justification offered for

¹¹ STOEBUCK & WHITMAN, *supra* note , at 440.

¹² *Id.* at 460-61; *see also* Orth, *supra* note , at 640 ("In the law of easements, burden and its corresponding abuse, 'overburden,' are principally used to resolve two types of cases: (1) use by the easement owner other than the authorized use, and (2) use by the easement owner in connection with land other than the benefited land.").

¹³ STOEBUCK & WHITMAN, *supra* note , at 460. For an overview of the reasonable use test see Kratovil, *supra* note , at 652-55.

¹⁴ *See* RESTATEMENT OF PROPERTY § 486 (1944) (stating that the purpose of the limitation is to preserve the parties' "reasonable . . . exercise of their respective privileges").

¹⁵ Orth, *supra* note , at 640.

¹⁶ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.11 (2000) ("[A]n appurtenant easement or profit may not be used for the benefit of property other than the dominant estate."); STOEBUCK & WHITMAN, *supra* note , at 461.

¹⁷ *See* Penn Bowling Recreation Ctr., Inc. v. Hot Shoppes, Inc., 179 F.2d 64 (ruling that use of an easement to serve land purchased after creation of the easement constituted misuse of the easement).

¹⁸ Shroder v. Brenneman, 23 Pa. 348, 351 (1854).

prohibiting use of the easement to serve land other than the dominant estate is that the limitation “reflects the likely intent of the parties.”¹⁹

This second limitation—the limit to benefiting only the dominant estate—unlike the first limitation, does not permit even a “reasonable” increase of burden.²⁰ Instead, regardless of the quantum of the increased burden on the servient estate caused by servicing land other than the dominant parcel, courts will enjoin the misuse of the easement.²¹

III. The Contested Common Law: Injunction or Extinguishment?

A. *The Contested Common Law*

Commentators, courts, and attorneys, today generally agree that the remedy for abuse of an easement is an injunction against the abuse.²² In the United States, courts have continuously and consistently ruled that abuse of an easement did not result in extinguishment of the easement.²³ From the earliest cases, courts granted injunctions as remedies for abuse, and they consistently declined to extinguish easements.

However, repeatedly—in the scholarly literature, court opinions, and arguments by counsel—the claim has appeared that at common law the remedy for abuse of an easement was extinguishment. For example, in their popular property treatise, Herbert Hovenkamp and Sheldon Kurtz state that the “common law . . . generally extinguish[ed] an easement appurtenant when its owner attempted to use it for the benefit of lands other than the dominant estate.”²⁴

From statements in their opinions, some courts and the attorneys practicing before them perceived the common law similarly. For instance, in the much-cited and discussed case of *Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.*, the court defined the question in the case as “whether appellant’s use [abuse] of the right-of-way resulted in forfeiture and extinguishment of the

¹⁹ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.11 (2000); *see also id.* (stating that the “rule stated in this section . . . creates a presumption that after-acquired property was not intended to benefit from the easement”).

²⁰ *See S.S. Kresge Co. v. Winkelman Realty Co.*, 50 N.W. 2d 920, 922 (Wis. 1952) (“The owner of the servient estate is not required to wait until his property has been unreasonably burdened . . . but he may proceed when any additional burden is placed upon his property.”).

²¹ *See* JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 8.11 (2001) (“An attempted extension of the easement to serve nondominant land represents an overburden of the servient tenement, regardless of the amount of usage.”).

The *Restatement’s* authors feared that a less clear rule, one that, for example, permitted use of nondominant land so long as it did not impose an unreasonable burden on the servient estate, would lead to “difficult litigation over the question whether increased use unreasonably increases the burden on the servient estate.” RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.11 cmt. b (2000).

²² *E.g.*, JOHN G. SPRANKLING, *UNDERSTANDING PROPERTY* 546 (2d ed. 2007); STROEBUCK & WHITMAN, *supra* note , at 461.

²³ There are a handful of states that, as I will briefly discuss, statutorily deviated from the rule stated in the text. *See infra* footnote 97.

²⁴ HOVENKAMP & KURTZ, *supra* note , at 386.

easement.”²⁵ The D.C. Circuit understood forfeiture to be a plausible legal argument, although it ultimately rejected it.

The plaintiff servient tenant’s attorney argued to the trial court and D.C. Circuit in *Penn Bowling* that the defendant dominant tenant’s abuse of his easement by servicing land outside of the dominant estate resulted in a forfeiture of the easement.²⁶ In fact, the lower court in *Penn Bowling* had ordered the easement extinguished because of the dominant tenant’s abuse.²⁷

This disconnect—between the nearly universal American rule and the continued raising of extinguishment as a possible remedy—did not end until the 1950s. I argue below that this disconnect is the result of the mistaken identification of English common law with the common law rule used by American courts.

B. *The American Common Law Remedy for Abuse of an Easement was not Extinguishment*

From antebellum America until the 1950s, courts repeatedly addressed and rejected forfeiture as the proper remedy for abuse of an easement. The earliest American cases rejected the servient tenant’s claim for extinguishment of an easement and instead ruled that the remedy for abuse of an easement is an injunction against the misuse. For example, in *McTavish v. Carroll*, the Maryland Court of Appeals faced a trespass action brought by the dominant estate holder against the servient tenant for the servient tenant’s blockage of a right-of-way.²⁸ The servient tenant argued on appeal that that plaintiff’s easement was extinguished because he had altered its scope.²⁹ The court ruled, to the contrary, that the plaintiff’s alleged abuse of his easement “did not destroy the right of easement of the plaintiff; it merely gave a right of action to the defendant.”³⁰

The *McTavish* Court followed an earlier, 1843, Massachusetts case, *Mendell v. Delano*, where the court held that misuse of an easement did not result in forfeiture: “By a wrongful user, a party does not forfeit his legal rights.”³¹ And *Mendell* itself was not the first time the Supreme Judicial Court of Massachusetts had ruled that the remedy for abuse of an easement was not extinguishment. Five years earlier, in *Davenport v. Lamson*, the court had similarly ruled that the

²⁵ *Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.*, 179 F.2d 64, 66 (D.C. Cir. 1949). In the lower court, the servient estate holder moved for a declaratory judgment that the dominant estate holder’s abuse of the easement resulted in its extinguishment. *Id.* at 65. The district court granted the servient estate holder’s motion and extinguished the easement. *Id.*

²⁶ *Id.* at 65.

²⁷ *Id.*

²⁸ *McTavish v. Carroll*, 13 Md. 429 (Md. C.A. 1859).

²⁹ *Id.* at *6, *11.

³⁰ *Id.* at *11. In an earlier Pennsylvania case, *Shroder v. Brenneman*, 23 Pa. 348 (1854), the Pennsylvania Supreme Court faced an evidentiary question on appeal. In ruling on the evidentiary question the court noted in passing that the servient tenant’s remedy, when the dominant estate holder expanded the scope of the dominant estate served by a right-of-way easement, was an action for trespass on the case. *Id.*

³¹ *Mendell v. Delano*, 48 Mass. 176, 181 (1843).

servient tenant's remedy for the dominant tenant's unauthorized extension of his easement was a trespass action.³²

The most prominent case, from the turn of the twentieth century, to address the remedy for abuse of an easement was *McCullough v. Broad Exch. Co.*, decided by the intermediate New York court of appeals.³³ At issue in *McCullough* was the expansion of the dominant tenement served by a right-of-way.³⁴ The dominant tenant erected a large office building that encompassed both the dominant estate and other, surrounding parcels of land, all served by the easement.³⁵

Overruling the lower court's order of forfeiture, the appellate court refused to order the easement extinguished: "An unlawful or excessive use of an easement may be enjoined, but it is difficult to see upon what principle of law the court is authorized to declare it forever and altogether forfeited and extinguished."³⁶ Instead, the court enjoined the dominant tenant from using the easement until it modified the building so that only the dominant estate benefited from the right-of-way.³⁷

Nineteenth century commentators confirmed this case law, writing that abuse of an easement by a dominant tenant did not result in extinguishment of the easement. Emory Washburn's 1868 treatise on property law, for instance, stated that abuse of an easement resulted in extinguishment only if the illegitimate increased use could not be separated from legitimate use.³⁸ Washburn affirmed that one would "not thereby lose his easement" for simple excessive use.³⁹ This rule was affirmed in later editions⁴⁰ and by later commentators, discussed below.

Likewise, Leonard A. Jones' *A Treatise on the Law of Easements*, published in 1898, affirmed that abuse of an easement could give rise to an injunction, but it would not result in extinguishment of the easement.⁴¹ "The mere use of the easement for a purpose not authorized, the excessive use or misuse, . . .

³² *Davenport v. Lamson*, 38 Mass. (21 Pick.) 72, 75 (1838); *see also* *French v. Marstin*, 32 N.H. 316 (1855) (following *Davenport v. Lamson*).

Mendell and *Davenport* both referenced damages as the plaintiffs' remedy. This was because the plaintiffs brought trespass actions seeking a remedy for harm already done by the servient tenants.

³³ *McCullough v. Broad Exchange Co.*, 92 N.Y. Supp. 533 (1905). For a contemporaneous review of *McCullough* see Note, 18 HARV. L. REV. 608 (1905).

³⁴ *McCullough*, 92 N.Y. Supp. at 535.

³⁵ *Id.*

³⁶ *Id.* at 536; *see also id.* ("The erection of the building upon its own land was lawful, and does not work a forfeiture of the easement.").

³⁷ *Id.* at 538.

³⁸ 2 EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 342 (3d ed. 1868).

³⁹ *Id.*

⁴⁰ *See* EMORY WASHBURN, A TREATISE ON THE AMERICAN LAW OF REAL PROPERTY 342 (Crowell ed., 4th ed. 1885) ("Nor does one having an easement in another's land lose it by merely abusing it, or using it for purposes for which he has no right to exercise it.").

⁴¹ LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS 665, 685 (1898).

are not themselves sufficient to constitute an abandonment.”⁴² (Jones also rejected the view later adopted by the Washington Supreme Court in *Brown v. Voss*,⁴³ instead finding that the “owner of the dominant estate is not allowed to make material alterations in the character of his easement, although such alterations would not make the easement more burdensome to the servient estate.”⁴⁴)

In 1909, Alfred G. Reeves stated in his treatise on real property that when a dominant tenant improperly increased the burden on the servient estate it was “settled that the owner of the latter may recover damages at law for the injury or enjoin its continuance by a suit in equity.”⁴⁵ He continued stating it was “at one time” believed that for excessive misuse the owner of the privilege might be “compelled to relinquish it altogether and that the servient land should in consequence be relieved of the entire burden.”⁴⁶ Reeves corrected this misconception, stating that “if that which is wrongfully and excessively claimed or enjoyed can be distinguished and separated from that which is rightfully owned, this will be done and only the excessive amount will be taken away and prohibited.”⁴⁷

In a 1905 Case Note in the *Harvard Law Review*, the author of the note argued that forfeiture of an easement was not a remedy for abuse of an easement.⁴⁸ The strongest remedy courts permitted, according to the note, was an injunction against use of the easement until the dominant tenant could alter his estate to eliminate abuse of the easement.⁴⁹ Through the twentieth century, this American rule continued to dominate: “Courts . . . appear to be in accord in considering that the mere misuse or excessive use thereof does not ordinarily constitute a forfeiture, the view being that an injunction is the proper remedy.”⁵⁰

If, as I have shown, the rule followed by American courts and commentators was that abuse of an easement did not lead to extinguishment of the easement through an injunction, then why did attorneys and courts repeatedly raise and reject the contrary rule? The answer lies, at least partly, in English law and its continuing influence on American law.⁵¹

⁴² *Id.* at 685.

⁴³ *Brown v. Voss*, 715 P. 2d 514 (Wash. 1986).

⁴⁴ JONES, *supra* note , at 664.

⁴⁵ I ALFRED G. REEVES, A TREATISE ON THE LAW OF REAL PROPERTY § 195 at 266 (1909) (reprint ed. Rothman & Co. 1997).

⁴⁶ *Id.*

⁴⁷ *Id.* He added, however, that “when . . . such separation and distinction can not be made, the prohibition of the excessive claim results in the destruction also of the entire original right.” *Id.*

⁴⁸ Note, 18 HARV. L. REV. 608, 609 (1905).

⁴⁹ *Id.*

⁵⁰ See Jack D. Warren, Recent Decisions, 29 MISS. L.J. 229, 230 (1958); see also *Recent Decisions*, 28 CAL. L. REV. 644, 645 (1940) (“[I]t is generally held by American courts that an easement will not be extinguished by misuse.”).

⁵¹ See *Recent Decisions*, 28 CAL. L. REV. 644, 609 (1940) (arguing that the scholars, attorneys, and courts that promoted the forfeiture remedy improperly followed “early English cases dealing with the easement of light”).

C. *The Doctrine of Ancient Lights and Its Impact on American Law*

English law was the first to answer the question of what remedy is appropriate for abuse of an easement, and it continued to adhere to a rule different from the American one, in some cases into the twentieth century. The English rule that granted forfeiture as remedy for abuse of an easement first arose in the context of ancient lights.⁵²

Ancient lights is the doctrine, generally rejected by American jurisdictions,⁵³ that a landowner may acquire a prescriptive (negative) easement to sunlight.⁵⁴ As described by one commentator, ancient lights is the “doctrine . . . whereby an owner of land who has had uninterrupted access to light through windows [for a number of years] can prevent an adjoining landowner from so building as to block the light.”⁵⁵ The holder of ancient lights had a cause of action against neighboring land owners who improved their land “so as to obstruct the ancient lights of an adjoining house.”⁵⁶

The English courts, when faced with the claim that the ancient lights holder had increased the scope of the prescriptive easement to light, provided varying remedies for the abuse including extinguishment of the ancient lights.⁵⁷ The dominant tenant could increase the scope of ancient lights by, for example, building more windows. Such “[a]n alteration,” concluded Charles James Gale in

⁵² See *McCullough v. Broad Exch. Co.*, 92 N.Y.S. 533, 537 (1905) (finding that the English rule first arose in the context of ancient lights).

