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WHEN "COMPREHENSIVE" PRESCRIPTIVE EASEMENTS OVERLAP ADVERSE POSSESSION: SHIFTING THEORIES OF "USE" AND "POSSESSION"

Will Saxe*

Abstract: Human nature dictates that private ownership of land creates conflict among neighbors. In the realm of adverse possession and prescriptive easements, the law intervenes to settle these disputes. Adverse possession quiets conflict by providing the ripened possessor with title in fee simple absolute. In contrast, a prescriptive easement provides the holder with only a right of use. However, there are occasions when a prescriptive easement establishes a right of use so broad and encompassing that it amounts to a grant of de facto possession. Thus, such a "comprehensive prescriptive easement" enables the court to award the equivalent of possession while only requiring proof of mere prescriptive use. This Note examines the problems of comprehensive prescriptive easements, and explores possible solutions where rights of use are the equivalent of possession.

Introduction

Inherent in the private ownership of land is conflict among neighbors and users of real property.[1] In the form of both adverse possession and prescriptive easement, the law intervenes to settle these disputes.[2] While adverse possession and prescriptive easements are related in many ways, each doctrine has a unique effect on private property rights.[3] Adverse possession rewards the possessing party with fee simple absolute and formally severs possession from the original title holder.[4] In contrast, prescriptive easements establish only a right of use, as the

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[1] *See* 7 Thompson on Real Property, Thomas Edition § 60.01, at 390 (David A. Thomas ed., 1994).

[2] *See* 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(i), at 435; 3 Am. Jur. 2d *Adverse Possession* § 1 (2002).

[3] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(i), at 435.

[4] *Id.*

land owner retains full title of the property.[5] However, there are times when a prescriptive easement may allow such a broad and encompassing use that it grants a de facto right of possession.[6] In what this Note terms a "comprehensive prescriptive easement," the successful claimant earns a right of possession while only having to prove the right of use associated with the typical prescriptive easement.[7]

This Note addresses the problems of comprehensive prescriptive easements and discusses methods that may counteract granting rights of use equivalent to possession in prescriptive easement cases. Part I provides an analysis of the required elements of adverse possession. Part II examines the necessary components of a successful prescriptive easement claim. Part III introduces the concept and implications of comprehensive prescriptive easements. Lastly, Part IV examines possible judicial adaptations that may diminish the inequity stemming from a comprehensive prescriptive easement's awarding of de facto possession without having satisfied the more stringent adverse possession requirements.

I. Adverse Possession

Adverse possession, a doctrine grounded in history, allows the ripened possessor to acquire absolute title to property from the original owner.[8] Transferring full title through adverse possession began centuries ago in England.[9] At first, there was no need for remedial doctrines such as adverse possession because ownership of property had no value until it was possessed or seized.[10] As property laws devel-

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[5] *Id.*

[6] *See infra* Part III.

[7] *See* Raab v. Casper, 124 Cal. Rptr. 590, 596 (Ct. App. 1975) ("An exclusive interest labeled 'easement' may be so *comprehensive* as to supply the equivalent of an estate, i.e., ownership.") (emphasis added).

[8] *See* 3 Am. Jur. 2d *Adverse Possession*, *supra* note 2, §§ 1–2 (defining adverse possession "as an actual and visible appropriation of property commenced and continued under a claim of right inconsistent with and hostile to the claim of another"); 10 Thompson on Real Property, *supra* note 1, § 87.01, at 71–74.

[9] Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 Geo. L.J. 2419, 2421 (2001). At one time, the original property owner in England had to prove that unripe adverse possession had begun after the coronation of Henry II in order to retrieve possession. 10 Thompson on Real Property, *supra* note 1, § 87.01, at 73. Later, this cut-off point was adjusted to the coronation of Richard I. Lastly, Henry VIII created a statute that fixed a general time limitation of three score years before suit was barred. *Id.* § 87.01, at 71–74.

[10] *See* 10 Thompson on Real Property, *supra* note 1, § 87.01, at 72 ("If one was disseised, if one lost possession, one lost the interest in the land.").

oped, so did the concept of separating title from possession.[11] This separation of owner and possessor complicated property ownership and interfered with clear title.[12] Thus, adverse possession became a method to quiet title by prohibiting the original owner from asserting ownership without consideration of time.[13]

As with any statute of limitations that benefits the general welfare,[14] adverse possession is based on fundamental policy considerations—the prevention of "stale claims" and providing repose to the parties.[15] Originally, English statutes of limitations concerning land ownership served to identify certain points in time prior to which a party could not rely on evidence in support of title.[16] By 1540, statutes of limitations employed the modern approach of identifying a set period of time after which the original property owner was barred from bringing suit to regain title.[17] The evolution of the statute of limitations culminated in a 1623 statute that required a twenty-year period of possession for the purposes of quieting title and avoiding suits.[18] Today, adverse possession under American common law has adopted

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[11] *See id.*

[12] *See* John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 Cornell L. Rev. 816, 819–20 (1994).

[13] *Id.* Generally, adverse possession is not a favored method for quieting title because, among other reasons, the claims are greatly contested, settlement is often impracticable, and with many title companies paying attorney fees through title insurance, there is little incentive to settle. Michael P. O'Connor, *Adverse Possession—Alive and Well in the 1990s*, N.Y. St. B.J., Jan. 1998, at 14, 15.

[14] *See* 10 Thompson on Real Property, *supra* note 1, § 87.01, at 86.

[15] Sprankling, *supra* note 12, at 819–20.

> At some point, however, the true owner's opportunity to challenge the possessor's title must end. Delay decreases the availability and reliability of evidence; witnesses die, memories fade and documents are lost. Adjudications premised on such stale evidence are prone to error. Moreover, the possessor is ultimately entitled to "repose," or freedom from the nagging concern generated by title insecurity.

Id. at 819; *see* William B. Stoebuck & Dale A. Whitman, The Law of Property 860 (3d ed. 2000) ("If we had no doctrine of adverse possession, we should have to invent something very like it.").

[16] 16 Richard R. Powell, Powell on Real Property § 91.01[1], at 91-4 to 91-5 (Michael Allan Wolf ed., 2000).

[17] *Id.*

[18] *Id.*; *see* 1623, 21 Jac., c. 16, §§ 1, 2.

this twenty-year lapse period.[19] In addition to the common law, most states have passed statutes defining the period of limitation.[20]

Beyond the judicial justifications of quieting title and limiting suits, adverse possession progressed in the United States as a method to promote economic development by encouraging the productive use of land.[21] Under adverse possession, the productive user of land is favored over the idle owner.[22] In addition, the statute of limitations for adverse possession serves to quiet title, thereby encouraging development.[23] For property to successfully develop, security in title must exist.[24] Without security and comfort in title, economic growth is hindered by the expense of securing property; this in turn limits the resources available for development of property.[25] In addition, without the ability to easily secure title, there is less incentive to accumulate private wealth through economic development.[26]

A. *Required Elements of Adverse Possession*

Several distinct requirements must be met by the possessor in order for adverse possession to ripen and compel the transfer of ti-

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[19] 10 Thompson on Real Property, *supra* note 1, § 87.01, at 75.

[20] *Id.*; *e.g.*, Mass. Gen. Laws ch. 260, § 21 (2004). For a compilation of individual state legislation pertaining to adverse possession, see 10 Thompson on Real Property, *supra* note 1, § 87.01, at 77–86.

[21] Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. Mich. J.L. Reform 939, 942 (1996) ("Again, our society's traditional preference for the development of land appears. If the adverse possessor makes valuable use of land where the true owner does not, the law views the adverse possessor as more socially responsible and thus preferable to the true owner."); Sprankling, *supra* note 12, at 874; *see* Stake, *supra* note 9, at 2435–36. Sprankling and Stake both examine whether the public policy considerations surrounding adverse possession and land use are environmentally unsound or obsolete. Sprankling, *supra* note 12, at 884; Stake, *supra* note 9, at 2435–36. Importantly, legal scholars have begun to question the environmental impact of adverse possession and whether its encouragement of property development is outdated. *See* John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. Chi. L. Rev. 519, 520 (1996) (declaring that "the property law system tends to resolve disputes by preferring wilderness destruction to wilderness preservation"); William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 Land & Water L. Rev. 79, 96 (1996) ("Incentives to render an increased use of land are no longer needed to open frontiers and provide for society.").