⁵³ See *Fontainebleau Hotel Corp. v. Forty-Five Twenty-Five, Inc.*, 114 So. 2d 357 (Fla. App. 1959) (rejecting the ancient lights doctrine); see also *Sher v. Leiderman*, 226 Cal. Rptr. 698 (Cal. 1986) (same); *Mohr v. Midas Realty Corp.*, 431 N.W. 2d 380 (Iowa 1988) (same); III JAMES KENT, COMMENTARIES ON AMERICAN LAW *448 (O.W. Holmes, Jr., ed.) (12th ed. 1889) (finding that ancient lights was not accepted in America because it would interfere with economic development).

While the doctrine of ancient lights itself has been rejected, some jurisdictions have moved to permitting what is effectively the same result through other legal doctrines, such as nuisance. See, e.g., *Prah v. Maretti*, 321 N.W. 2d 182 (Wisc. 1982) (holding that the owner of solar panels has a nuisance cause of action against a neighboring land owner whose house, when constructed, would block the solar panels’ access to sunlight).

⁵⁴ 28A C.J.S. *Easements* § 51 (1996). For a broad review of ancient lights see H.A. de Colyar, *Notes on the Easement of Light in England and Elsewhere*, 7 J. SOC. OF COMP. LEGIS. 298 (1906).

⁵⁵ Arthur Allen Leff, *The Leff Dictionary of Law: A Fragment*, 94 YALE L.J. 1855, 2019 (1985); see also 28A C.J.S. *Easements* § 51 (1996) (stating that once a landowner acquired the right to ancient lights, an adjoining landowner could not act in such a way as to block the light received through ancient lights).

The time period to establish the prescriptive negative easement to ancient lights, after some initial uncertainty, was set at twenty years. See de Colyar, *supra* note , at 298 (“The length of time required at common law to establish a right to access of light was always a somewhat uncertain quantity.”); III KENT, *supra* note , at *448 (citing *Bury v. Pope*, Cro. Eliz. 118, for the proposition that the prescriptive period extended to thirty or forty years); *Aynsley v. Glover*, L.R. 10 Ch. 283 (1875) (holding that the prescriptive period was a reasonable amount of time); The Prescription Act, 2 & 3 Will. 4 c. 71, § 3 (1832) (setting the prescriptive period at twenty years).

⁵⁶ III KENT, *supra* note , at *448.

⁵⁷ See de Colyar, *supra* note , at 298 (stating that the remedy of forfeiture was appropriate where the dominant tenant “has, to the prejudice of the servient owner, substantially altered the mode of enjoying the light originally acquired”).

his *A Treatise on the Law of Easements*, “which imposes an additional burden[,] may destroy the easement all together.”⁵⁸

The English courts reasoned that forfeiture was necessary because it was often practically impossible for the servient tenant—the party whose land was burdened by the prescriptive ancient lights easement—to remedy the unauthorized increased scope of the dominant tenant’s use of ancient lights by blocking only the unauthorized increase.⁵⁹ When a dominant tenant increased the land served by a driveway easement beyond the dominant estate, the servient tenant could relatively easily obstruct the easement. By contrast, to obstruct a dominant tenant’s use of ancient lights, the servient tenant would have to build a structure to block the dominant tenant’s access to sunlight. The English courts consequently permitted the servient tenant to sue for extinguishment of the ancient lights easement.⁶⁰

The English rule permitting forfeiture in the context of ancient lights provided little support for application of that rule to all easements and, especially, in the United States. First, the unique circumstances of an easement for light which the English courts relied on to permit forfeiture are inapplicable to other types of easements. Self-help in the context of, for example, a driveway easement is relatively simple: obstruct the drive.

Second, the American rule, which permits a court to enjoin the dominant tenant’s use of the easement until the unauthorized use is separated from authorized use, satisfactorily protects the servient tenant’s rights without limiting the dominant tenant’s rights any further than necessary.⁶¹ In the context of a driveway easement, the court can enjoin the dominant tenant’s use of the drive until the dominant tenant has “shown that only the dominant tenement is served by the easement.”⁶²

Third, the American rejection of the doctrine of ancient lights makes acceptance of the remedy that accompanied the doctrine difficult.⁶³ American

⁵⁸ CHARLES JAMES GALE, *A TREATISE ON THE LAW OF EASEMENTS* 468 (W.J. Byren ed., 10th ed. 1925); *see also id.* at 472 (“[T]he cases in which the suggestion [of forfeiture] has been most frequently made that the . . . easement has been destroyed are cases relating to the easement of light.”).

⁵⁹ *Renshaw v. Bean*, 18 Q.B. 112; *Hutchinson v. Copestake*, 8 C.B. (N.S.) 101; *Garritt v. Sharp*, 3 Ad & E. 325.

⁶⁰ *See McCullough v. Broad Exch. Co.*, 92 N.Y.S. 533, 537 (1905).

Some commentators found that the forfeiture remedy for abuse of ancient lights was limited to those situations where the unauthorized excessive use could not be separated from the dominant tenant’s authorized use. GALE, *supra* note , at 478.

⁶¹ *See Recent Decisions*, 28 CAL. L. REV. 644, 645 (1940) (“[B]ut as the servient owner has adequate protection through legal remedies which would suspend the use of the easement until it could be properly used, there seems no reasons for depriving the owner of the easement of the right to make proper use of it.”).

⁶² *Penn Bowling Recreation Ctr.*, 179 F.2d at 67.

⁶³ *See de Colyar, supra* note , at 298 (“In the United States of America the easement of light which obtains in England is not generally recognized, being regarded as an anomaly in the law.”).

courts rejected ancient lights because of the different circumstances in America.⁶⁴ They found that ancient lights would unduly limit development.⁶⁵

D. *The Continuing Influence of the English Rule of Forfeiture*

Despite these reasons for not adopting the English forfeiture rule, American attorneys, commentators, and courts parroted the English position into the mid-twentieth century. This continued vitality of the English rule occurred firstly because it provided the common law background against which American legal actors operated. American legal practice, especially prior to Legal Realism, often looked to England for guidance and as a source of legal norms.⁶⁶

In addition, a few commentators restated the earlier discussions of the English position in English case law and its mention in some American cases, giving it continuing life even though it was not adopted by American courts. Lastly, counsel for servient tenants had a powerful incentive to seek forfeiture if the legal argument was remotely plausible. Forfeiture would permit the servient tenants to recover at no cost the easement right he had sold.

For example, some nineteenth century property law treatises published in the United States stated the English rule instead of the American rule. In this vein, *A Treatise on the Law of Easements*, authored by an English attorney John L. Goddard,⁶⁷ stated that “[a]lteration in the condition or character of a dominant tenement will frequently effect the extinction of an easement by operation of law.”⁶⁸ The authorities cited to support this rule were entirely English.⁶⁹

⁶⁴ See *McCullough v. Broad Exch. Co.*, 92 N.Y.S. 533, 537 (1905) (finding that the doctrine of ancient lights “was never given place in our jurisprudence”); see also MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* at 44-46 (1977) (describing the rejection of ancient lights because of its hindrance of economic growth and expansion).

⁶⁵ 28A C.J.S. *Easements* § 51 (1996); see also *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838) (“[I]t cannot be applied in the growing cities and villages of this country, without working the most mischievous consequences.”). For other early courts rejecting the doctrine of ancient lights see *Haverstick v. Sipe*, 33 Pa. 368 (Pa. 1859); *Rogers v. Sawin*, 10 Gray 376 (Mass. 1858).

The courts also objected to ancient lights arguing that one cannot adversely possess light which one enjoys on one’s own property and not on the property of one’s neighbor. 28A C.J.S. *Easements* § 51 (1996). See also *Parker v. Foote*, 19 Wend. 309 (N.Y. Sup. Ct. 1838) (rejecting the doctrine of ancient lights because “in case of lights, there is no adverse user, nor indeed any use whatsoever of another’s property; and no foundation is laid for indulging any presumption against the rightful owner”). Therefore, one’s use of light is not adverse to one’s neighbor’s rights and one could not “acquire[] a beneficial interest in the land of [one’s] neighbor.” 28A C.J.S. *Easements* § 51 (1996).

⁶⁶ Thomas W. Merrill, *The Judicial Prerogative*, 12 Pace L. Rev. 327, 346 (1992).

⁶⁷ The *Treatise*’s cover notes that the edition published in the United States is “enlarged from the second English edition.” JOHN LEYBOURN GODDARD, *A TREATISE ON THE LAW OF EASEMENTS* (Edmund H. Bennett, ed., 1880).

⁶⁸ *Id.* at 452; see also *id.* at 453 (“As a general rule it may be taken that any alteration of a dominant tenement, of such a nature that the tenement or the mode of user of an easement is substantially changed in character . . . will cause the extinction or suspension of an easement.”).

⁶⁹ *Id.*

Goddard's statement of the English rule was later followed by the influential Tiffany's *The Law of Real Property*.⁷⁰ Tiffany stated—partially quoting Goddard—that “[a]n alteration in the character of the dominant tenement, which necessarily involves a substantial change or increase in the user of the easement, will terminate or extinguish the easement.”⁷¹ Tiffany, like Goddard, failed to cite any American cases to support his claim.⁷²

Through the period from the mid-nineteenth century to the mid-twentieth century, the English rule continued to be reported, cited, and argued over, even though it was not followed by American courts.⁷³ As summarized in the *Baylor Law Review* in 1957: “Although sufficient dicta can be found in cases to support the proposition that an easement may be lost by misuser, actual loss is seldom found.”⁷⁴

Attorneys relied on English case law to support their claims of forfeiture. For example, in the 1859 *McTavish v. Carroll* case, discussed above,⁷⁵ the servient tenant argued that the dominant tenant's enlargement of the dominant estate “operated an extinguishment of the easement.”⁷⁶ In support of his claim of forfeiture, the servient tenant cited four English cases.⁷⁷ Likewise, in *McMillan v. Cronin*, decided in 1878, the servient tenant's attorney argued that the dominant tenant “had forfeited his right to the use of the way” by enlarging the scope of the easement.⁷⁸

Courts repeatedly, throughout the nineteenth century and up to the mid-twentieth century, faced the arguments of counsel advocating, and rulings of lower courts approving, forfeiture as a remedy. And just as consistently, the courts rejected forfeiture as a remedy. In *O'Banion v. Cunningham*, for instance, the servient tenant argued that the dominant tenant's abuse of the easement

⁷⁰ 1 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND* 733 (1903).

⁷¹ *Id.*

⁷² *Id.* Interestingly, in the 1920 edition of Tiffany's *The Law of Real Property*, the role of extinguishment of easements was limited to those cases where the excessive use of the dominant estate could not be separated from legitimate use of the estate. 2 HERBERT THORNDIKE TIFFANY, *THE LAW OF REAL PROPERTY AND OTHER INTERESTS IN LAND* 1370 (1920). The same view was carried forward into the 1939 edition. That is the majority position today.

⁷³ See Jack D. Warren, *Recent Decisions: Easements—Abandonment by Misuse*, 29 *MISS. L.J.* 229, 229 (1958) (“Some text-writers have concluded that one means of extinguishment . . . is forfeiture by misuse. This conclusion appears to have been derived by analogy from early English cases dealing with easements of light.”); see also *McMillen v. Cronin*, 75 *N.Y.* 474 (1879) (noting in passing the possibility of forfeiture).

⁷⁴ Dwight R. Mann, *Recent Decisions: Property—Easements—Forfeiture for Misuser*, 9 *BAYLOR L. REV.* 433, 434 (1957); see also Jack D. Warren, *Recent Decisions*, 29 *MISS. L.J.* 229, 229-30 (1958) (“Courts . . . appear to be in accord in considering that mere misuse or excessive use thereof does not ordinarily constitute a forfeiture.”).

⁷⁵ See *supra* notes , and accompanying text.

⁷⁶ *McTavish v. Carroll*, 13 *Md.* 429 (1859).

⁷⁷ *Id.*

⁷⁸ *McMillan v. Cronin*, 75 *N.Y.* 474, 476 (1878); see also *Deavitt v. Washington County*, 53 *A.* 563, 564 (Vt. 1903) (rejecting the plaintiff's argument that “unauthorized use” caused the easement to be “extinguished” because “forfeiture is not the remedy”).

resulted in forfeiture.⁷⁹ The Court of Appeals of Kentucky ruled, by contrast, that “[a] right-of-way is not forfeited by a [mis]use.”⁸⁰ Other courts faced similar arguments by counsel, only to reject them as well.⁸¹ Similarly, in *McCullough v. Broad Exch. Co.*, the court addressed and rejected forfeiture as a remedy.⁸² “An unlawful or excessive use of an easement may be enjoined, but it is difficult to see upon what principle of law the court is authorized to declare it forever and altogether forfeited and extinguished because of an unauthorized or excessive use.”⁸³

The most prominent case in the twentieth century to affirm the American rule was *Penn Bowling Recreation Center v. Hot Shoppes*.⁸⁴ But even in *Penn Bowling*, the court faced and rejected the contrary rule that was adopted by the district court.⁸⁵ In *Penn Bowling* the dominant tenant used the right-of-way easement to serve property other than the dominant estate.⁸⁶ Following the lead of *McCullough*, the court enjoined the dominant tenant from abusing the easement.⁸⁷

The American rule that the proper remedy for abuse of an easement was an injunction continued to hold sway through most of the twentieth century.⁸⁸ The 2005 edition of *Tiffany on Real Property* summarized the status quo: “[T]he fact that the owner of the easement makes a use of the servient tenement not justified

⁷⁹ *O'Banion v. Cunningham*, 182 S.W. 185, 186 (Ky. 1916).

⁸⁰ *Id.*

⁸¹ *See Kneisel v. Krug*, 8 Ohio Dec. Rep. 581 (Ohio Supr. Ct. 1883) (holding that forfeiture of an easement, as advocated by counsel, was not a permissible remedy); *McMillen v. Cronin*, 75 N.Y. 474 (1879) (rejecting the servient tenant's argument for forfeiture).

⁸² *McCullough v. Broad Exch. Co.*, 92 N.Y.S. 533, 536-37 (1905).

⁸³ *Id.* at 536.

⁸⁴ *Penn Bowling Recreation Center v. Hot Shoppes*, 179 F.2d 64 (D.C. Cir. 1949).

⁸⁵ *Id.* at 65-66 (rejecting the district court's holding that forfeiture is the appropriate remedy for abuse of an easement).

⁸⁶ *Id.* at 65.

⁸⁷ *See id.* at 67 (citing *McCullough*).

In the late-nineteenth century, five states statutorily adhered to the English rule. *See* LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS 665, 671 (1898) (listing California, Montana, North and South Dakota, and Oklahoma); *see also* JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND §10:26 (West Group 2001) (1998) (citing Cal. Civ. Code § 811(3) (1987); Mont. Code Ann. § 70-7-111(3) (1991); ND Cent. Code § 47-05-12(3) (1991); Okla. Stat. Ann. Tit. 60, § 59(3) (1988); SD Codified Laws Ann. § 43-13-12 (1988)).

In its *Civil Code*, California provided that an easement is extinguished by misuse. *See* Cal. Civ. Code § 811 (3) (1950) (“[T]he performance of any act upon either tenement, by the owner of the servitude . . . which is incompatible with its nature or exercise,” extinguishes the easement.). However, despite the *Code*'s relatively clear mandate for forfeiture, California courts following the *Code* have generally awarded damages or a temporary injunction, and have only on rare occasion extinguished easements. *See* L.S.M., *Recent Decisions: Easements: Extinguishment by Material Alteration*, 28 CAL. L. REV. 644, 644-46 (1940) (describing California law). In *Crimmins v. Gould*, for example, the court held that forfeiture was justified because the unauthorized use was inseparable from the authorized use. *Crimmins v. Gould*, 308 P. 2d 786 (Cal. 1957). *Compare* *Ward v. City of Monrovia*, 108 P. 2d 425 (Cal. 1940) (holding that misuse of an easement resulted in forfeiture); *Lux v. Haggin*, 69 Cal. 255 (1886) (extinguishing an easement).

⁸⁸ *See Recent Decisions*, 28 CAL. L. REV. 644, 645 (1940) (“[I]t is generally held by American courts that an easement will not be extinguished by misuse.”).

by the character or extent of the easement does not involve the extinguishment . . . of the easement At least, there is no cause for termination of the easement unless the misuse makes it impossible to effectuate the purpose for which the easement was created.”⁸⁹

Thus far, I have argued that the remedy afforded a servient tenant for a dominant tenant’s misuse of an easement has traditionally been an injunction. I showed that the American rule has been followed by American courts from the earliest cases. I then argued that the contrary English rule continued to be advocated by scholars, attorneys, and even a few (lower) courts, despite its nearly unanimous rejection by American courts.

The American rule was most prominently challenged in 1986, by the Washington Supreme Court in *Brown v. Voss*.⁹⁰ In *Brown* the court declined to enjoin misuse of an easement and instead authorized an award of damages to the servient tenant for the dominant tenant’s misuse.⁹¹ Below, I will show that *Brown* was not, as it is often characterized,⁹² an unprecedented deviation from American law. Rather, cases prior to *Brown* had recognized that, under certain circumstances, damages was a more appropriate remedy for misuse than an injunction. Below, I will argue that courts should follow *Brown*.

IV. Courts Should Adopt the *Brown* Rule in Place of the American Rule

A. Brown v. Voss’ Deep Roots in American Law

Brown v. Voss involved a suit by the dominant tenant against the servient tenant to enjoin the servient tenant from obstructing a right-of-way easement.⁹³ The servient tenant obstructed the right-of-way because the dominant tenant had utilized the easement to serve a nondominant tenement in addition to the dominant estate.⁹⁴ The trial court found that there was no damage to the servient estate because there was no difference in the amount or kind of traffic on the right-of-way.⁹⁵

The Washington Supreme Court affirmed the trial court’s denial of an injunction against the dominant tenant.⁹⁶ The Supreme Court first recited the American rule and found that the dominant tenant’s use of the easement to serve a

⁸⁹ TIFFANY & JONES, TIFFANY ON REAL PROPERTY § 821 (2005).

⁹⁰ *Brown v. Voss*, 715 P. 2d 514 (Wash. 1986).

⁹¹ *Id.* at 517-18.

⁹² See Orth, *supra* note , at 643 (describing *Brown* as “avoid[ing] strict application” of the American rule); Pamela McClaran, Note, *Extending the Benefit of an Easement: A Closer Look at a Classic Rule—Brown v. Voss*, 105 Wn. 2d 366, 715 P.2d 514 (1986), 62 WASH. L. REV. 295, 303 (1987). (same).

⁹³ *Brown*, 715 P. 2d at 515. For an overview on *Brown* and an argument that it was mistaken see McClaran, *supra* note , at 295.

⁹⁴ *Brown*, 715 P. 2d at 515.

⁹⁵ *Id.* at 516.

⁹⁶ *Id.* at 517-18.

nondominant parcel was “a misuse of the easement.”⁹⁷ It then relied on courts’ equitable discretion to hold that misuse of an easement does not necessarily require an injunction.⁹⁸ The court noted that equitable relief is lodged in the trial court’s discretion, and that since there was no substantial injury to the servient tenant—but there would be substantial hardship to the dominant tenant who had expended significant sums on the nondominant estate—the trial court was justified in denying injunctive relief.⁹⁹

Although *Brown v. Voss* was seen as portending a dramatic sea change in American case law, it was not the first American case to provide noninjunctive relief.¹⁰⁰ Earlier American courts had also ordered damages when, under the circumstances, granting an injunction would do more harm than good. For example, in *National Lead Co. v. Kanawha Block Co.*, the court ruled that “the degree of actual burden is a material and appropriate element in consideration of the application for injunctive relief.”¹⁰¹ The district court refused to grant an injunction because the dominant tenant’s use of the easement to serve a nondominant parcel did not increase the burden on the servient tenant and greatly benefited the dominant tenant.¹⁰² Like the later *Brown* Court,¹⁰³ the district court relied on the principles governing equity relief—the relative cost and benefit of an injunction, and its equitable discretion—to order that the servient tenant’s remedy was damages.¹⁰⁴

Illinois courts have also denied injunctive relief under similar circumstances.¹⁰⁵ In *Wetmore v. Ladies of Loretto*, the servient tenant sold the dominant tenant ten acres of land and an easement across the servient tenant’s remaining property to the nearby public right-of-way.¹⁰⁶ Then, the servient tenant sold the dominant tenant another tract.¹⁰⁷ The dominant tenant serviced both tracts with the original easement, but used the easement much less intensively than in the past because the dominant tenant had also procured another route to the public roads that it used more extensively.¹⁰⁸ The *Wetmore* Court refused to enjoin the

⁹⁷ *Id.* at 517; see also *id.* (“As noted by one court in a factually similar case, “[I]n this context, this classic rule of property law is directed to the rights of the respective parties rather than the actual burden on the servitude.”).

⁹⁸ *Id.*

⁹⁹ *Id.* at 517-18. Commentators have taken the court’s holding in *Brown* to stand for the proposition that “if the injury to the servient estate resulting from the enlarged estate was minimal and the enlargement of the dominant estate socially valuable, the owner of the servient estate might be entitled to damages, rather than equitable relief.” KURTZ & HOVENKAMP, *supra* note , at 386-87.

¹⁰⁰ See Kratovil, *supra* note (arguing that courts should abandon the American rule in favor of an unreasonable increase of burden standard).

¹⁰¹ *National Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D.W.V. 1968), *aff’d per curiam*, 409 F.2d 1309 (4th Cir. 1969).

¹⁰² *Id.*

¹⁰³ The *Brown* Court cited *National Lead Co. v. Brown*, 715 P. 2d at 517.

¹⁰⁴ *National Lead Co.*, 288 F. Supp. at 365.

¹⁰⁵ *Wetmore v. Ladies of Loretto*, Wheaton, 220 N.E. 2d 491, 497 (Ill. App. Ct. 1966).

¹⁰⁶ *Id.* at 492-93.

¹⁰⁷ *Id.*

¹⁰⁸ *Id.* at 497.

dominant tenant's use of the original easement to service the nondominant tract because "such trivial and inconsequential misuse [does not] justif[y] the issuance of an injunction" and "the benefit to be obtained [by the servient tenant] does not warrant the hardship imposed."¹⁰⁹

This line of cases builds on the inherent equitable authority of courts.¹¹⁰ Courts have the discretion to issue injunctive relief only if they are satisfied that it will "provide significant benefits that are greater than its costs or disadvantages."¹¹¹ As a result, "an injunction that would bear heavily on the defendant without benefiting the plaintiff will usually be refused."¹¹² Carrying these principles over to the context of abuse of an easement, if damages will sufficiently redress a servient tenant's harm—if any—and injunctive relief will harm the dominant tenant disproportionately to the servient tenant's benefit, courts should deny injunctive relief.¹¹³

This was the approach taken in *Chafin v. Gay Coal & Coke Co.*, where the court rejected the servient tenant's request for an injunction and instead authorized damages.¹¹⁴ In *Chafin*, the dominant tenant, which was a coal mining company, used its easement to remove coal from nondominant land.¹¹⁵ The court first found that "[i]t is questionable whether there is any additional servitude" on the servient estate, and then determined that an injunction would "occasion serious loss to defendant [dominant tenant] and would afford plaintiff [servient tenant] very little benefit."¹¹⁶ Relying on its equitable discretion, and balancing the "relative expense and inconvenience to which the parties would be put," the court refused to enjoin the dominant tenant and instead ordered that the servient tenant may pursue damages.¹¹⁷ Other courts have ruled similarly.¹¹⁸

This line of cases supports the test I propose that courts adopt on when to order damages in place of an injunction: (1) when the dominant tenant's servicing nondominant land does not pose an unreasonable burden on the servient estate;

¹⁰⁹ *Id.*

¹¹⁰ See *National Lead Co.*, 288 F. Supp. at 365 ("Each case must be decided upon its own circumstances, and it rests in the discretion of the court whether a mandatory injunction shall issue."); Orth, *supra* note , at 643 ("Courts avoiding strict application [of the American rule] . . . balance the burden imposed on the servient parcel if extension is allowed against the hardship of the easement owner if extension is denied."); see also BRUCE & ELY, *supra* note , § 8.14 ("Courts exercise discretion in fashioning equitable relief.").

¹¹¹ 42 AM. JUR. 2D *Injunctions* § 35 (2007); see also *id.* ("Generally, a court is not bound to make a decree that will work greater injury than the wrong that the court has been asked to redress.").

¹¹² *Id.*; see also RESTATEMENT (SECOND) TORTS § 941 (1977) (listing the relative hardship of granting an injunction as one of the factors courts must consider when deciding whether to enjoin tortious activity).

¹¹³ See 42 AM. JUR. 2D *Injunctions* § 35 (2007) ("Even if the wrongful acts are indisputable, an injunction may be denied if the payment of money would afford substantial redress and if the injunction would subject the defendant to grossly disproportionate hardship.").

¹¹⁴ *Chafin v. Gay Coal & Coke Co.*, 156 S.E. 47, 50 (W.V. 1930).

¹¹⁵ *Id.* at 49.

¹¹⁶ *Id.* at 49-50.

¹¹⁷ *Id.* at 50.

¹¹⁸ *Carbone v. Vigliotti*, 610 A.2d 565, 569 (Conn. 1992); *Ogle v. Trotter*, 495 S.W. 2d 558 (Tenn. Ct. App. 1973).

and (2) when the cost to the dominant tenant imposed by an injunction—of ceasing his use of the easement to service nondominant land—is substantially greater than the benefit to the servient tenant.¹¹⁹ The court in *National Lead Co.*, for example, emphasized both of these factors. It found that “the additional traffic over the roadway generated by its use is minimal” and that an injunction would “seriously impede the efficiency of [the dominant tenant’s] operation, and would be of little or no benefit to National.”¹²⁰ Other courts have used similar analyses, both in this context¹²¹ and in others.¹²²

The *Restatement (Third)* also supports courts’ reliance on their equitable discretion to tailor remedies and to order damages in place of an injunction under the *Brown* conditions. Section 8.3 provides that a “servitude may be enforced by any appropriate remedy or combination of remedies” including damages and equitable relief.¹²³ Section 8.3, according to the *Restatement (Third)*’s authors, was meant to confirm the “wide discretion in selecting remedies” judges possess after the merger of law and equity.¹²⁴ Judges are authorized under section 8.3 to grant damages and/or injunctive relief, as appropriate to the situation.¹²⁵ Indeed, the *Restatement (Third)*’s authors state that courts may take into consideration the harm, if any, done to the servient estate along with the relative costs and benefits of enforcement of the easement when deciding what remedy to order.¹²⁶

Courts have relied on their equitable discretion in many areas of property law where formerly the rule was that an injunction was mandatory. For instance, the innocent improver doctrine is a modern reform that permits courts to order an innocent improver of another’s property to pay damages instead of giving the true owner injunctive relief and thereby forcing the innocent improver to remove the improvement.¹²⁷ Traditionally, when a party built a building or some improvement on a portion of another’s property and the true owner successfully

¹¹⁹ See 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* 713 (2d ed. 1993) (“Assessment of injunction cases increasingly requires [courts] to consider the costs and benefits of an injunction.”).