[22] Latovick, *supra* note 21, at 942.

[23] *See* Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, *in* Perspectives on Property Law 190, 193–94 (Robert C. Ellickson et al. eds., 3d ed. 2002).

[24] *See id.*

[25] *Id.*

[26] *Id.*

tle.[27] The possessor must show: (1) actual possession that is;[28] (2) hostile or adverse;[29] (3) open and notorious;[30] (4) continuous;[31] and (5) exclusive.[32] Lastly, adverse possession does not ripen until the applicable statute of limitations has been satisfied.[33]

1. Actual Possession

For adverse possession to ripen, there must first be possession under the law of that particular jurisdiction.[34] Generally, the adverse possessor acquires only those lands in his immediate and direct possession.[35] The requisite level of possession is achieved not through casual acts of ownership, but rather through significant acts of dominion that serve as an ouster to the true owner.[36] Actual possession can be demonstrated through a variety of uses and other forms of occupation.[37] Many forms of possession other than the traditional establish-

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[27] JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 139 (5th ed. 2002); 10 THOMPSON ON REAL PROPERTY, *supra* note 1, § 87.01, at 75.

[28] DUKEMINIER & KRIER, *supra* note 27, at 139; *see, e.g.*, Chaney v. State Mineral Bd., 444 So. 2d 105, 108 (La. 1983) ("'Stated otherwise, the possessor without title is entitled to be maintained in possession only to the extent of the boundaries within which he proved actual, physical and corporeal possession.'" (quoting City of New Orleans v. New Orleans Canal, Inc., 412 So. 2d 975, 982 (La. 1982))).

[29] DUKEMINIER & KRIER, *supra* note 27, at 139 & n.12; *see, e.g.*, Shandaken Reformed Church of Mount Tremper v. Leone, 451 N.Y.S.2d 227, 228 (App. Div. 1982) ("When possession is permissive in its inception, adverse possession will not arise until there is a distinct assertion of a right hostile to the owner and brought home to him.").

[30] DUKEMINIER & KRIER, *supra* note 27, at 139; *see, e.g.*, Goldman v. Quadrato, 114 A.2d 687, 690 (Conn. 1955) (requiring open possession within adverse possession claims).

[31] DUKEMINIER & KRIER, *supra* note 27, at 139; *see, e.g.*, Iowa R.R. Land Co. v. Blumer, 206 U.S. 482, 484 (1907) (listing continuous possession as a required element for ripened adverse possession).

[32] DUKEMINIER & KRIER, *supra* note 27, at 139; *see, e.g.*, Rutar Farms & Livestock, Inc. v. Fuss, 651 P.2d 1129, 1134 (Wyo. 1982) (finding that possession was not exclusive because neighboring cattle also grazed on the property in question).

[33] *See* DUKEMINIER & KRIER, *supra* note 27, at 139; *see, e.g.*, MASS. GEN. LAWS ch. 260, § 21 (2004).

[34] 10 THOMPSON ON REAL PROPERTY, *supra* note 1, § 87.05, at 112.

[35] Chaney v. State Mineral Bd., 444 So. 2d 105, 108 (La. 1983); *see* 10 THOMPSON ON REAL PROPERTY, *supra* note 1, § 87.05, at 112. One exception to the requirement of actual possession is the doctrine of constructive adverse possession under color of title. *See* DUKEMINIER & KRIER, *supra* note 27, at 145–46. Through constructive adverse possession, an adverse possessor holding land under defective title while actually possessing only a certain portion of that parcel can acquire title to the full property once adverse possession ripens. *E.g.*, John T. Clark Realty Co. v. Harris, 2 N.Y.S.2d 137, 141 (App. Div. 1938); *see* DUKEMINIER & KRIER, *supra* note 27, at 145–46; 10 THOMPSON ON REAL PROPERTY, *supra* note 1, § 87.07, at 123–27.

[36] 10 THOMPSON ON REAL PROPERTY, *supra* note 1, § 87.04, at 99–111.

[37] *Id.* § 87.06, at 120–21.

ing of residence[38] may be sufficient to satisfy actual possession, such as building structures[39] or enclosures,[40] and cutting timber.[41] However, in determining actual possession, the primary factor is whether the activity in question is consistent with an act that would ordinarily be performed by the true owner for that particular parcel.[42] Thus, the character of the land and its typical uses are of the utmost importance in establishing actual possession.[43]

2. Hostile or Adverse Possession

The requirement of hostile possession is a misnomer.[44] Ill will or malice is not necessary to show that possession is hostile or adverse.[45] Instead, possession must merely be a claim of ownership—commonly called a claim of right—that is adverse to the original title holder.[46] While claim of right is clearly a mandatory element of adverse possession, there are differences among jurisdictions regarding what state of mind is required by the possessor.[47] For example, Georgia,[48] Indi-

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[38] *Id.* § 87.04, at 107.

[39] Williams v. Rogier, 611 N.E.2d 189, 195 (Ind. Ct. App. 1993) ("For residential land, the presence of permanent improvements such as border fences or buildings which are in place during the entire statutory period can be sufficient to establish adverse possession.").

[40] Robin v. Brown, 162 A. 161, 163 (Pa. 1932) (finding a fence must be of substantial character to be sufficient for adverse possession).

[41] *See* Drennen Land & Timber Co. v. Angell, 475 So. 2d 1166, 1172 (Ala. 1985) (holding that the act of selling timber constituted actual possession because the area was "predominantly timberland").

[42] *See* Hand v. Stanard, 392 So. 2d 1157, 1160 (Ala. 1980) ("Land need only be used by an adverse possessor in a manner consistent with its nature and character—by such acts as would ordinarily be performed by the true owners of such land in such condition.").

[43] *Id.* 3 Am. Jur. 2d *Adverse Possession*, *supra* note 2, at § 21 (summarizing that adverse possession claims should be viewed in light of the location and nature of the property in question).

[44] *See* 3 Am. Jur. 2d *Adverse Possession*, *supra* note 2, at § 43.

[45] *Id.*

[46] Calhoun v. Woods, 431 S.E.2d 285, 287 (Va. 1993). Hostile possession is the possessor's use of the property as his own. *See id.* In other words, his use must be as if he were in fact the true owner. *Id.*

[47] Margaret Jane Radin, *Time, Possession, and Alienation*, 64 Wash. U. L.Q. 739, 746–47 (1986) (Noting that "[t]here are three positions that have existed in legal doctrine: (1) state of mind is irrelevant; (2) the required state of mind is, 'I thought I owned it;' (3) the required state of mind is, 'I thought I did *not* own it [and intended to take it].' These can roughly be thought of as the objective standard, the good-faith standard, and the aggressive trespass standard.").

[48] *E.g.*, Halpern v. Lacy Inv. Corp., 379 S.E.2d 519, 521 (Ga. 1989) ("We hold that the correct rule is that one must enter upon the land claiming in good faith the right to do so.").

ana,[49] Iowa,[50] and Oregon[51] require that the adverse possessor have a good faith belief in ownership.[52] This is illustrative of a judicial trend in adverse possession law whereby the possessor's intent has become increasingly important in the court's eyes.[53] Courts appear less willing to allow adverse possession as a means of rewarding title to the undeserving, knowing trespasser.[54] Regardless of the debate concerning intent, the bottom line when it comes to issues of hostile possession remains that the possessor's actions must be inconsistent with claims of ownership by the true title holder or any other party.[55]

Frequently, the issue of hostile possession rests on whether the possessor had the permission of the true owner.[56] In fact, adverse possession claims may be thwarted due to a jurisdiction's reliance on a pre-

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[49] *E.g.*, Pennington v. Flock, 93 Ind. 378, 383 (1884).

[50] *E.g.*, Carpenter v. Ruperto, 315 N.W.2d 782, 786 (Iowa 1982) ("We now confirm that good faith, as explained in this case, is essential to adverse possession under a claim of right.").

[51] OR. REV. STAT. § 105.620(1)(b) (2003).

[52] Per C. Olson, Comment, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 ENVTL. L. 1297, 1300 & n.17 (1993). The author claims that the good faith standard is counter to the fundamental policy objectives behind adverse possession itself. *See id.* at 1321. For example, by adopting the good faith requirement, Oregon has ignored the more favored purpose of adverse possession—rewarding those who act as true property owners instead of passive title holders. *Id.*

[53] *See* R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331, 332 (1983). However, a judicial focus on good faith serves to complicate adverse possession matters by assigning to the courts the near impossible task of determining intent, which, due to the passage of time, usually results in mere speculation. *Id.* at 357; *see* Olson, *supra* note 52, at 1316.

[54] *See* Helmholz, *supra* note 53, at 332 (finding that most cases did not award title to the willful trespasser).

> The cases, taken as a whole, do not show that the adverse possessor must plead and prove that he acted in good faith. It is enough that the question may be raised under the rubric "claim of right." But the cases do clearly show that the trespasser who knows that he is trespassing stands lower in the eyes of the law, and is less likely to acquire title by adverse possession than the trespasser who acts in an honest belief that he is simply occupying what is his already.

Id. For a more detailed perspective on the question of good and bad faith within adverse possession, see Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1 (1986); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65 (1986).

[55] Strickland v. Markos, 566 So. 2d 229, 233 (Ala. 1990) (holding that there is no requirement that the possessor intend to claim the property of another because such a requirement would reward bad faith); *see* 3 AM. JUR. 2D *Adverse Possession*, *supra* note 2, at § 43.

[56] *See* Shandaken Reformed Church of Mount Tremper v. Leone, 451 N.Y.S.2d 227, 228 (App. Div. 1982); 3 AM. JUR. 2D *Adverse Possession*, *supra* note 2, at § 43.

sumption that possession of another's property is done with permission of the owner.[57] Regardless of the type of presumption employed, a successful claim of hostile possession often hinges on whether the possessor is acting as a true owner rather than as a tenant or licensee.[58]

3. Open and Notorious Possession

In addition to being adverse, the possessor's actions must be overt actions of ownership that would alert the true title holder to an opposing claim of right.[59] The public policy reason behind this requirement is to provide notice of the adverse possession to the record title holder,[60] and, in some cases, even to the general public.[61] This stems from the fundamental policy argument that the title holder who has notice of another party possessing his land as a true owner, yet fails to act, should be prohibited from later contesting the adverse possessor's claim of ownership.[62] In sum, open and notorious adverse possession must be achieved through an unequivocal display of an opposing claim of ownership to the title holder or his agents.[63]

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[57] Vezey v. Green 35 P.3d 14, 22 (Alaska 2001) ("'There is a presumption that one who possesses or uses another's property does so with the owner's permission.'" (quoting Smith v. Krebs, 768 P.2d 124, 126 (Alaska 1989))).

[58] *See id.* at 23.

[59] 10 Thompson on Real Property, *supra* note 1, § 87.07, at 127–28; *see, e.g.*, Goldman v. Quadrato, 114 A.2d 687, 690 (Conn. 1955).

[60] *Vezey*, 35 P.3d at 22; Striefel v. Charles-Keyt-Leaman P'ship, 733 A.2d 984, 990–91 (Me. 1999) (stating that open, visible, and notorious adverse possession is required in order "to provide the true owner with adequate notice that a trespass is occurring, and that the owner's property rights are in jeopardy").

[61] *See* Marengo Cave Co. v. Ross, 10 N.E.2d 917, 921 (Ind. 1937) (holding that possession "must be so conspicuous that it is generally known and talked of by the public"). This view, however, appears to be an extreme outlook because most issues of open and visible possession are determined based upon whether the record title holder was on notice. *See Vezey*. 35 P.3d at 22 n.24; Snook v. Bowers, 12 P.3d 771, 783 (Alaska 2000).

[62] Philbin v. Carr, 129 N.E. 19, 27 (Ind. App. 1920) (stating that when learning of an adverse claim of title, a true owner should protect his title or pursue an act of ejectment).

[63] Elliot v. West, 665 S.W.2d 683, 691 (Mo. Ct. App. 1984) ("Where, as here, actual knowledge of the record owner is not proved, the claimant must show an occupancy *so obvious* and well recognized as to be inconsistent with and injurious to the owner's rights that the law will authorize a presumption from the facts that he had such knowledge.") (emphasis added); 10 Thompson on Real Property, *supra* note 1, § 87.08, at 131; *see, e.g.*, Alaska Nat'l Bank v. Linck, 559 P.2d 1049, 1053 (Alaska 1977) (finding that the standard of knowledge is based on the constructive knowledge of what a dutiful land owner would have known). Some jurisdictions, however, have required actual knowledge for certain types of adverse possessions claims. *See, e.g.*, Coleman v. Coleman, 459 S.E.2d 166, 168 (Ga. 1995).

4. Continuous Possession

In order for adverse possession to ripen, it must be continuous throughout the entire statutory period.[64] Probably more than any other element of adverse possession, the extent of continuity required depends on the nature and character of the possession and parcel.[65] The level of continuity required by a possessor is determined by evaluating how an "average" owner would use the property.[66] In some cases, even seasonal usage can be considered continuous.[67] For example, in *Burkhardt v. Smith* the Supreme Court of Wisconsin found that regular use as a summer cottage was enough to establish continuous adverse possession.[68] In contrast, merely intermittent or sporadic usage such as hunting, fishing, or fruit picking will usually not be considered adequately continuous.[69] When examining if a seasonal or similarly occasional use is sufficiently continuous, it is necessary to determine whether there is any indication of abandonment by the possessor.[70] If there is no act of abandonment coupled with the intent to abandon, sufficient seasonal use that comports with the character and nature of the property will be considered continuous.[71]

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[64] *See, e.g.*, Mass. Gen. Laws ch. 260, § 21 (2004).

[65] *See* N.A.S. Holdings, Inc. v. Pafundi, 736 A.2d 780, 784 (Vt. 1999).

[66] *Id.* (quoting Darling v. Ennis, 415 A.2d 228, 230 (Vt. 1980)). Continuity may also be maintained through the doctrine of tacking, where adverse possession is passed from one party to the next in order to achieve the statutory requirements. 10 Thompson on Real Property, *supra* note 1, § 87.13, at 159. For tacking to be successful, privity between the parties must exist. *Id.* § 87.13, at 160. For a brief summary of tacking, see *id.*

[67] *See* Roche v. Town of Fairfield, 442 A.2d 911, 917 (Conn. 1982). "With respect to the manner of continuous possession, '[t]he location and condition of the land must be taken into consideration and the alleged acts of ownership must be understood as directed to those circumstances and conditions.'" *Id.* at 917 n.11 (quoting Benne v. Miller, 50 S.W. 824, 828 (Mo. 1899)).

[68] 115 N.W.2d 540, 544 (Wis. 1962).

[69] Okuna v. Nakahuna, 594 P.2d 128, 132 (Haw. 1979) ("Infrequent visits to the property to pick and gather fruits can hardly be said to constitute continuous possession or even possession at all.").

[70] *See* Pease v. Whitney, 98 A. 62, 64 (N.H. 1916) (finding a break in farming of land did not necessarily constitute an indication of intent to abandon); Dukeminier & Krier, *supra* note 27, at 140 n.15.

[71] *See Pease*, 98 A. at 64; Dukeminier & Krier, *supra* note 27, at 140 n.15.