¹²⁰ *Id.* at 364.

¹²¹ See, e.g., *Chafin v. Gay Coal & Coke Co.*, 156 S.E. 47, 50 (W.V. 1930) (relying on two propositions to conclude that the servient tenant’s remedy was damages: (1) the dominant tenant’s servicing of nondominant land was “an immaterial change [that] does not affect the easement”; and (2) an injunction “would occasion serious loss to defendant [dominant tenant] and would afford plaintiff [servient tenant] very little benefit”); *Whetmore*, 220 N.E. 2d at 497 (same).

¹²² See BRUCE & ELY, *supra* note , §7.17 (“[W]hen equity so demands, courts tolerate an easement holder’s minor unilateral expansion of the servitude’s dimensions so long as the servient owner is not materially disadvantaged.”).

¹²³ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 8.3 (2000).

¹²⁴ *Id.* § 8.3 cmt. b.

¹²⁵ *Id.*

¹²⁶ *Id.* § 8.3 cmt. e; see also *id.* § 8.3 cmt. h (“The costs and benefits of enforcement of the servitude by various means may be considered in determining the availability and appropriate selection of remedies.”); *id.* (“The severity of the breach or violation may be an important factor. If it is minor, injunctive relief may not be warranted unless necessary to protect a property interest.”).

¹²⁷ 41 AM. JUR. 2D *Improvements* § 19 (2007).

sued to eject the improver, courts enjoined the improver to remove the portion of his structure on the true owner's property.¹²⁸

The modern trend is to award the true owner the option of conveying the strip of land to the improver for compensation or purchasing the adverse possessor's offending building.¹²⁹ Courts that have adopted the innocent improver doctrine reasoned that equitable relief was inappropriate because the harm to the true owner was slight, and an injunction ordering the improver to remove the offending structure would subject the improver to harm substantially disproportionate to the benefit received by the true owner from the injunction.¹³⁰ As under the *Brown* rule, courts that follow the innocent improver doctrine continue to recognize that one party's legal rights have been violated, but instead of ordering injunctive relief, they order damages to the harmed party. This movement in remedies, a symptom of the broader movement from property to contract rules, is discussed in more detail below, in Part IV.B.

In sum, *Brown* was not a dramatic innovation. On the contrary, the *Brown* rule has a long pedigree stretching back decades and rooted in the traditional equitable prerogatives of courts to achieve equity between the parties before them.

While *Brown* did not usher in an immediate transformation in courts across the country, the *Brown* rule has made inroads.¹³¹ As the *Restatement Third's* authors themselves recently noted, "[a] few recent cases may indicate a shift from the rule stated in this section [the American rule]."¹³² At least four states, Illinois, Connecticut, Tennessee, and West Virginia, have also moved in *Brown's* direction.¹³³ *Brown's* deep roots in, and its consonance with other areas of easement law, discussed below, will make it easy for courts to continue adopting the *Brown* rule. And its normative attractiveness, also explained below, shows that courts should adopt the *Brown* rule.

¹²⁸ 57 A.L.R. 263 § 4 (1958).

¹²⁹ 41 AM. JUR. 2D *Improvements* § 19 (2007).

¹³⁰ *Pakulski v. Luxwiczewski*, 289 N.W. 231, 234 (Mich. 1939); *see also* DOBBS, *supra* note , at 816 (describing the equitable balancing that occurs).

¹³¹ *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY 547 (2d ed. 2007) (finding that "modern decisions have begun to erode this traditional standard").

¹³² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES at rep. note (2000).

¹³³ *See* *Carbone v. Vigliotti*, 610 A.2d 565 (Conn. 1992); *Ogle v. Trotter*, 495 S.W. 2d 558 (Tenn. Ct. App. 1973); *Wetmore v. Ladies of Loretto, Wheaton*, 220 N.E. 2d 491 (Ill. App. Ct. 1966); *Chafin v. Gay Coal & Coke Co.*, 156 S.E. 47 (W.V. 1930).

B. *The Brown Rule Fits Better with Current American Property Law Which Has Moved Toward Contract Concepts and Remedies Over Traditional Property Concepts and Remedies*

In many areas, American property law has slowly moved away from employing property concepts toward using contract concepts. Here, I am drawing on the distinction most prominently made by Guido Calabresi and A. Douglas Melamed.¹³⁴ Property rules, according to Calabresi and Melamed, give the holder of an entitlement a right to sell the entitlement on the holder's terms.¹³⁵ In other words, the entitlement holder can refuse to transfer the entitlement. By contrast, liability rules give the holder of the entitlement the right to an objectively determined amount of compensation, but no veto to a transfer of the entitlement.¹³⁶

In the remedies context, entitlements protected by property rules prevent the taking of the entitlement "from the holder unless the holder sells it willingly and at the price at which he subjectively values the property."¹³⁷ A liability rule permits the transfer of an entitlement from one holder to another upon the payment of its value set by "an external, objective standard."¹³⁸ Theft and traditional nuisance rules are examples of areas that employ property rules, while eminent domain and negligence are examples of liability rules.¹³⁹ The distinction, as described by later commentators, is that "[p]roperty rules discouraged nonconsensual takings . . . [while l]iability rules permitted nonconsensual takings in return for payment of damages."¹⁴⁰

In addition to differences in remedies, contract and property law traditionally have employed relatively distinct rules and principles. For example, below I discuss the adoption by contract law—and refusal to adopt by property law—of the doctrine of mutuality of covenants. Over time, property law has adopted contract rules and principles that it had previously rejected. In doing so, the courts have shed property rules and principles deemed out of touch with the realities of current social circumstances.

This movement from property concepts to contract concepts has occurred across the spectrum of property doctrines. In fact, one of the most startling aspects of teaching property law is the consistency of this change across broad swaths of property doctrine. I will below discuss a few of the prominent examples of doctrinal change.

¹³⁴ Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

¹³⁵ *Id.* at 1092.

¹³⁶ *Id.*

¹³⁷ *Id.* at 1105.

¹³⁸ *Id.*

¹³⁹ *Id.* at 1105-27.

¹⁴⁰ Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 704 (1996).

One prominent area in which the law has undergone dramatic change is the lease.¹⁴¹ A lease was traditionally classified as a conveyance of an interest in land.¹⁴² A lease was the agreement between a landlord and tenant authorizing the tenant to possess the landlord's land¹⁴³ for a determinate period or at the landlord's will.¹⁴⁴ Traditionally, the common law treated a lease as a conveyance of an estate in land: a nonfreehold estate.¹⁴⁵ The landlord conveyed to the tenant, through the lease, a leasehold estate, which entitled the tenant to exclusive possession of the parcel.¹⁴⁶

To modern eyes, the most remarkable aspect of the common law's use of property concepts to understand leaseholds was that the covenants in the lease were independent.¹⁴⁷ "Under the doctrine of independent covenants, the landlord's failure to make promised repairs did not excuse the tenant from paying rent. Each promise was independent. Likewise the tenant's failure to pay rent entitled the landlord to sue for the rent but not for possession."¹⁴⁸ The last one hundred years of development of landlord-tenant law is in large measure the substitution of contract doctrines—especially the dependency of covenants—for property doctrines.¹⁴⁹

The first move away from a more property-based view of leases occurred when courts implied a covenant of quiet enjoyment the violation of which by the landlord would justify the tenant in refusing to pay rent or, later yet, to terminate the lease.¹⁵⁰ Courts initially found violations of the covenant of quiet enjoyment only when the landlord actually evicted the tenant, but later they extended the doctrine to include constructive eviction, which I discuss below.¹⁵¹

¹⁴¹ For an in-depth review of the transformation of the lease see Mary Ann Glendon, *The Transformation of American Landlord-Tenant Law*, 23 B.C. L. REV. 503, 513 (1982); John Forester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972).

¹⁴² 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140, *143.

¹⁴³ The landlord usually has a fee simple estate, but all that is necessary for a lease is that the landlord have an estate of longer duration than the lease. STOEBUCK & WHITMAN, *supra* note , at 244.

¹⁴⁴ STOEBUCK & WHITMAN, *supra* note , at 244.

¹⁴⁵ *See id.* at 253 (stating that at common law a "lease was usually spoken of as a conveyance and not a contract").

¹⁴⁶ KURTZ & HOVENKAMP, *supra* note , at 266 (stating that a leasehold grants "exclusive possession and control of the land in the tenant").

¹⁴⁷ KURTZ & HOVENKAMP, *supra* note , at 270.

¹⁴⁸ *Id.* at 270 n.3; *see also* STOEBUCK & WHITMAN, *supra* note , at 253 ("[W]hen the law of contract developed the concept of dependence of covenants and, flowing from that concept, the equitable remedy of rescission for substantial failure of consideration, that remedy was not a traditional part of law.").

¹⁴⁹ *See, e.g.*, STOEBUCK & WHITMAN, *supra* note , at 283 (discussing the evolution of the implied covenant of quiet enjoyment and how American courts adopted the covenant using the contract concept of dependency of covenants).

¹⁵⁰ *See id.* at 282-86 ("[T]he rule allowing the tenant either to suspend rent or to terminate for an eviction exists as a large exception to the lease-conveyancing doctrine of independence of covenants. This in turn tends to support the conclusion . . . that courts will allow the tenant to terminate all obligations, a result that is essentially rescission in the contract sense.").

¹⁵¹ *Id.* at 284.

A related movement occurred when the courts abandoned the doctrine of *caveat conductor*, or lessee beware, in many situations. Initially, a lessee took the premises of the leasehold without any warranty by the landlord that the premises were suitable for the lessee's intended use of them.¹⁵² Indeed, even if the lessee bargained for an explicit covenant in the lease obligating the landlord to provide services or repair the parcel, breach of these covenants did not entitle the tenant to refuse to pay rent or terminate the lease because of the independency of lease covenants.¹⁵³

Beginning in the nineteenth century, and accelerating in the 1960s, courts began to create exceptions to and limit the sweep of *caveat conductor*. Courts did so first through an expansion of constructive eviction.¹⁵⁴ A tenant could claim constructive eviction—and, most importantly, be relieved of paying rent—if the tenement became uninhabitable.¹⁵⁵ This expansion made lease covenants mutually dependent¹⁵⁶ and relied on the contract rationale of failure of consideration.¹⁵⁷

Because of limitations of constructive eviction,¹⁵⁸ and the realities of modern urban residential life,¹⁵⁹ courts further undermined the independency of covenants by creating the doctrine of implied warranty of habitability.¹⁶⁰ This doctrine implied in all residential leases a covenant that landlords would maintain the residential premises so as to be suitable for human habitation.¹⁶¹ Tenants, upon breach of this covenant by the landlord, have many remedies from which to choose including deduction from rent, cancellation of the leasehold, and repair and deduction from rent.¹⁶² This change in the residential lease context is being repeated with commercial leases.¹⁶³

Much of this movement has consciously been one of adopting contract concepts. For example, the courts that adopted the doctrines of constructive

¹⁵² *Id.* at 289.

¹⁵³ *Id.* at 292-93. This was the result of the independence of covenants. Glendon, *supra* note , at 511. Property law had not, as contract law had, adopted the doctrine of mutuality of covenants. *Id.*

¹⁵⁴ One precursor to constructive eviction was the rule that landlords had a duty to ensure that premises leased through short-term leases for furnished leaseholds were fit for the promised use. *Ingalls v. Hobbs*, 31 N.E. 286 (Mass. 1892); *see also* Glendon, *supra* note , at 514-15. For a review of the evolution of constructive eviction see Max P. Rapacz, *Origin and Evolution of Constructive Eviction in the United States*, 1 DEPAUL L. REV. 69 (1952).

¹⁵⁵ 49 AM. JUR. 2D *Landlord and Tenant* § 523 (2007).

¹⁵⁶ *See* Glendon, *supra* note , at 513 (“As courts began routinely to permit ‘constructive eviction’ to serve as a remedy for a landlord’s breach of covenants in the lease, the legal fiction became a functional substitute for the missing doctrine of mutually dependent covenants.”).

¹⁵⁷ *Id.*

¹⁵⁸ For example, to claim constructive eviction, a tenant was required to vacate the premises. *Id.* at 513.

¹⁵⁹ Primarily, the fact that urban dwellers, unlike their rural ancestors, sought decent residential dwellings with their concomitant services rather than productive farmland.

¹⁶⁰ 52 C.J.S. *Landlord and Tenant* § 687 (2007).

¹⁶¹ *Id.*

¹⁶² *See* Glendon, *supra* note , at 513 (“Court decisions recognizing implied warranties of habitability have generally extended to the tenant all the usual contract remedies for breach of warranty.”).

¹⁶³ 52 C.J.S. *Landlord and Tenant* § 686 (2007).

eviction and implied warranty of habitability explicitly relied on and moved towards contract doctrine.¹⁶⁴

Although the change in the lease context is perhaps most striking, all across the spectrum of property law courts have in recent years more readily employed contract concepts in place of property concepts. In nuisance, for example, courts have moved away from automatically abating (enjoining) nuisances.¹⁶⁵ Instead, courts today will, consistent with *Restatement (Second) of Torts* § 826(b),¹⁶⁶ grant damages.¹⁶⁷

The most famous instance of this was the Court of Appeals of New York's decision in *Boomer v. Atlantic Cement Co.*¹⁶⁸ In *Boomer*, the court ruled that a cement factory, whose dust and vibration constituted a nuisance to its plaintiff neighbors, must pay permanent damages to the plaintiffs.¹⁶⁹ The court reasoned that damages "do[es] justice between the contending parties" and that avoiding injunctive relief is important because of the great social benefit created by the cement plant.¹⁷⁰ The court refused to apply a property rule and instead employed the contract norm of damages.¹⁷¹

The reasoning supporting the *Brown* rule is similar to that employed by *Boomer* and section 826(b). Courts should not enjoin activity if the injunction would cause substantial harm while at the same time providing little if any benefit.