5. Exclusive Possession

For an adverse possession claim to successfully ripen, the possessor must have sole possession[72] as a true owner would.[73] The policy behind this requirement is that adverse possession must serve as an ouster of the legal title holder.[74] The exclusion of others does not necessarily need to be absolute, but must rather be of the type and character that an average true owner would display.[75]

As can be expected, exclusive possession can be a tough standard to meet.[76] Actions that may appear to most neighbors as those of an exclusive owner may not be sufficient for an adverse possession claim.[77] For example, in *Pettis v. Lozier*, the Supreme Court of Nebraska held that grazing livestock, planting trees, gardening, and posting "No Trespassing" signs were insufficient to successfully prove exclusive adverse possession.[78] Often, a basic indicator of exclusive possession is the possessor's forceful halting of actions that originated on the property by outside parties prior to the commencement of adverse possession.[79] In the eyes of the court, such affirmative steps will likely be sufficient to provide the necessary ouster for exclusive adverse possession.[80]

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[72] 10 Thompson on Real Property, *supra* note 1, § 87.09, at 133. Two or more parties cannot adversely possess the same parcel simultaneously and establish exclusive possession from one another. Philbin v. Carr, 129 N.E. 19, 28 (Ind. App. 1920).

[73] *See, e.g.*, Rutar Farms & Livestock, Inc. v. Fuss, 651 P.2d 1129, 1134 (Wyo. 1982).

[74] Philbin 129 N.E. at 28; 10 Thompson on Real Property, *supra* note 1, § 87.09, at 133.

[75] Smith v. Hayden, 772 P.2d 47, 53–54, 57 (Colo. 1989) (finding that the adverse possessor used the property as an average owner by parking cars, storing fuel, and hosting barbeques, while neighbors stored lumber on the parcel and their children played on the land. that use was not sufficient).

[76] *See* Pettis v. Lozier, 349 N.W.2d 372, 374, 376 (Neb. 1984); Dukeminier & Krier, *supra* note 27, at 140.

[77] *See Pettis*, 349 N.W.2d at 374, 376; Dukeminier & Krier, *supra* note 27, at 140.

[78] 349 N.W.2d at 374, 376; Dukeminier & Krier, *supra* note 27, at 140.

[79] *See Pettis*, 349 N.W.2d at 374; Wiedeman v. James E. Simon Co., 307 N.W.2d 105, 106, 108 (Neb. 1981) (holding possession to be exclusive where possessor ended the dumping of trash on the property). Note that the Supreme Court of Nebraska made this ruling only three years prior to finding that the possessor's extensive actions in *Pettis* did not establish exclusivity. *See Pettis*, 349 N.W.2d at 374. Thus, prohibiting actions that occurred prior to the beginning of adverse possession appears to be fundamental to establishing exclusivity. *See id.*; *Wiedman*, 307 N.W.2d at 106, 108.

[80] *Wiedman*, 307 N.W.2d at 106, 108; *see Pettis*, 349 N.W.2d at 374.

B. *Rights Acquired by Adverse Possession: Fee Simple Absolute*

Prior to the lapsing of the statutory period, the adverse possessor can be ejected only by the true owner.[81] Other than the true owner, the adverse possessor is secure in title against all remaining parties.[82] However, once all the requirements of adverse possession have been met throughout the entire statutory period, the possessor acquires full title in fee simple absolute.[83] Therefore, ripened adverse possession not only protects the possessor from an act of ejectment by the original owner, it provides security from claims by all parties.[84] Like any fee simple absolute, the new title is not lost by an abandonment of possession or any other failure to assert title.[85] Furthermore, the acquisition of title by the adverse possessor operates as a conveyance by warranty deed from the true owner.[86] In sum, adverse possession results in fee simple absolute, what a buyer would expect to receive in any traditional conveyance.[87]

II. Prescriptive Easements

An easement is a property right that is broadly defined as "a non-possessory right to enter and use land in the possession of another" without interference from the possessor.[88] Another definition states that easements are the right to enjoy the land of another.[89] Prescriptive easements are created through prescriptive use, which the *Restatement (Third) of Property (Servitudes)* defines as "a use that is adverse

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[81] *See, e.g.*, Spring Valley Estates, Inc. v. Cunningham, 510 P.2d 336, 338 (Colo. 1973) ("In other words, from the beginning of his possession period, an adverse possessor has an interest in a given piece of property enforceable against everyone *except* the owner or one claiming through the owner.").

[82] *See id.*

[83] *Id.*; Stryker v. Rasch, 112 P.2d 570, 577 (Wyo. 1941) (stating that "when adverse possession for the statutory period is held, the adverse possessor is vested with full, new and distinct title"). The general rule is that adverse possession does not ripen when the true owner is the state or federal government. Latovick, *supra* note 21, at 939. Despite this sovereign immunity, states in some cases have failed to protect property from adverse possession. *See id.* at 939–40.

[84] *Cunningham*, 510 P.2d at 338.

[85] DeShon v. St. Joseph Country Club Vill., 755 S.W.2d 265, 268 (Mo. Ct. App. 1988).

[86] Niederhelman v. Niederhelman, 336 S.W.2d 670, 676 (Mo. 1960).

[87] *See Cunningham*, 510 P.2d at 338.

[88] Restatement (Third) of Prop.: Servitudes § 1.2(1) (2000); *see* 7 Thompson on Real Property, *supra* note 1, § 60.02(b), at 392.

[89] Commercial Wharf E. Condo. Ass'n v. Waterfront Parking Corp., 552 N.E.2d 66, 73 (Mass. 1990) ("An easement is an interest in land which grants to one person the right to use or enjoy land owned by another.").

to the owner of the land or the interest in land against which the servitude is claimed."[90] Thus, much like adverse possession, prescriptive easements are born from activities—use as compared to the possession of land—that are without the consent of the true owner.[91] Whether through adverse possession or prescriptive easement, once these activities are sufficient to create a ripened claim, an actual property right in favor of the actor is created without compensation to the original land owner for his severed or reduced property rights.[92]

Like the law of adverse possession, the law of prescriptive easements is grounded in extensive history.[93] At the end of medieval times in England, prescriptive easements were based on a theory of a "lost grant."[94] Before then, England had applied a statute of limitations that required proof of use stemming back to the coronation of Richard I in 1189.[95] When this task became difficult, the presumption of a lost grant was created in order to easily quiet title; this allowed parties—after a certain period of time elapsed—to presume that longstanding uses of property had been authorized in a deed that was now missing.[96] While this lost grant theory was initially accepted in American courts, it has been replaced by a statute of limitations and an acquisition of property theory.[97] These theories are supported by the principles that productive use of land should be rewarded and repose should be provided to the user by preventing stale claims.[98] Thus, the doctrine of prescriptive

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[90] Restatement (Third) of Prop.: Servitudes § 2.16(1). Prescriptive easements have an alternative definition as well: "a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude." *Id.* § 2.16(2).

[91] *See id.* § 2.16(2).

[92] *See* Joseph William Singer, *The Reliance Interest in Property*, 40 Stan. L. Rev. 611, 669–70 (1988). Yet, some valid arguments for compensation within prescriptive easements may exist. Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 594 (Cal. 1984) (Reynoso, J., dissenting); *infra* Part IV.B. For an extensive discussion on the argument for ordering compensation in cases of prescriptive easements in general, see Darryl S. Cordle, Note, Warsaw v. Chi. Metallic Ceilings, Inc.*: Compensation for Prescriptive Easements*, 19 Loy. L.A. L. Rev. 111, 120–21 (1985).

[93] *See* Restatement (Third) of Prop.: Servitudes § 2.17 cmt. b; 10 Thompson on Real Property, *supra* note 1, § 87.01, at 72–74.

[94] Restatement (Third) of Prop.: Servitudes § 2.17 cmt. b.

[95] *Id.* Because American courts could not require continuous use from 1189, modern prescription law developed as a remedy. David Casanova, Comment, *The Possibility and Consequences of the Recognition of Prescriptive Avigation Easements by State Courts*, 28 B.C. Envtl. Aff. L. Rev. 399, 405 (2001).