In the context of servitudes specifically, courts have likewise more readily employed contract concepts in place of property concepts. For instance, even though the common law traditionally prohibited a servient tenant from unilaterally relocating an easement, courts have more recently used equitable considerations to permit servient tenants to do so.¹⁷² Many states permit servient tenants to relocate an easement so long as the easement's termini remain the same and the dominant tenant is not materially inconvenienced.¹⁷³

¹⁶⁴ See, e.g., *Dyett v. Pendleton*, 8 Cow. 727, 732 (N.Y. Sup. Ct. 1826) (citing, as a reason to employ the doctrine of constructive eviction, the failure "of the consideration on which only the tenant was obliged to pay rent"); *Javins v. First Nat'l Realty Corp.*, 428 F. 2d 1071, 1075 (D.C. Cir. 1970) (relying on the "belief that leases of urban dwelling units should be interpreted and construed like any other contract" to employ the doctrine of implied warranty of habitability).

¹⁶⁵ 58 AM. JUR. 2D *Nuisance* § 220 (2007).

¹⁶⁶ RESTATEMENT (SECOND) OF TORTS § 826(b) (1979).

¹⁶⁷ See KURTZ & HOVENKAMP, *supra* note , at 773 ("Today many courts hold that the ordinary remedy in cases involving a continuing nuisance is 'permanent' damages, provided that the activity is socially valuable and cannot reasonably be performed in a less harmful way.").

¹⁶⁸ *Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870 (N.Y. 1970).

¹⁶⁹ *Id.*

¹⁷⁰ *Id.* at 873.

¹⁷¹ See also *Spur Indus. Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700 (Ariz. 1972) (holding that the plaintiff who "came to the nuisance" must pay damages to compensate the defendant tortfeasor for the cost of moving).

¹⁷² BRUCE & ELY, *supra* note , §7.16.

¹⁷³ *Id.*

The *Restatement (Third) of Property: Servitudes* also adopts this position.¹⁷⁴ It permits a servient tenant to unilaterally relocate an easement—both regarding an easement’s location and dimensions—to accommodate development of the servient estate so long as the relocation does not “significantly lessen” the easement’s utility or “increase the burdens” on the dominant tenant.¹⁷⁵

The *Restatement (Third) of Property: Servitudes* elsewhere further evidences property law’s movement toward contract concepts.¹⁷⁶ For instance, section 2.1 provides that a servitude is created if the servient tenant “enters into a contract . . . to create a servitude.”¹⁷⁷ The *Restatement*’s drafters further state that the *Restatement* “adopted the model of interpretation used in contract law.”¹⁷⁸

Against the background of this broad and continued movement in property law, the *Brown* rule is not an anomaly. Instead, it is simply another example of this movement. The *Brown* rule’s use of monetary instead of injunctive relief better fits the law of servitudes in particular and American property law more broadly than does the American rule. Given a choice between two rules, one of which better fits the surrounding legal materials—the principles, rules, statutes, cases, and practices—courts should and do choose the better fitting rule.

At the extremes, examples are easy to come by. For instance, American law never accepted the doctrine of ancient lights.¹⁷⁹ One, if not the primary reason for its rejection is that ancient lights did not fit with the pro-development legal doctrines that dominated American property law.¹⁸⁰ From its inception, and in many instances remaining so today, American property law doctrines encouraged settlement and development of the nation’s most valuable asset,¹⁸¹ its enormous, rich landmass. Ancient lights impeded close urban industrial development by permitting landowners to acquire prescriptive easements to air and light.¹⁸² For this reason, it never found a home in American law.

Another example of American property law’s pro-development stance was its acceptance of the riparian common enemy doctrine.¹⁸³ The common enemy doctrine privileged an owner to eliminate surface water from his land without liability for doing so.¹⁸⁴ The common enemy doctrine permitted quick and

¹⁷⁴ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000).

¹⁷⁵ *Id.* This rule, according to the *Restatement*’s authors, “applies unless expressly negated by the easement instrument.” *Id.* § 4.8(3) cmt. f.

¹⁷⁶ See *Abington Ltd. P’ship v. Heublein*, 717 A.2d 1232, 1240 (Conn. 1998) (“Those provisions [of the *Restatement (Third)*] adopt a contracts oriented view of the law of easements and servitudes.”).

¹⁷⁷ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.1(1)(a) (2000).

¹⁷⁸ *Id.* ch. 4 intro. note (2000).

¹⁷⁹ See *supra* notes , and accompanying text.

¹⁸⁰ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860* at 44-46 (1977) (describing the rejection of ancient lights because of its hindrance of economic growth and expansion).

¹⁸¹ Other than its people, of course.

¹⁸² HORWITZ, 1780-1860, *supra* note , at 44-46.

¹⁸³ See SPRANKLING, *supra* note , at 514-15 (discussing the common enemy doctrine).

¹⁸⁴ *Id.* at 514.

unrestricted development in an environment of abundant land.¹⁸⁵ The ancient lights and the common enemy doctrines received different receptions into American property law depending on their fit with the pro-development substance of American property law.

Courts' use of fit as a criteria for whether to adopt a particular rule also occurs when the possible rules all fit relatively well with surrounding legal materials. In *Tenhet v. Boswell*, the California Supreme Court decided the effect of a joint tenant's lease of his interest in a joint tenancy.¹⁸⁶ The court held that the joint tenant's lease did not sever the joint tenancy.¹⁸⁷ In doing so, the court rejected two alternative rules: one rule was that such a lease effected a permanent severance; the second alternative was that if the joint tenant died during the period of the lease, the lease severed the joint tenancy.¹⁸⁸

To reach its decision, the *Tenhet* Court reviewed the surrounding legal materials. The court looked to statutes that provided that severance of a joint tenancy must be done explicitly and not by implication.¹⁸⁹ The court also noted that previous case law had established that a mortgage did not sever a joint tenancy.¹⁹⁰ And perhaps central to the court's reasoning was the chief characteristic of joint tenancies: the right of survivorship.¹⁹¹ Permitting a joint tenant to sever a joint tenancy through a lease and thereby destroy the right of survivorship in the other joint tenants would undermine their expectations.¹⁹² In this manner of comparing the possible rules to the surrounding law, the *Tenhet* Court chose the rule that best fit the surrounding legal materials.

This "fit" analysis helps one explain legal change.¹⁹³ Legal change often occurs when particular legal rules are found to not fit the broader legal principles that comprise that area of the law.¹⁹⁴ This occurred, for instance, in the context of landlord liability for harm caused by preexisting conditions on the leased premises. The traditional common law rule was that a landlord was not liable for harm caused by "dangerous conditions existing on the land when the lessee took possession."¹⁹⁵ Courts, as common law courts often do,¹⁹⁶ created a number of exceptions to the rule because it was perceived to be harsh.¹⁹⁷

¹⁸⁵ See *State v. Deetz*, 224 N.W. 2d 407, 414-16 (Wisc. 1974) (abandoning the common enemy doctrine because it did not "comport[] with the realities of modern society").

¹⁸⁶ *Tenhet v. Boswell*, 554 P.2d 330 (Cal. 1976).

¹⁸⁷ *Id.* at 335.

¹⁸⁸ *Id.* at 334-35.

¹⁸⁹ *Id.* at 335.

¹⁹⁰ *Id.* at 336.

¹⁹¹ *Id.* at 337.

¹⁹² *Id.*

¹⁹³ See RONALD DWORKIN, *LAW'S EMPIRE* 225-75 (describing the necessity of a "fit" criteria).

¹⁹⁴ *Id.* at 15-20 (describing an example of how judges use fit as a criteria to choose legal rules).

¹⁹⁵ RESTATEMENT (SECOND) OF TORTS § 356 (1965).

¹⁹⁶ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 117-18 (1988).

¹⁹⁷ See RESTATEMENT (SECOND) OF TORTS § 357-62 (1965) (listing exceptions to the common law rule).

Thereafter, courts turned toward a general negligence standard for landlord liability to tenants.¹⁹⁸ They did so because the legal principle underlying the lease had changed from the transference of an estate in land to a contract for goods and services.¹⁹⁹ As the Utah Supreme Court recognized in *Williams v. Melby*, “[t]he expanded liability of landlords under modern law has evolved from recognition of the fact that a residential lessee does not realistically receive an estate in land.”²⁰⁰ The concept of landlord immunity from liability for harm done by the leasehold was based on the presupposition that the landlord’s transfer of the leasehold estate eliminated the landlord’s responsibility to the lessee for the estate itself.²⁰¹ With that conception of the nature of the lease gone, landlord immunity no longer fit the underlying legal principle in that area of law—the lease as contract—nor the surrounding legal doctrines, especially constructive eviction and the implied warranty of habitability.²⁰²

Over time, the *Brown* rule has come to better fit American property law than does the American rule. The *Brown* rule better fits the surrounding legal doctrines where courts use their equitable discretion to fashion damages remedies under circumstances that permit the effective use of easements and preserve the parties’ intent. The *Brown* rule also fits property law’s movement toward contract concepts and remedies. This fit provides a strong reason for courts to adopt it.

Of course, the elimination of landlord immunity by Utah and other states also comported with what those courts believed to be the more normatively attractive general negligence standard.²⁰³ Below I argue that, not only does the *Brown* rule better fit American property law, it is also normatively preferable to the American rule.

C. *The Brown Rule is Normatively Superior to the American Rule*

i. The Possible Scope of Damages Under the *Brown* Rule

Up to this point I have not fully discussed the scope of damages under the *Brown* rule. There are two possible permutations on damages under *Brown*: the first permits only nominal damages, and the second permits both nominal and compensatory damages. Each possibility has potentially attractive and unattractive characteristics, and I will discuss each possibility briefly.

To step back for a moment, under the *Brown* rule, a servient tenant suffers nominal damages when his legal entitlement is violated by the dominant tenant’s servicing of nondominant land. Both the nominal and compensatory damages

¹⁹⁸ See Olin L. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99 (1982) (explaining the movement toward a general negligence standard for landlords).

¹⁹⁹ See *Williams v. Melby*, 699 P.2d 723, 727 (Utah 1985) (using this line of reasoning).

²⁰⁰ *Id.*

²⁰¹ See Glendon, *supra* note , at 535-36 (describing how the new conception of the lease as contract moved courts to eliminate landlord immunity from suit).

²⁰² *Id.*

²⁰³ DWORKIN, *supra* note , at 231 (explaining that judges use normative criteria to determine which legal rule or principle is best justified).

approaches would permit the servient tenant to recover nominal damages for this breach of legal right.

Divergence between the two approaches occurs when the dominant tenant's use of the easement to service nondominant land results in more intensive use than prior to such servicing. The dominant tenant's use remains within the reasonably expected scope of use by the parties when they created the easement—the dominant tenant's use is not an unreasonable burden—but it is a greater burden than before.

For example, assume that when hypothetical parties created an easement they anticipated an intensity of use at level X. Assume further that the dominant tenant had been using the easement at level Y, which was one-quarter of X. Then, the dominant tenant purchased an adjacent parcel and began using the easement at level Z which was one-half of X. The dominant tenant's subsequent use remains reasonable because it remains under X, but it is twice as intense a use as before the dominant tenant began servicing nondominant land.

No court has explicitly addressed the appropriate measure of damages under these circumstances. However, courts could take either of the two paths laid out above: (1) award only nominal damages; or (2) award nominal and compensatory damages with the measure of compensatory damages being the difference between the intensity of use before and after the dominant tenant began servicing nondominant land ($Z - Y$ in the hypothetical above).

The attraction of the first approach is that the dominant tenant's use remains within the reasonable expectations of the parties. How can the servient tenant complain when he sold an easement that permitted this intensity of use? The nominal damages approach is also the one implicitly followed by courts who have followed the *Brown* rule, given the facts of the cases.

The attraction of the second approach is that it forces the dominant tenant to pay for acting beyond his legal entitlement thereby ensuring that the dominant tenant sufficiently values servicing the nondominant land. Additionally, the compensation approach gives value to the servient tenant's subjective valuation of his property (the difference between Z and Y above). No courts have adopted this approach—although none have explicitly rejected it either—which presents an obstacle to its adoption by courts generally.

Below, I address the efficiency and fairness of the *Brown* rule. In doing so, I assume the nominal damages approach, but I also note when and how the compensatory damages approach may be more normatively attractive.

ii. The *Brown* Rule is More Efficient Than the American Rule

First, the *Brown* rule is more efficient because, ex ante, parties negotiating whether to contractually obligate themselves to either the *Brown* or American rule would choose the *Brown* rule. From the dominant tenant's perspective, the *Brown* rule is preferable because it permits him to use the easement more broadly than he otherwise would. That is, even though the dominant tenant may not wish to increase the intensity of his use and instead simply wishes to employ the easement

for the same use on a parcel other than the dominant parcel, the dominant tenant would—all else being equal—prefer to have the option. Under the compensatory damages approach, this is true at least for those instances when the dominant tenant would be willing to pay damages for increased use.

From the servient tenant’s perspective, there is no a priori reason to prefer one rule over the other. The servient tenant would be entitled, under either rule, to the same level of burden on his estate. And, under the compensation version of the *Brown* rule, the servient tenant would receive compensation for any increase beyond the previous intensity.