[96] Restatement (Third) of Prop.: Servitudes §§ 2.16 cmt. g, 2.17 cmt. b.

[97] *See id.* § 2.17 cmt. b.

[98] *Id.* The acquisitive-prescription theory is particularly compelling:

easements can accomplish many of the same fundamental concerns as adverse possession without fully transferring title.[99]

A. *Required Elements of Prescriptive Easements*

The requirements for a successful easement by prescription are quite similar to those of adverse possession.[100] For a prescriptive easement to ripen, the use must be hostile or adverse,[101] open and notorious,[102] and continuous.[103] In addition, a prescriptive easement does not ripen until the applicable statute of limitations has expired.[104] Lastly, although exclusivity is a factor in forming a prescriptive easement, it is not the same concept as developed in adverse possession law.[105]

1. Hostile or Adverse Use

For an easement by prescription to ripen, the use must be adverse or hostile to that of the true owner, thereby indicating a claim of right.[106] A use is considered adverse if it is inconsistent with the desires of the owner to such an extent that, had he known of the use, he would have stopped it.[107] Thus, any indication that the use was somehow subservient or permissive to that of the owner prevents the estab-

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> Because the uses that create prescriptive rights in these cases are not tortious, the results cannot be explained by statute-of-limitations theory. They can be explained, however, under the theory that use pursuant to an express or implied agreement gives rise to an entitlement, if continued for the prescriptive period.

Id.

[99] *See id.*; Latovick, *supra* note 21, at 942; Sprankling, *supra* note 12, at 819.

[100] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(vi), at 438.

[101] LaRue v. Kosich, 187 P.2d 642, 646 (Ariz. 1947) ("It is a recognized rule of law that where the use of a private way by a neighbor is by the express or implied permission of the owner. the continued use is not adverse and cannot ripen into a prescriptive right.").

[102] Kayfirst Corp. v. Wash. Terminal Co., 813 F. Supp. 67, 73 (D.D.C. 1993) ("Under District of Columbia law, an easement by prescription will arise only if the claimant's use of the servient estate is, among other things, open and notorious . . . .").

[103] Baker v. Armstrong, 611 S.W.2d 743, 745 (Ark. 1981) (requiring prescriptive use to be "continuous" for seven years).

[104] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(vi), at 438; *see* Mass. Gen. Laws ch. 187, § 2 (2004) ("No person shall acquire by adverse use or enjoyment a right or privilege of way or other easement from, in, upon or over the land of another, unless such use or enjoyment is continued uninterruptedly for twenty years.").

[105] *See* 10 Thompson on Real Property, *supra* note 1, § 87.09, at 133; 25 Am. Jur. 2d *Easements and Licenses in Real Property* § 53 (2004).

[106] *See LaRue*, 187 P.2d at 646; 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(viii), at 440.

[107] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(viii), at 440.

lishment of a prescriptive easement because the use is not considered adverse.[108]

When evaluating the hostile nature of the use in question, a majority of jurisdictions presume that the use is adverse to the wishes of the true owner.[109] Some states apply a more moderate approach and only presume adversity once the open and continuous requirements are met.[110] A minority of states have adopted a presumption of permissive use.[111] Additionally, some states apply a presumption of permissive use depending on distinct variables, such as when parties are related[112] or the land is wild, unenclosed, and uncultivated.[113]

Yet a presumption of permissiveness may not be necessary, as courts often aggressively look for indications of permissive use.[114] For example, in *Chaconas v. Meyers*, the District of Columbia Court of Appeals considered friendly exchanges between the claimant and the owner as evidence that the use was not adverse.[115] Thus, like adverse possession, proving actions hostile or adverse to the true owner can be a formidable requirement.[116]

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[108] *See* Hollis v. Tomlinson, 585 So. 2d 862, 863–64 (Ala. 1991) (finding that the use of a road was not adverse because claimants had asked permission to use on several occasions).

[109] Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g (2000); *see* Lunt v. Kitchens, 260 P.2d 535, 537 (Utah 1953) ("Because of the presumption that the use of another's land is adverse to him, the owner has the burden to show that the use was under his permission as distinguished from against it."). For a more extensive summary on presumptions of use for purposes of prescription, see Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g; 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(viii), at 441–43. For a limited discussion of presumptions of permission within adverse possession. see *supra* notes 56–58 and accompanying text.

[110] *See* Chaconas v. Meyers, 465 A.2d 379, 380 (D.C. 1983); West v. Smith, 511 P.2d 1326, 1333 (Idaho 1973) ("The general rule is that proof of open, notorious, continuous, uninterrupted use of the claimed right for the prescriptive period, without evidence as to how the use began, raises the presumption that the use was adverse and under a claim of right.").

[111] Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g; *see, e.g.*, West v. Slick, 326 S.E.2d 601, 610 (N.C. 1985) ("The law presumes that the use of a way over another's land is permissive or with the owner's consent unless the contrary appears." (quoting Dickinson v. Pake, 201 S.E.2d 897, 900 (N.C. 1974))).

[112] *See, e.g.*, Martin v. Proctor, 313 S.E.2d 659, 662 (Va. 1984) (finding that a child's use of a parent's land is presumed to be permissive without notice of an unequivocal assertion of ownership).

[113] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(viii), at 442–43; *see* Carpenter-Union Hills Cemetery Ass'n v. Camp Zoe, Inc., 547 S.W.2d 196, 201–02 (Mo. Ct. App. 1977).

[114] *See Chaconas*, 465 A.2d at 383.

[115] *Id.*

[116] *See id.*

2. Open and Notorious Use

Open and notorious use is required for prescriptive easements to ripen so that the true owner has notice of the adverse use on his property.[117] Presumably, armed with the knowledge that his property was at risk, the owner would undertake an action of ejectment.[118] Like adverse possession, the owner need not actually know of the use; rather, it is only necessary that the use be so open and visible that the title holder is presumed to have the constructive knowledge of a dutiful owner.[119] The type of use that is considered open and visible to satisfy constructive knowledge depends on the nature and character of the property in question.[120]

Open and notorious use can be a difficult standard to achieve because seemingly substantial uses may not be sufficiently visible to the diligent owner.[121] For example, in *Tenn v. 889 Associates*, the Supreme Court of New Hampshire found that the placement of portable air conditioners did not amount to open and visible use, partly due to the fact that they were placed twelve feet or more above the roof of the building.[122] Likewise, in *Maine Coast Heritage Trust v. Brouillard*, the Supreme Judicial Court of Maine ruled that occasional passage by foot for bird-watching could not be considered open for purposes of establishing a prescriptive easement.[123]

3. Continuous Use

Like adverse possession, use must be continuous throughout the prescriptive period for a prescriptive easement to ripen.[124] As expected, the extent of continuity required to establish a prescriptive

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[117] *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. h (2000). In fact, this requirement is considered satisfied if the owner has actual knowledge—regardless of whether or not the use is open and notorious. *Id.*

[118] *See id.*

[119] Swift v. Kniffen, 706 P.2d 296, 304 (Alaska 1985) (explaining that the adverse user "need not show that the record owner had actual knowledge of the adverse party's presence. Rather, the owner is charged with knowing what a duly alert owner would have known.").

[120] *Id.*

[121] *See* Me. Coast Heritage Trust v. Brouillard, 606 A.2d 198, 200 (Me. 1992); Tenn v. 889 Assocs., 500 A.2d 366, 372 (N.H. 1985).

[122] 500 A.2d at 372.

[123] 606 A.2d at 200.