Similar reasoning is found in section 4.8(3) of the *Restatement*.²⁰⁴ As noted above,²⁰⁵ section 4.8(3) permits a servient tenant to unilaterally move an easement so long as it does not “significantly lessen the utility of the easement” or “increase the burdens on the owner.”²⁰⁶ In response to the charge that such a rule would allow the servient tenant to interrupt the “settled expectations” of the dominant tenant, the *Restatement*’s drafters argued that “the safeguards contained in the rule . . . will protect the easement owner’s legitimate interests.”²⁰⁷ The conditions on when the servient tenant could move an easement, like the conditions I propose courts adopt through the *Brown* rule, would “increase the value of [one] estate without any significant decrease in the value of the [other] estate.”²⁰⁸

Possibly the only potential concern the servient tenant would have is that, all else being equal, it is more likely that a dominant tenant may excessively use an easement if the easement may service more land than if the easement serviced only the land contained within the dominant estate. With this increased potential for excessive use also comes increased potential for litigation.

At the same time, however, a servient tenant will recognize that the potential for excessive use is dependent on many factors and that additional land may, under the circumstances, be a small factor indeed. For example, some uses are more amenable to excessive use upon the accession of additional land. Commercial right-of-way usage is this type of use because of the dominant tenant’s incentive to maximize profits. Or, local regulations, such as zoning, may not permit the dominant tenant to use surrounding parcels for the use for which he is utilizing the easement. Consequently, while *ex ante* it is difficult to state with certainty whether the servient tenant would prefer the *Brown* rule over the American rule, it is likely that the servient tenant would generally not prefer one rule over the other.

Secondly, the *Brown* rule is more efficient than the American rule because it helps avoid the transaction costs created by the American rule in certain circumstances. The *Brown* rule overcomes the transaction costs that would be

²⁰⁴ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000).

²⁰⁵ See *supra* notes and accompanying text.

²⁰⁶ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.8(3) (2000).

²⁰⁷ *Id.* §4.8 cmt. f.

²⁰⁸ *Id.*

associated with remaking an easement to permit it to service nondominant land.²⁰⁹ This is especially true as the number of parties grows larger, but if the parties are in a bilateral monopoly, that too can increase transaction costs.

The servient tenant, in situations where the *Brown* rule would not apply, has strong incentives to hold out. The servient tenant's harm is low or nonexistent, and imposition of an injunction would cause substantially more harm to the dominant tenant. With this leverage, the servient tenant can raise the price of an easement modification far beyond what the easement modification is worth to him. In jurisdictions with the *Brown* rule, however, the dominant tenant is able to force modification of the easement on terms more aligned with the parties' gains and losses occasioned by the modification.²¹⁰ This will limit transaction costs.

When servitudes that run with the land are created by two or more parties,²¹¹ the property rights to the servient parcel have been partitioned or fragmented.²¹² More than one person controls aspects of the servient estate. The servient tenant, in the traditional easement context, retains the underlying fee which includes all the rights of fee ownership except for the right to exclude the dominant tenant from the dominant tenant's use of the servient estate for easement purposes. The dominant tenant has the right to use the servient tenement for easement purposes.²¹³

When parties fragment the rights to a particular parcel, they or their successors-in-interest are more likely to later face difficulty in altering the status of the fragmentation, difficulty greater than that faced when the parties initially created the servitude and fragmented the property rights of the servient estate. In other words, the parties or their successors face "asymmetric transaction costs."²¹⁴

²⁰⁹ See Richard A. Epstein, *A Clear View of the Cathedral: The Dominance of Property Rules*, 106 YALE L.J. 2091, 2092 (1997) ("The standard practice in virtually all legal systems assumes the dominance of property rules over liability rules, except under those circumstances where some serious holdout problem is created because circumstances limit each side to a single trading partner.").

²¹⁰ Under the nominal damages approach, the dominant tenant's leverage is greater than under the compensatory damages approach because under the former the servient tenant will not receive compensation equal to the amount of the increased use occasioned by servicing the nondominant land.

²¹¹ Servitudes will be created between more than two parties in the context of, for example, common interest communities. A common interest community includes residential developments where the property owners in the developments are all bound by similar covenants.

²¹² For a discussion of the fragmentation of property rights see Ben W.F. Depoorter & Francesco Parisi, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes*, 3 GLOBAL JURIST FRONTIERS 1 (2003); see also *id.* at 18 n.58 ("The 'partitioning of property rights' we refer to . . . can be described as the situation when several people each possess some portion of the rights to use the land.").

²¹³ See *id.* at 18 ("In economic terms, servitudes thus present a *division of property rights* where several parties obtain exclusionary right as to one particular estate.").

²¹⁴ *Id.* at 21. For a more in-depth discussion of asymmetrical transaction costs see Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, George Mason University School of Law, Law and Economics Working Paper No. 01-13, available at http://papers.ssrn.com/paper.taf?abstract_id=264314.

This is because, if one of the parties (or their successors) wishes to alter their relationship, it “involves transaction and strategic costs of a greater magnitude than those incurred for the original fragmentation of the right.”²¹⁵ As described by Depoorter and Parisi, the

intuition for such asymmetry is quite straightforward. A single owner faces no strategic costs when deciding how to partition his property. Conversely, multiple non-conforming co-owners are faced with a strategic problem, given the independence of their decisions. These strategic costs increase the transaction costs of any attempted reunification of the fragments into a unified bundle.

If one party to an easement wishes to renegotiate the fragmentation, each party will have a veto.²¹⁶

Assume, for a moment, that the context with which we are concerned is one where the servient tenant has deeded to the dominant tenant an easement to drive across the servient tenant’s property in exchange for consideration. The parties created an easement appurtenant to the dominant tenement. The dominant tenant has a single-family residence and two automobiles. Assume further that the dominant tenant wished to build a new house on an after-acquired parcel (and demolish his old house). If he were to do so, the dominant tenant would drive from his new residence on the nondominant parcel over the dominant parcel, and then use the easement to cross the servient tenant’s property.

If the dominant tenant approached the servient tenant to renegotiate the terms of the easement—assuming that the easement’s terms explicitly forbade servicing nondominant land—the transaction costs faced by the dominant tenant are likely to be higher than when the parties initially negotiated the easement.²¹⁷ The servient tenant may seek to act strategically, or the servient tenant may mistake how much the dominant tenant values the proposed changes. In both cases, the dominant tenant faces powerful obstacles. “Even reversing a simple property transaction can result in monopoly pricing.”²¹⁸ And these obstacles only increase as the number of parties necessary to the negotiation increases.²¹⁹

²¹⁵ Depoorter & Parisi, *supra* note , at 23.

²¹⁶ Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, at 10, George Mason University School of Law, Law and Economics Working Paper No. 01-13, available at http://papers.ssrn.com/paper.taf?abstract_id=264314.

²¹⁷ *Id.* at 21-22.

²¹⁸ *Id.* at 23. The literature on this point is conflicted. Compare Jay Weiser, *The Real Estate covenant as Commons: Incomplete Contract Remedies Over Time*, 13 S. CAL. INTERDISC. L.J. 269, 278 (2004) (arguing that when two parties negotiate they “can often” come to a mutually beneficial arrangement); Hoffman & Spitzer, *Experimental Tests of the Coase Theorem with Large Bargaining Groups*, 15 J. LEGAL STUD. 149, 151 (1986) (same); with RICHARD A. POSNER, *ECONOMIC ANALYSIS OF THE LAW* § 3.9 (5th ed. 1998) (finding that negotiations in bilateral monopolies may result in large surpluses from negotiation going to one party); Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 899-900 (1988) (arguing that bilateral monopolies do not result in efficient negotiation).

²¹⁹ See Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, at 22, George Mason University School of Law, Law and Economics Working Paper No. 01-13,

The American rule aggravates these asymmetrical transaction costs. It protects the servient tenant's entitlement with a property remedy.²²⁰ As a result, a dominant tenant has no recourse if the servient tenant acts strategically or mistakenly and demands an inordinate price for alteration of the easement.²²¹ The *Brown* rule, by contrast, encourages the servient tenant to bargain in good faith with the dominant tenant because the servient tenant's entitlement is protected by a contract remedy.²²²

Under the compensatory damages approach, this means that, in the face of strategic or mistaken behavior, the dominant tenant may obtain an objective determination of the value of the change to the easement he is pursuing. He can obtain this by paying damages to the servient tenant for his use of the easement to service nondominant land where the measure of damages is the cost to the servient tenant of the alteration of the easement. This shift to liability rules to avoid the costs associated with renegotiation between parties to an easement has been advocated by scholars in other contexts as well.²²³ “[L]iability rules emerge as the best candidate for the difficult task of balancing individual autonomy against efficiency concerns when there are positive transaction and strategic costs.”²²⁴

A powerful example of the inefficiency of the American rule is found in *McCullough v. Broad Exch. Co.*²²⁵ *McCullough*, discussed above, involved a large office building that straddled both the dominant estate and nondominant land, and that was serviced by a right-of-way easement.²²⁶ The court enjoined use of a right-of-way by the dominant tenant until the dominant tenant established that the easement would only serve the portion of the building on the dominant estate.²²⁷

In *McCullough*, the burden placed on the servient estate by the dominant tenant was reasonable. As the court found, the burden imposed by servicing

available at http://papers.ssrn.com/paper.taf?abstract_id=264314 (“Since today’s predominant instance of land use arrangements running with the land has shifted from two-party uses to the governance of common interest communities, the relevance of the economic model of fragmentation is amplified.”).

²²⁰ See Weiser, *supra* note , at 278 (arguing similarly).

²²¹ See Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, at 21, George Mason University School of Law, Law and Economics Working Paper No. 01-13, available at http://papers.ssrn.com/paper.taf?abstract_id=264314 (arguing that under “a property-type remedy, the owner will never receive less than the value he places on his entitlements and will on average be able to extract part of the buyer’s surplus”).

²²² See *id.* (finding that “under a liability-type remedy, the owner will not be able to extract the taker’s surplus”).

²²³ See Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, at 19, George Mason University School of Law, Law and Economics Working Paper No. 01-13, available at http://papers.ssrn.com/paper.taf?abstract_id=264314 (“In the presence of high transaction costs, liability rules are thus more likely to induce efficient reallocation of rights and resources.”).

²²⁴ *Id.* at 26.

²²⁵ *McCullough v. Broad Exch. Co.*, 92 N.Y.S. 533 (1905).

²²⁶ *Id.* at 534-35.

²²⁷ *Id.* at 536-37.

nondominant land was less than the dominant tenant could have imposed through use of the dominant estate alone.²²⁸ In addition, the harm to the dominant tenant caused by an injunction was substantially greater than any benefit received by the servient tenant. The injunction effectively prevented the dominant tenant from utilizing its twenty story office building without enormous costs to modify the building and its support systems such as heat.²²⁹ The court recognized this dramatic imbalance when it “comforted” the dominant tenant stating that it was “not impossible” to separate the building, and that, in any event, “the office building may be destroyed or otherwise demolished.”²³⁰ Application of the *Brown* rule in *McCullough* would have led to a more efficient result. It would have avoided idling a large, new office building.

Under the compensatory damages approach, the result is even more appealing. The servient tenant could have recovered damages for any use of the easement beyond the intensity of the previous use. This would have compensated the servient tenant for any losses while permitting the valuable use by the dominant tenant.

To make the *McCullough* case more concrete, assume that the harm of increased use to the servient tenant caused by servicing nondominant land was five dollars. Assume further that the value to the dominant tenant of servicing nondominant land was seventy-five dollars. Under the *Brown* rule, the servient tenant has the initial legal entitlement. Enjoining the dominant tenant’s use of the easement for the after-acquired parcel would relatively decrease net value by seventy dollars. Permitting a court to award compensatory damages to the servient tenant would relatively increase net societal wealth by seventy dollars.

One counter argument to adoption of the *Brown* rule is that it might discourage bargaining by a dominant tenant who wishes to have his easement service nondominant land by giving the dominant tenant an incentive to abuse his easement and then simply pay damages. This argument is misplaced because the *Brown* rule only applies, and damages is available as a remedy to the servient tenant, if the cost to the dominant tenant of ceasing his abuse is substantially greater than the benefit to the servient tenant. This will occur most frequently when, as in *Brown*, the dominant tenant has already expended substantial resources. It is unlikely that dominant tenants would gamble by making a substantial investment in the hope that they could do so quickly enough to come under the *Brown* rule.

²²⁸ See *id.* at 536-37 (“It is manifest, therefore, that although appellant, as owner of the dominant tenement, might have lawfully devoted it to a use that would have authorized and required a greater burden on this easement and right-of-way than has now been imposed . . .”).

²²⁹ See *id.* at 535-36 (describing the modifications that the dominant tenant would have to make to permit use of the building).

²³⁰ *Id.* at 536.

iii. The *Brown* Rule is Fairer than the American Rule

Fairness means giving each his due, his just desert.²³¹ What is due a person depends on the circumstances in which the person finds himself.²³² Two different, though related forms of justice are applicable to the question of the fairness of courts granting damages instead of equitable relief when a dominant tenant services nondominant land on the conditions imposed by the *Brown* rule.²³³ The first form of justice is distributive, the second, commutative.²³⁴ Both forms of justice serve the ultimate goal of human society: human flourishing.²³⁵

Distributive justice provides that each person in a society should have a sufficient share of the society's resources to enable him to live a distinctively human life.²³⁶ As Aristotle noted, without sufficient material, cultural, religious, and intellectual resources, a human cannot live a virtuous life.²³⁷ Of course, each society—and the same society at different points of time—will have different amounts of these goods and hence what distributive justice requires is relative to the society's circumstances.²³⁸

Commutative justice governs the relationship between two (or a few) persons.²³⁹ It is related to distributive justice. While distributive justice ensures that the society provides its members with what they need from the common stock, commutative justice ensures that individuals maintain their stock of goods

²³¹ For an in-depth discussion of justice see ARISTOTLE, *NICOMACHEAN ETHICS* bk. 5 (D.P. Chase trans., 1947); SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* II-II, QQ. 57-61 (Benzinger Bros. ed., English Dominican trans., 1947); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 160-97 (1980).

²³² See JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 39-40 (2006) (arguing that the laws in different societies may differ, in part because of the different circumstances facing those societies).

²³³ The reason for my turn to justice as an appropriate concept to employ to determine a proper remedy is similar to James Gordley's, who has argued that "the basic concepts of private law are rooted in the concept of commutative justice." GORDLEY, *supra* note , at 12.

²³⁴ GORDLEY, *supra* note , at 8 ; see FINNIS, *supra* note , at 164 ("The requirements of justice, then, are the concrete implications of the basic requirement of practical reasonableness that one is to favour and foster the common good of one's communities."). Of course, there are transactions that bear on both distributive and commutative justice. *Id.* at 179.

²³⁵ FINNIS, *supra* note , at 169; see also GORDLEY, *supra* note , at 7 ("Writers in the Aristotelian tradition believe there is a distinctively human life to which all one's capacities and abilities contribute. Living such a life is the ultimate end to which all well-chosen actions are a means, either instrumentally or as constituent parts of such a life.").

²³⁶ See FINNIS, *supra* note , at 166-67 (emphasis deleted) ("A disposition is distributively just, then, if it is a reasonable resolution of a problem of allocating some subject-matter that is essentially common but needs (for the sake of the common good) to be appropriated to individuals."); GORDLEY, *supra* note , at 8 ("[F]or writers in the Aristotelian tradition, living a distinctively human life requires, not only virtues . . . but external things as well.").

²³⁷ ARISTOTLE, *POLITICS* bk. 1, pt. 4 (Benjamin Jowett trans., 2000).

²³⁸ See GORDLEY, *supra* note , at 13 ("[W]e have to view society as an ongoing enterprise, concerned at the social level with ensuring, so far as possible, that each person has a fair share, and in individual transactions, that no one increases his share by depriving another of his resources.").

²³⁹ See FINNIS, *supra* note , at 177-84 (explaining commutative justice).

during transactions²⁴⁰ with others.²⁴¹ More specifically, it requires that individuals treat others in such a way during transactions that the transactions do not deprive others of their share of society's goods.²⁴² "Commutative justice," as James Gordley has argued, "require[s] that [they] do so at a price that enriched neither party at the other's expense."²⁴³

Assume again that the context with which we are concerned is one where the servient tenant has deeded to the dominant tenant an easement to drive across the servient tenant's property in exchange for consideration. The dominant tenant has a single-family residence and two automobiles. The parties explicitly agreed, when they were negotiating the terms of the easement, that the dominant tenant would not use the easement to service after-acquired land.

In this hypothetical, the parties have consensually structured their relationship. They have bargained with one another to exchange things of equivalent value.²⁴⁴ Their transaction met the requirements of commutative justice because each participant in the transaction was left better off after the transaction and no one was worse off. Thus, each party's share of society's goods necessary to enable them to live distinctively human lives was augmented.

The hypothetical dominant tenant would violate commutative justice by, for example, using the easement for more vehicles than the parties would have reasonably anticipated or a different kind of vehicle, one that burdens the servient estate more than typical automobiles. If the dominant tenant opened a business in his home on the dominant estate and numerous customers, suppliers, and salesmen frequently drove across the easement, the dominant tenant has taken more from the servient tenant than was permitted by the parties' bargain. The servient tenant sold a certain level of intensity of use of his property, and the dominant tenant was using the servient estate much more than that. Or, if the dominant tenant opened a rock quarry on the dominant estate and began to drive large excavating equipment across the easement, the servient tenant's stock of goods—his peaceful use of his property—was diminished beyond the amount he received from the dominant tenant by way of consideration for the easement.

Given a voluntary transaction that met the requirements of commutative justice, the parties' respective obligations vis-a-vis the easement were, to the extent their agreement provided, governed by the agreement. Hence, it would be unfair for the dominant tenant to use the easement to service nondominant land in contravention of the agreement. To do so would take from the servient tenant

²⁴⁰ Transactions broadly construed to include nonconsensual encounters such as torts.

²⁴¹ See GORDLEY, *supra* note , at 8 ("The object of commutative justice is to enable him to obtain [society's resources] without unfairly diminishing other's ability to do so.").

²⁴² See JOHN FINNIS, AQUINAS 200 (1998) ("A sound system of 'private law' (i.e. state law regulating private transactions) will track the moral judgments that answer th[e] question [of was this fair]. Underlying these judgments is always the principle of equality (equivalence) in the exchange.").

²⁴³ GORDLEY, *supra* note , at 12.

²⁴⁴ See FINNIS, AQUINAS *supra* note , at 201 (describing the "requirement of equality of mutual benefit").

more than he had bargained for and violate commutative justice by reducing the servient tenant's share of society's goods. If the dominant tenant used the easement for the benefit of nondominant land, the servient tenant would be entitled to compensation for the damage he has suffered and an injunction to prevent further damage in contravention of their agreement.

In the hypothetical discussed above, the parties' agreement made determinate the norms that would govern their relationship regarding the easement, and specifically whether the dominant tenant could use the easement to service after-acquired land. Now, changing the hypothetical, assume that the parties had not discussed and hence had not agreed on whether the dominant tenant could service nondominant land. In this hypothetical, the parties' agreement did not create the norm governing the dominant tenant's servicing nondominant land. Assume further that the dominant tenant built a new house on an after-acquired parcel (and demolished his old one). The dominant tenant then drove from his new residence on the nondominant parcel over the dominant parcel, and then used the easement to cross the servient estate.

The dominant tenant did not violate commutative justice. The dominant tenant did not deprive the servient tenant of more of his share of society's goods than for which the servient tenant had bargained. The dominant tenant's intensity of use of the easement remained the same: two cars used for residential purposes. This was the scope of use agreed to by the parties. They had contracted for a specific intensity of use by the dominant tenant—two cars used for residential purposes—and the dominant tenant continued to use the easement at that same level of intensity. Each party retained the same—sufficient—portion of society's goods.

Not only was the servient tenant's share of society's goods not reduced, instead, each party's sum of goods continued to be higher as a result of the parties' bargain. The parties had increased their sum of goods through a mutually beneficial, consensual exchange. Those increased sums were not diminished by the dominant tenant's use of the easement to benefit after-acquired property.

That is not the end of the story. The dominant tenant's use of the easement to benefit the nondominant parcel increased his sum of goods. The dominant tenant engaged in a mutually beneficial, consensual exchange to purchase the after-acquired parcel. To preserve this increase in the dominant tenant's sum of goods, he must be permitted to use the easement. As a result, an injunction would be an inappropriate remedy. An injunction to stop the dominant tenant's use of the easement for the after-acquired parcel would reduce the dominant tenant's share of goods without any corresponding increase in the servient tenant's share. This holds true so long as the first *Brown* condition is satisfied and the dominant tenant has not unreasonably increased the burden on the servient estate.

Commutative justice would be violated if a court ordered the dominant tenant to cease utilizing the easement to service his residence on the nondominant parcel. An injunction would cause substantially greater harm to the dominant

tenant than it would benefit the servient tenant. The dominant tenant would lose the use of his residence while the servient tenant gained nothing because, as posited, the dominant tenant's use remained the same.

James Gordley has reached a similar conclusion in the context of closure of real covenants. Gordley has argued that when the cost to the servient tenant imposed by a real covenant is greater than the benefit to the dominant tenant, courts should award damages instead of injunctive relief.²⁴⁵ Gordley reasoned that if the dominant tenant could receive injunctive relief for a servient tenant's closure of a servitude, the dominant tenant could demand more from the servient tenant to "buy back" the servitude than the amount by which the dominant tenant benefited from it.²⁴⁶ Permitting the servient tenant to pay damages avoids this unfairness.

Similarly here, permitting the hypothetical servient tenant to receive an injunction would permit the servient tenant to demand more consideration from the dominant tenant to expand the easement to service nondominant land than the harm incurred by the servient tenant. Under the compensatory damages approach, monetary relief ensures that the servient tenant's share of goods is not decreased, and prevents the servient tenant from decreasing the dominant tenant's share of goods disproportionately to the servient tenant's level of harm. As James Gordley has likewise concluded: "[A] party may demand more for assuming a burden . . . than the amount by which he will be inconvenienced It is unfair of him to do so."²⁴⁷

Of course, my conclusion that injunctive relief would violate commutative justice depends on the parties not having bargained over the contingency of the dominant tenant servicing nondominant land.²⁴⁸ If the parties did determine in their agreement that the dominant tenant would be enjoined if found servicing nondominant land, then their bargain provides the ordering norms governing their relationship, and it would violate commutative justice for a court not to enjoin a dominant tenant who violates the provision.²⁴⁹

My conclusion that the *Brown* rule is fair is bolstered by the use of similar rules in other areas of property law, discussed above.²⁵⁰ For instance, in the nuisance context, damages instead of an injunction will be awarded if the value of

²⁴⁵ GORDLEY, *supra* note , at 90-91.

²⁴⁶ *Id.* at 90.

²⁴⁷ *Id.* at 99.

²⁴⁸ See BRUCE & ELY, *supra* note , § 8.2 ("When precise language is employed to create an easement, such terminology governs the extent of usage.").

²⁴⁹ Depoorter & Parisi reach a similar conclusion. They find that if the parties could choose their remedy, the asymmetrical transaction costs would "disappear." Depoorter & Parisi, *supra* note , at 38.

²⁵⁰ See *infra* notes and accompanying text.

the nuisance is substantially greater than its harm.²⁵¹ This same rule is followed in other countries as well.²⁵²

iv. Objections Against the *Brown* Rule are Unpersuasive

The *Brown* rule is normatively preferable to the American rule because it is the more efficient rule, because it is fairer, and because objections to it are misplaced. In addition, objections lodged by courts and commentators against permitting a dominant tenant to benefit land other than the dominant estate are not persuasive against the *Brown* rule.

Earlier, I recounted that the primary argument made in support of the American rule was that it prevented excessive use of the easement.²⁵³ “The purpose of this rule is to prevent an increase of the burden upon the servient estate.”²⁵⁴ The *Brown* rule meets this concern. It does so first by ensuring that an injunction is available if the dominant tenant’s servicing nondominant land poses an unreasonable burden on the servient estate.

In *Ogle v. Trotter*, for example, the Tennessee Court of Appeals ruled that the dominant tenant’s use of his right-of-way easement to service an additional parcel did not merit an injunction.²⁵⁵ The court found that the “evidence conclusively shows that, instead of increasing the burden imposed upon said easement, the Ogles have materially decreased such burden.”²⁵⁶ The court went on to hold, as a result, that “the reason for such rule does not exist in the instant case and therefore the rule is not applicable to it.”²⁵⁷

The court in *Ogle* recognized that if an expansion of the land served by an easement does not unreasonably burden the servient estate, there is no reason to enjoin the dominant tenant. This shows that the concern of avoiding excessive use can be met by the first prong of my proposed test which limits the damages remedy to those cases where there is no unreasonable burden on the servient tenant.

Courts and commentators find this reasoning persuasive in the analogous context of the intensity of use to which a dominant tenant may put his easement. When the question is whether the dominant tenant has overburdened an easement

²⁵¹ *Boomer v. Atlantic Cement Co.*, 257 N.E. 2d 870 (N.Y. 1970).

²⁵² See GORDLEY, *supra* note , at 71 (“In Germany, France, and most American states, the defendant will not be forced to stop interfering if his activity is of considerably greater value than the harm done by the interference, and he has picked an appropriate place to carry it on.”).

²⁵³ See, e.g., *National Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D.W.V. 1968) (“Except for this rule, the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate.”); Pamela McClaran, Recent Development, *Extending the Benefits of an Easement: A Closer Look at a Classic Rule—Brown v. Voss*, 105 W.N.2d 366, 715 P.2d 514 (1986), 62 WASH. L. REV. 295, 307-10 (1986) (listing arguments against the *Brown* rule).

²⁵⁴ *Ogle v. Trotter*, 495 S.W. 2d 558, 565 (Tenn. Ct. App. 1973).

²⁵⁵ *Id.* at 565-66.

²⁵⁶ *Id.* at 566.

²⁵⁷ *Id.*

by using the easement too intensively, courts employ a reasonableness test.²⁵⁸ They permit the dominant tenant to increase the intensity of his use of the easement so long as it “is reasonably necessary for the full enjoyment of the easement.”²⁵⁹ This position was adopted by the *Restatement (Third)*.²⁶⁰

The most common example of this principle is the right-of-way easement. The dominant tenant may use a truck to drive on a right-of-way created prior to the advent of the automobile.²⁶¹ And use of a right-of-way created when the dominant estate had one single family residence was reasonable when the easement later served more single family residences on subdivided portions of the original dominant estate.²⁶²

The same concern voiced in the context of expanding the dominant estate—overburdening the servient tenant—is applicable in the context of the intensity of the dominant tenant’s use. The proven ability of courts to adequately address this concern in the intensity context provides strong evidence that courts will be equally adept at addressing the concern when the dominant tenant services nondominant land.²⁶³ This also undercuts the *Restatement (Third)* authors’ concern that adoption of the *Brown* rule would lead to increased litigation.²⁶⁴

Under the *Brown* rule, the first criteria, which requires that any additional burden on the servient estate be reasonable—not materially increase the burden on the servient estate—prevents harm to the servient tenant. If the servient tenant experiences an unreasonable increase in the burden imposed by the dominant tenant, then the servient tenant will receive an injunction stopping the overburden and damages to compensate him for past damages.