[124] *See, e.g.*, MASS. GEN. LAWS ch. 187, § 2 (2004); Baker v. Armstrong, 611 S.W.2d 743, 745 (Ark. 1981). As with adverse possession, the doctrine of tacking can be applied to establish continuity among subsequent users. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 cmt. *l* (2000).

easement is highly dependent upon the nature and character of the use itself.[125] Frequently, the primary concern in evaluating continuity is whether an interruption in use has occurred that significantly interfered with the user.[126] Yet, like adverse possession, seasonal use can establish continuity in certain circumstances.[127] For example, in *Ward v. Harper*, the Supreme Court of Virginia held that seasonal use for timber operations in a remote area was sufficient for continuity.[128] In contrast, in *Veach v. Day*, the Supreme Court of Appeals of West Virginia ruled that using a road only a few times a year for hunting was considered too sporadic to establish continuity.[129]

4. Issue of Exclusive Use

In deciding on the scope of a prescriptive easement, a court will determine if the easement pertains to public or private rights based upon whether the use is by discrete individuals or by the public as a whole.[130] For example, in *Burks Brothers of Virginia, Inc. v. Jones*, the Supreme Court of Virginia established many individual private prescriptive easements for access to a mountain trail.[131] By instituting several private easements instead of one single public easement, the court found each private right independent of the others.[132] In other words, because each individual user was able to establish an easement without relying on the use of other parties, instituting an easement for the public was not warranted.[133] In contrast, a public easement is appropriate if an individual's use is insufficiently exclusive, but when combined with the use and enjoyment of others, compels the recogni-

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[125] *See, e.g.*, Ward v. Harper, 360 S.E.2d 179, 182 (Va. 1987) ("In determining continuity, the nature of the easement and the land it serves, as well as the character of the activity must be considered.").

[126] Voorhies v. Pratt, 166 N.W. 844, 845 (Mich. 1918) (holding that despite owner's failed attempts to stop the flow of a drainage easement, there was not a sufficient interruption to find a break in continuity).

[127] *See Ward*, 360 S.E.2d at 182.

[128] *Id.*

[129] 304 S.E.2d 860, 863 (W. Va. 1983) (stating that the use "must be more than occasional or sporadic" to be continuous).

[130] *See* 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(v), at 438.

[131] 349 S.E.2d 134, 139 (Va. 1986).

[132] *Id.* ("Here, by contrast, there is no evidence of any use by the general public. Each landowner asserted his own right, independent of all others, to use the trail, and no rights were dependent upon the common enjoyment of similar rights by others.").

[133] *See id.*

tion of a prescriptive easement.[134] Private use will not be sufficient to generate a private easement when it is combined with similar public use and there is no private act indicating the assertion of an exclusive individual right.[135] In sum, the question of whether a public easement exists is often simply answered by examining "the character of the use, namely, whether or not the public, generally, have had the free and unrestricted right [of] use."[136] By examining the general character of the use, courts will reward broad communal-like uses with public rights while rewarding narrower individual uses with private rights.[137]

In addition to being established by multiple private parties, the government can establish a public prescriptive easement.[138] The Illinois case of *Town of Deer Creek Road District v. Hancock* serves as a prime example of establishing a public easement by government action.[139] Deer Creek argued that the town had acquired a prescriptive easement for public use of a road located on the Hancock property, despite claims by the Hancocks that the road was used only by their social guests, the occasional hunter, and those who serviced families living on the road.[140] The town presented evidence that during the prescriptive period, it had undertaken great efforts in maintaining the road, such as digging ditches, building culverts, cutting grass, and plowing snow.[141] The court found that once a party demonstrates public use, a presumption of a public prescriptive easement exists, which the Hancocks failed to overcome.[142]

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[134] *See id.* ("In such a case, the right of each user of the way is dependent upon the enjoyment of similar rights by others, and no private prescriptive rights will arise.").

[135] Simmons v. Perkins, 118 P.2d 740, 744 (Idaho 1941) ("The use of a driveway in common with the owner and the general public, in the absence of some decisive act on the user's part indicating a separate and exclusive use on his part negatives any presumption of individual right therein in his favor.").

[136] Town of Deer Creek Rd. Dist. v. Hancock, 555 N.E.2d 1147, 1149–50 (Ill. App. Ct. 1990).

[137] *See id.*; 7 THOMPSON ON REAL PROPERTY, *supra* note 1, § 60.03(b)(6)(v), at 438 (explaining that the primary test is the nature of the use, not the number of users).

[138] *See Hancock*, 555 N.E.2d at 1147–49. As with adverse possession, sovereign immunity protects government property against the ripening of prescriptive easements. 7 THOMPSON ON REAL PROPERTY, *supra* note 1, § 60.03(b)(6)(iv), at 437.

[139] 555 N.E.2d at 1147–49.

[140] *Id.* at 1148.

[141] *Id.* at 1147–48.

[142] *Id.* at 1149–50.

B. *Rights Acquired by Prescriptive Easement: Rights of Use*

Unlike adverse possession, a ripened prescriptive easement does not lead to a transfer in title;[143] rather, a prescriptive easement leaves title with the true owner while reserving a use in the property.[144] The title holder remains free to use his property as he wishes, so long as it does not interfere with the easement rights.[145] Even if there is a later transfer of title by the fee simple owner, the easement remains.[146] Examples of rights of use enabled through prescriptive easements include: the rights of way or passage;[147] the right to access water or dispose of waste through pipes;[148] the right to place a mobile home on a neighbor's land:[149] the right to flood the lands of another;[150] the right to cut timber;[151] and the right of aircraft to intrude into a private party's airspace.[152] These examples illustrate the central difference between prescription and adverse possession: while a prescriptive easement provides a distinct property right based on use, its holder does not gain full title.[153]

III. The Dilemma of Comprehensive Prescriptive Easements

As is evident by an explanation of their respective requirements, the doctrines of adverse possession and prescriptive easements are quite similar. Yet, as discussed above, a dramatic discrepancy exists in how ripened adverse possession and prescriptive easements affect property rights, with adverse possession resulting in fee simple absolute, while prescriptive easements produce only a right of use.[154] However, in some instances, the right of use provided by a prescriptive easement may be so vast and encompassing that it is the equivalent of

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[143] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(i), at 435.

[144] *Id.*

[145] Restatement (Third) of Prop.: Servitudes § 2.17 cmt. a (2000).

[146] *See* Riddock v. City of Helena, 687 P.2d 1386, 1389 (Mont. 1984) ("Further, prescriptive title once established is not divested by transfer of the servient estate.").

[147] Burks Bros. of Va., Inc. v. Jones, 349 S.E.2d 134, 139 (Va. 1986).

[148] Knight v. Cohen, 93 P. 396, 397 (Cal. Dist. Ct. App. 1907).

[149] Johnson v. Kaster, 637 N.W.2d 174, 177 (Iowa 2001). A more compelling claim may have been adverse possession since placement of the mobile home could be considered possession rather than use. *See id.* at 182 n.1. The court noted that although "resolution of this case seems to be most appropriate under the doctrine of adverse possession, neither party pursued this theory further than the initial pleadings." *Id.*

[150] Mueller v. Fruen, 30 N.W. 886, 887 (Minn. 1886).

[151] Ward v. Harper, 360 S.E.2d 179, 182 (Va. 1987).

[152] Casanova, *supra* note 95, at 407–10.

[153] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(i), at 435.

[154] *Id.*

fee simple absolute.[155] Thus, a successful claimant of a comprehensive prescriptive easement achieves possession while only having to prove the lesser rights of use associated with a prescriptive easement.[156]

The case of *Raab v. Casper* illustrates how a prescriptive easement can have the same result as adverse possession.[157] In a case of a mistaken property line, the defendants built part of their home, driveway, utility lines, and landscaping on a portion of their neighbor's property.[158] The trial court had ruled that this amounted to a successful prescriptive easement for use of the driveway, utility lines, and yard.[159] The Court of Appeal of California reversed the holding, finding that the prescriptive easement granted rights equivalent to a transfer in title without having to meet the requirements of adverse possession.[160] The court provided the following reasoning for reversing the earlier finding:

> The [trial court's] judgment declares that defendants are entitled to an easement for roadway and utility lines "together with an easement for the maintenance of lawn, fences, shrubs, fruit trees, and landscaping around the [defendants'] house . . . ." Although adroitly phrased to avoid the language of a grant of title, the last-quoted clause was undoubtedly designed to give defendants unlimited use of the yard around their home. Defendants doubtless did not intend plaintiffs, owners of the nominal servient tenement, to picnic, camp or dig a well in their yard. They doubtless did not intend to own a house on one side of the boundary with an unmarketable yard on the other. *The findings and judgment were designed to exclude plaintiffs from defendants' domestic establishment, employing the nomenclature of easement but designed to create the practical equivalent of an estate.*[161]

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[155] *See* Warsaw v. Chi. Metallic Ceilings, Inc., 188 Cal. Rptr. 563, 568 (Ct. App. 1983), *vacated*, 676 P.2d 584 (Cal. 1984); Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975). "An exclusive interest labeled 'easement' may be so comprehensive as to supply the equivalent of an estate, i.e., ownership." *Id.* at 596.