Second, assuming that the servient estate has been subject to an increased—though still reasonable—burden that has damaged the servient tenant, the compensatory damages version of the *Brown* rule permits the servient tenant to recover damages to compensate him. This will deter dominant tenants from servicing nondominant land and thereby deter excessive use of the easement.

²⁵⁸ See BRUCE & ELY, *supra* note , § 8.3 (“[T]he parties are deemed to have contemplated the easement holder’s right to do whatever is reasonably convenient or necessary in order to enjoy fully the purposes for which the easement was granted.”).

²⁵⁹ SPRANKLING, *supra* note , at 546.

²⁶⁰ See RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 4.10 (2000) (concluding that the “manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate”).

²⁶¹ Glenn v. Poole, 423 N.E. 2d 1030 (Mass. App. Ct. 1981); see also BRUCE & ELY, *supra* note , § 8.3 (finding that the “concept of reasonableness includes consideration of changes in the surrounding area and technological developments”).

²⁶² See Martin v. Music, 254 S.W. 2d 701 (Ky. Ct. App. 1953) (holding that expansion of a sewer line easement to serve two additional residences on the subdivided dominant estate was reasonable and permitted).

²⁶³ For another instance of courts using their equitable authority to make judgments, this time on a dominant tenant’s unilateral expansion of the dimensions of an easement see BRUCE & ELY, *supra* note , § 7.17 (“[W]hen equity so demands, courts tolerate an easement holder’s minor unilateral expansion of the servitude’s dimensions so long as the servient owner is not materially disadvantaged.”).

²⁶⁴ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 11cmt. b (2000).

A second reason given by the *Restatement (Third)*'s authors for rejecting the *Brown* rule was that it did not "reflect[] the likely intent of the parties."²⁶⁵ The authors gave no support for this claim and, as I discussed above, it is not clear that parties bargaining over an easement would not intend to permit immaterial increases in use of an easement by the dominant tenant servicing nondominant land.²⁶⁶ In closely related areas of easement law, courts *do* presume that parties intend that the easement accommodate reasonable increases in use through subdivision of the dominant estate, changes in the easement's dimensions, changes in technology, or simply through more intensive use itself.

First, courts hold that the benefit of an easement normally runs to each parcel when a dominant tenant divides the dominant estate.²⁶⁷ Courts do, however, limit the increased burden that subdivision can impose on the servient estate by limiting the surcharge to what "might have been reasonably anticipated."²⁶⁸ So long as any increased burden on the servient estate is reasonable, courts presume that the parties intended such development to fulfill the purpose of the easement. This reasonableness requirement prevents harm to the servient tenant, and the requirement could effectively perform a similar function when the dominant tenant services nondominant land.

Under the *Brown* rule, expansion of the amount of land serviced by the easement remains prohibited. In other words, the servient tenant retains the legal entitlement. However, if the dominant tenant uses the easement to benefit nondominant land, the remedy is damages if the dominant tenant's use does not unreasonably expand the burden on the servient estate. And, if the servient estate is unreasonably burdened by the dominant tenant's expanded use, the servient tenant's remedy remains an injunction. The reasonableness requirement provides an adequate dividing line between the remedies courts will give. This is because the reasonableness requirement distinguishes those uses by the dominant tenant that harm the servient tenant and hence were not within the likely contemplation of the parties, from those uses that do not harm and hence were within the likely contemplation of the parties.

Second, the *Brown* rule's distinction based on whether the increased burden is reasonable is consistent with the law governing when a dominant tenant expands an easement's dimensions. Courts do not enjoin such expansion if "the servient owner is not materially disadvantaged."²⁶⁹ They permit this unilateral expansion of an easement's dimensions by the dominant tenant to effectuate the easement's purpose.²⁷⁰ "If the change is slight and immaterial, or is not so

²⁶⁵ *Id.*

²⁶⁶ *See supra* Part IV.C.ii.

²⁶⁷ BRUCE & ELY, *supra* note , § 8.12 ("An easement appurtenant benefits the entire dominant estate and is apportionable among subsequent owners if the dominant estate is divided.").

²⁶⁸ STOEBUCK & WHITMAN, *supra* note , at 462; *see also* Cushman Va. Corp. v. Barnes, 129 S.E. 2d 633, 640 (Va. 1963) (holding that increased use from subdivided dominant estate was permissible so long as it did not pose an unreasonable burden on the servient estate).

²⁶⁹ BRUCE & ELY, *supra* note , § 7.17.

²⁷⁰ *See Sordi v. Adenbaum*, 533 N.Y.S. 2d 566, 567 (N.Y. App. Div. 1988) ("To limit the dimensions of the easement to the terms of the metes and bounds descriptions would, as a practical

substantial as to result in the creation or substitution of a new and different servitude, it is not objectionable.”²⁷¹

Relatedly, section 4.8(3) of the *Restatement* permits a servient tenant to unilaterally alter the location and dimensions of an easement to accommodate development of the servient estate so long as the changes do not “significantly lessen the utility” of the easement or “increase the burdens” on the dominant tenant.²⁷² The *Restatement*’s drafters justified this deviation from the majority of jurisdictions²⁷³ by arguing that “it will increase the overall utility because it will increase the value of the servient estate without diminishing the value of the dominant estate.”²⁷⁴ The same reasoning justifies the *Brown* rule: the value of the servient estate is protected by the first prong—reasonable use—while the value of the easement, and hence of the dominant estate, is increased.

Third, courts also have no difficulty in finding alterations to the dominant tenant’s use of an easement because of changes in technology consistent with the parties’ intent.²⁷⁵ For instance, the Iowa Supreme Court ruled that an easement which permitted the dominant tenant to “drive teams” included “modern vehicular traffic.”²⁷⁶ Like changes in technology which may diverge from the concrete expectations of the parties but still remain within their overall contemplation, use of an easement to service nondominant land will remain within the parties’ contemplation.

Fourth, the *Restatement (Third)* is itself inconsistent on this point because section 4.10 states that the presumed intent of parties includes a reasonable increase in intensity of use, but not in section 4.11 which governs serving nondominant land; however, no reason is given for this difference in treatment. Section 4.11’s *prohibition* on benefiting nondominant land is partially justified by fitting the “likely intent of the parties.”²⁷⁷ By contrast, section 4.10 *permits* the dominant tenant to expand the “manner, frequency, and intensity of use” so long as such increase does not “cause unreasonable damage” to the servient tenant.²⁷⁸ The *Restatement (Third)*’s authors justified this rule—as they do in section 4.11’s contrary rule—by appeal to the “expectations of the parties” who created the

matter, defeat the basic purpose for which the easement was reserved, i.e., to provide a parking lot for seven cars.”); *see also id.* (“It has also been held that the dimensions of an easement may be unilaterally altered in order to permit use for the easement’s intended purpose.”).

²⁷¹ 25 AM. JUR. 2D *Easements and Licenses* § 84 (2007).

²⁷² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.8(3) cmt. b (2000).

²⁷³ *See id.* § 4.8(3) cmt. f (stating that “[t]his subsection . . . rejects the rule espoused by the weight of authority in the United States”).

²⁷⁴ *Id.*

²⁷⁵ BRUCE & ELY, *supra* note , § 8.3.

²⁷⁶ *Skow v. Goforth*, 618 N.W. 2d 275, 278 (Iowa 2000); *see also Hash v. Sofinowski*, 487 A. 2d 32, 34 (Pa. Super. 1985) (finding that Pennsylvania courts “presum[e] that advances in technology are contemplated in the grant of the easement”).

²⁷⁷ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §4.11 cmt. b (2000).

²⁷⁸ *Id.* § 4.10; *see also id.* § 4.8(3) cmt. f (justifying a rule permitting a servient tenant to unilaterally alter the location and dimensions of an easement by stating that it will accommodate normal development of the servient estate).

servitude.²⁷⁹ The authors do not attempt to explain the different treatment in sections 4.10 and 4.11.

Another example of the dissonance of section 4.11 within the *Restatement* can be seen by comparing its treatment with that received by section 5.7. Section 5.7 permits the dominant tenant to divide the dominant estate, with the benefit of the easement running to each subdivided parcel.²⁸⁰ Like section 4.10, section 5.7's rule is limited to prevent an "unreasonable increase in the burden" on the servient estate.²⁸¹ The use of this reasonableness requirement is also justified by the intent of the parties to the servitude.²⁸²

The *Restatement (Third)*'s reasons in these other areas for presuming that parties intended to permit reasonable increased use of an easement are also persuasive in the context of servicing nondominant land. Doing so permits greater overall utility with no loss to the servient estate. Indeed, in the context of servicing nondominant land itself, some courts have presumed that the parties to an easement intended the dominant tenant to use the easement to service nondominant land so long as the increased burden on the easement was not material.

For instance, the Connecticut Supreme Court, in *Carbone v. Vigliotti*, held that the dominant tenants' use of a right-of-way to service after-acquired residential lots did not overburden the easement.²⁸³ The dominant tenants wanted to build a house half of which would sit on after-acquired lots.²⁸⁴ The court found that any increase in use of the easement caused by servicing the one-half of the house that sat on the after-acquired lots was insignificant.²⁸⁵ Any increase in use of the easement was "within the reasonable expectations of the parties at the time of [the easement's] creation" because the grantee of the easement understood that the lots would be used in a manner similar to the surrounding neighborhood.²⁸⁶ Contrary to the *Restatement (Third)*'s position, the *Carbone* Court ruled that the parties' presumed intent would include the allowance for reasonable use for nondominant land.²⁸⁷

Consequently, there is no reason to assume—and in fact, as shown above, the law generally assumes the opposite—as does the *Restatement*, that parties to the creation of an easement would not intend that the dominant tenant may reasonably increase his use of an easement to benefit nondominant land.

²⁷⁹ *Id.* § 4.10 cmt. f.

²⁸⁰ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 5.7 (2000).

²⁸¹ *Id.* § 5.7(1),(3).

²⁸² *Id.* § 5.7 cmt. a.

²⁸³ *Carbone v. Vigliotti*, 610 A.2d 565, 569 (Conn. 1992).

²⁸⁴ *Id.* at 566-67.

²⁸⁵ *Id.* at 569.

²⁸⁶ *Id.*

²⁸⁷ See *Abington Ltd. P'ship v. Heublein*, 717 A.2d 1232, 1239 (Conn. 1998) (characterizing the *Carbone* Court as holding that "in some circumstances, the parties at the time of the creation of an easement may be found to have contemplated, as a matter of law, that its benefits might accrue to adjacent property that was not formally within the terms of the easement").

The third objection raised by many courts and scholars is that the “burden” of an easement is the legal right of the dominant tenant to use a portion of the servient estate in a specified way, not the dominant tenant’s actual usage.²⁸⁸ “The ruling limiting the benefit of an easement to the dominant parcel is concerned with the rights of the respective parties, rather than the actual burden of the servient parcel.”²⁸⁹ It is not clear what this means. It cannot mean that any time there is a violation of the servient tenant’s rights the servient tenant is due an injunction because the remedies for violation of rights are extremely diverse.²⁹⁰ The remedy afforded violation of a particular right depends on a number of factors and is the result of a prudential social choice on which remedy would best advance the common good.²⁹¹ Such factors include efficiency and fairness. And the evaluation of these factors can change as social circumstances change.²⁹² As I argued above, the most efficient and fair remedy for the violation of a servient tenant’s right in the context of dominant tenant using an easement to service nondominant land is damages.

More importantly, my proposal would not alter the underlying legal relationship between the servient and dominant tenants: the dominant tenant would have the legal right only to that use authorized at the creation of the easement and the servient tenant would retain the right to an easement of a specified scope. My proposal would only change the remedy provided when a dominant tenant exceeded his legal right: when the dominant tenant used the easement to service nondominant land. Instead of receiving an injunction to stop overburdening, the servient tenant would receive damages. The servient tenant’s legal right is still vindicated.

V. Conclusion

In this Article, I argued that courts should move away from the American rule and adopt instead the *Brown* rule which would permit courts to award damages when two conditions are met: (1) when the dominant tenant’s servicing of nondominant land does not pose an unreasonable burden on the servient estate; and (2) when the cost to the dominant tenant of ceasing his servicing of nondominant land is substantially greater than the benefit to the servient tenant. A remedy of damages instead of an injunction, under these circumstances, fits well with earlier case law, builds on courts’ equitable authority and concomitant

²⁸⁸ See, e.g., *National Lead Co.*, 288 F. Supp. at 364 (finding that the American rule “is directed to the rights of the respective parties rather than the actual burden on the servitude”); Orth, *supra* note , at 644 (“The burden of an easement is a legal burden. The burden exists regardless of the amount of the actual use of the easement or whether any use at all is made of it.”); see also BRUCE & ELY, *supra* note , § 8.11 (stating that any use of an easement to serve land other than the dominant estate is an “overburden of the servient tenement, regardless of the amount of usage”).

²⁸⁹ McClaran, *supra* note , at 296-97.

²⁹⁰ See 1 DAN B. DOBBS, DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION 1-20 (2d ed. 1993) (providing a brief overview of the numerous remedies available for violation of rights).

²⁹¹ For a discussion of prudential social choices see Lee J. Strang, *Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 438 (2006).

²⁹² For example, as I argued earlier, the remedy afforded for nuisances has changed to suit changed circumstances. *Supra* notes , and accompanying text.

case law, accords with the broader movement in property law from property to contract concepts, and is economically efficient and fair.