[156] *See Warsaw*, 188 Cal. Rptr. at 568; *Raab*, 124 Cal. Rptr. at 596–97.

[157] 124 Cal. Rptr. at 596–97.

[158] *Id.* at 592, 596.

[159] *Id.* at 592–93, 596–97.

[160] *See id.* at 597. In fact, the possession in question did meet the higher standard for adverse possession with one exception: "The findings recite no exclusivity of use. For that reason alone, they will not support a judgment of adverse possession." *Id.*

[161] *Id.* (emphasis added) (second alteration in original) (citation omitted).

The problematic nature of an easement that grants an all-encompassing use is addressed by Richard R. Powell.[162] Powell clarifies that an easement must only involve a "limited" use.[163] According to Powell, when the use becomes all-encompassing of the property, it ceases to be an easement: "If a conveyance purported to transfer to A an *unlimited* use or enjoyment of land, it would be in effect a conveyance of ownership to A, not an easement."[164] Powell identifies the crucial distinction between limited and unlimited uses: an easement can only exclude "the servient owner wholly from *some* specified uses of the servient land, as for example, the springs of water located thereon."[165]

The case of *Warsaw v. Chicago Metallic Ceilings, Inc.* serves as another illustration of the dilemma posed by comprehensive prescriptive easements.[166] Like many prescriptive easement cases, *Warsaw* involved a conflict among abutting landowners.[167] Both parcels were purchased from a common owner in 1972.[168] The plaintiffs built a commercial building with a driveway—alongside the defendant's property—so that large trucks could access the loading docks.[169] Shortly after the building became operational, it became clear that the driveway was not large enough to accommodate the trucks in order to access the loading docks without traveling on a vacant portion of defendant's property.[170] On several occasions, plaintiffs were unsuccessful in attempts to work with the defendant in order to establish mutual easements over each other's property.[171] In 1979, the defendant began constructing a warehouse on his property, including the portion used by plaintiffs.[172] In an attempt to halt construction, plaintiffs sought and were denied an injunction.[173] However, after completion of the construction, the trial

[162] 3 Richard R. Powell, The Law of Real Property ¶ 405, at 34-13 to 34-15 (Patrick J. Rohan ed., 1992).

[163] *Id.*

[164] *Id.* Recall that the acquisition of title by the adverse possessor operates as a conveyance by warranty deed from the true owner. S*ee* Niederhelman v. Niederhelman, 336 S.W.2d 670, 676 (Mo. 1960).

[165] 3 Powell, *supra* note 162, at ¶ 405, at 34-13 to 34-15 (emphasis added). Note that the key distinction is between a whole use of the entire property versus a whole use of some of the property.

[166] 676 P.2d 584, 586–87 (Cal. 1984).

[167] *Id.* at 586; *see, e.g.*, Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975).

[168] *Warsaw*, 676 P.2d at 586.

[169] *Id.*

[170] *Id.*

[171] *Id.* at 586–87.

[172] *Id.* at 587.

[173] *Id.*

court found that the plaintiffs held a prescriptive easement for the use of the trucks and ordered the defendant to remove the portion of the newly constructed building that interfered with the path of that easement.[174] On appeal, the Court of Appeal of California—in a ruling that was later overturned[175]—remanded the case, ordering the defendant be provided adequate compensation for the loss of property rights suffered as a result of the prescriptive easement.[176] In support of its decision, the court explicitly focused on the possessory nature of the easement:

> A simple affirmance of the judgment would result in plaintiffs, who are admittedly trespassers, acquiring *practical possession* of a sixteen thousand two hundred fifty (16,250) square foot parcel of defendant's valuable property free of charge with the added damage to the defendant of the cost of relocating the building.
>
> The doctrines of adverse possession and prescription purely and simply result in one person taking for his own use the private property of another. While the distinction between adverse possession and prescription lies in the fact that in the former fee title is acquired and in the latter simply a right in the land of another, the practical result is that in each case the true owner is divested of the right to make use of his land as he desires. The case at bench presents a classic example of that result.[177]

While the order for compensation was later vacated for public policy reasons, *Warsaw* stands as another example of how prescriptive easements can culminate in de facto possession.[178] Thus, the reasoning behind both the *Raab* and *Warsaw* decisions begs the question of how courts should respond when granting a prescriptive easement that would establish a right of use equivalent to ripened adverse possession though the claimant has only satisfied the elements of prescription.[179]

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[174] *Warsaw*, 676 P.2d at 587.

[175] *Id.* at 589.

[176] Warsaw v. Chi. Metallic Ceilings, Inc., 188 Cal. Rptr. 563, 568 (Ct. App. 1983), *vacated by* 676 P.2d 584 (Cal. 1984).

[177] *Id.* (emphasis added).

[178] *See id.*

[179] *See id.*; Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975).

IV. Some Traditional and Not-So-Traditional Methods to Counteract Comprehensive Prescriptive Easements

There are two logical methods to address the problem of comprehensive prescriptive easements: (1) make them harder to attain; or (2) apply tactics of mitigation once they are established.[180] First, this Note examines the application of two variations of the adversity requirement within the doctrines of adverse possession and prescription in some jurisdictions: a good faith requirement and a presumption of permissive use.[181] Through the court's implementation of the good faith requirement, a presumption of permissive use, or both, the user of land will face a greater burden in seeking a comprehensive prescriptive easement.[182] Second, this Note explores a much more radical alteration of the law of prescriptive easements: providing compensation to the true owner once a comprehensive prescriptive easement is established on his property.[183] Compensation would provide an appropriate form of mitigation for the servient estate title holder suffering from the severe loss in property rights that accompanies a comprehensive prescriptive easement.[184]

A. *Impeding the Process of Adversity in Prescription: Arguments for a Good Faith Requirement and Presumption of Permissive Use*

Comprehensive prescriptive easements reward the user with a right similar to possession without applying some of the more stringent requirements of adverse possession.[185] For example, prescriptive easement holders obviously must only demonstrate use, and need not demonstrate possession for the prescriptive period.[186] Perhaps a solution to this incongruity between rights gained and elements proved stems from an application of two of the more rigorous adverse possession and prescription requirements employed by various jurisdictions—a good faith belief in the right to use and a presumption of permissive use.[187] This Note proposes that the problem of comprehensive prescriptive ease-

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[180] *See infra* Part IV.A–B.

[181] *See infra* Part IV.A.

[182] *See infra* Part IV.A.

[183] *See infra* Part IV.B.

[184] *See infra* Part IV.B.

[185] *See* Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); 7 Thompson on Real Property, *supra* note 1, §§ 60.03(b)(6)(i), at 435, 60.03(b)(6)(vi), at 438.

[186] 7 Thompson on Real Property, *supra* note 1, § 60.03(b)(6)(vi), at 438.

[187] *See* West v. Slick, 326 S.E.2d 601, 610–11 (N.C. 1985); Carpenter v. Ruperto, 315 N.W.2d 782, 786 (Iowa 1982); *Raab*, 124 Cal. Rptr. at 596–97.

ments—the establishment of rights of possession without proving adverse possession—would be curtailed by slightly modifying the prescriptive easement doctrine to include these two additional elements.[188]

1. Good Faith Requirement

By requiring prescriptive users to prove a good faith belief in their right of use, the road to the comprehensive prescriptive easement would become more of an uphill climb.[189] The major criticism of both the doctrines of adverse possession and prescriptive easements often stems from the principle that they constitute reward for trespass.[190] Imposing a good faith requirement—a belief that one's use is based in right and not trespass—would dampen the court's obligation to reward such actions of trespass.[191]

While the good faith requirement is usually applied only in situations involving constructive possession under color of title in adverse possession,[192] it may be appropriate in limiting the scope of prescriptive easements.[193] A good faith requirement would serve to identify the truly "innocent" land users who, due to no fault of their own, are deserving of a prescriptive easement.[194] In situations of comprehensive prescriptive easements—where rights of use are the equivalent to possession—a good faith requirement would prevent the granting of de facto possession to someone other than the well-intentioned user.[195] Only those users who believed their use was one of right and not trespass would be worthy of an all-encompassing grant of near possession.[196] In other words, the good faith requirement would accomplish two functions: eliminate many of the claims for comprehensive prescriptive easements and reward those very easements to only the most deserving and innocent claimants.[197]

Certainly, the good faith requirement has substantial drawbacks.[198] A good faith requirement for adverse possession or prescrip-

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[188] *See infra* Parts IV.A.1–2.

[189] *See* Helmholz, *supra* note 53, at 332.

[190] *See id.* at 340–41.

[191] *See id.*

[192] 10 Thompson on Real Property, *supra* note 1, § 87.15, at 178.

[193] *See* Helmholz, *supra* note 53, at 332.

[194] *See id.*

[195] *See* Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); Helmholz, *supra* note 53, at 332.

[196] *See Raab*, 124 Cal. Rptr. at 596–97; Helmholz, *supra* note 53, at 332.

[197] *See* Helmholz, *supra* note 53, at 332.

[198] *See* Olson, *supra* note 52, at 1316, 1321.

tion may undermine the public policy principles behind the doctrines themselves.[199] For example, by impeding prescription, the good faith requirement does not always promote the quieting of title, nor would it always reward the productive use of land.[200] The most pressing concern is that the good faith requirement would saddle the courts with the burdensome task of determining the subjective intent of the land user.[201] In comparison to the severe consequences suffered by the servient estate holder in comprehensive prescriptive easement cases, the added judicial burden is warranted.[202] A more moderate solution is to apply the good faith requirement only to situations involving potential comprehensive prescriptive easements.[203] If this tactic is adopted, critics' concerns of a cumbersome judicial workload would be nullified since the problem is so uncommon that the seldom-encountered burden would not cripple the courts.[204] Thus, despite doctrinal and practical concerns, the good faith requirement—or at least the court's ability to consider intent in a balancing of the equities—may be enough to compensate for the destructive effects of comprehensive prescriptive easements.

2. Presumption of Permissive Use

Another remedy to the dilemma posed by comprehensive prescriptive easements is a presumption of permissive use.[205] By mandating a presumption of permissive use when evaluating claims of prescription, those seeking easements will face a tougher evidentiary standard.[206] To establish a prescriptive easement, a claimant must prove that the use was adverse to that of the true owner, forming a

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[199] *Id.* at 1321.

[200] *Id.* at 1298. However, recall that some public policy foundations for adverse possession and prescription—such as promoting the development of land—are no longer valid. *See supra* note 21.

[201] *See* Olson, *supra* note 52, at 1316.

[202] *See* Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); Olson, *supra* note 52, at 1316.

[203] *See Raab*, 124 Cal. Rptr. at 596–97; Olson, *supra* note 52, at 1316, 1321.

[204] *See Raab*, 124 Cal. Rptr. at 596–97; Olson, *supra* note 52, at 1316.

[205] *See* West v. Slick, 326 S.E.2d 601, 610–11 (N.C. 1985) (quoting Dickinson v. Pake, 201 S.E.2d 897, 900 (N.C. 1974)); *Raab*, 124 Cal. Rptr. at 596–97; Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g (2000).

[206] *See* Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g; *see also, e.g.*, *Slick*, 326 S.E.2d at 610–11 ("'There must be some evidence accompanying the user which tends to show that the use is hostile in character and tends to repel the inference that it is permissive and with the owner's consent . . . .'" (quoting *Dickinson*, 201 S.E.2d at 900) (alteration in original)).

claim of right.[207] When a presumption of permission exists, the claimant must overcome this presumption by presenting evidence that the use was actually adverse to the will of the owner.[208]

As with the requirement for good faith use, the presumption of permission would hinder many of those claiming comprehensive prescriptive easements.[209] Only those users who could furnish evidence that their use was truly inconsistent with the wishes of the owner would succeed.[210] Thus, like the good faith requirement, the presumption of permission would enable courts to discard many less compelling claims of adversity while rewarding only worthy parties that demonstrate a use adverse enough to overcome the evidentiary burden.[211] Furthermore, a presumption of permissive use comports with the view "that Americans are both neighborly and litigious" and therefore would have objected to any unauthorized use of their land.[212] Lastly, unlike the good faith requirement's query of subjective intent, the presumption of permission presents no additional burden to the court.[213] In fact, a presumption of permission may reduce the workload of courts by reducing the need to determine whether an owner has consented to the use in question.[214]

Nevertheless, a presumption of adverse use does advance several public policy objectives.[215] For example, a presumption of adverse use—and its facilitation of prescription—is conducive to rewarding the productive use of land.[216] However, as long as courts strictly enforce the open and continuous requirements, a presumption of adversity is not necessary because visible and prolonged use will be noticed and acted upon by the dutiful owner regardless of the presumption.[217] Conversely, the problem of comprehensive prescriptive easements—and its

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[207] LaRue v. Kosich, 187 P.2d 642, 646 (Ariz. 1947).

[208] *Slick*, 326 S.E.2d at 610–11.

[209] *See id.* (quoting *Dickinson*, 201 S.E.2d at 900); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.

[210] *See Slick*, 326 S.E.2d at 610–11 (quoting *Dickinson*, 201 S.E.2d at 900); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.

[211] *See Slick*, 326 S.E.2d at 610–11 (quoting *Dickinson*, at 900); Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.

[212] Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.

[213] *See* Olson, *supra* note 52, at 1316 (explaining the burden imposed by a good faith requirement).

[214] *See* Chaconas v. Meyers, 465 A.2d 379, 383 (D.C. 1983).

[215] Restatement (Third) of Prop.: Servitudes § 2.16 cmt. g.

[216] *See id.* Once again, one should consider the argument that encouraging the productive use of land and development in general is no longer a valid public policy objective. *See supra* note 21.

[217] *See Chaconas*, 465 A.2d at 380; West v. Smith, 511 P.2d 1326, 1333 (Idaho 1973).

reward of de facto possession—would be alleviated by the courts establishing a presumption of permissive use, or at the very least, aggressively seeking indications of consent from ownership.[218]

B. *Softening the Impact of Comprehensive Prescriptive Easements: The Argument for Compensation*

Both adverse possession and prescriptive easements reward the productive use of land by providing the possessor or user with a solidified property right.[219] Traditionally, nothing within the law of either doctrine provides for the awarding of compensation to the aggrieved land owner.[220] Thus, both adverse possession and prescriptive easements often produce clear winners and losers.[221] While there are certainly strong arguments that compensation should not apply to the average prescriptive easement, this may change when the easement repre sents a use so comprehensive that it awards de facto possession.[222]

Warsaw v. Chicago Metallic Ceilings, Inc. discusses the argument for compensation in prescriptive easement cases.[223] In affirming the establishment of a prescriptive easement, the Supreme Court of California then addresses the question of whether the land owner was entitled to compensation for the cost of relocating his building to accommodate the easement.[224] In denying compensation, the court found that there was "no basis in law or equity" for requiring the holder of an easement to compensate the owner of the servient property.[225] The foundation for the court's denial of compensation was two basic tenets of the doctrine of prescriptive easements: to reduce litigation in land disputes and to provide stability to individual prop-

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[218] *See* West v. Slick, 326 S.E.2d 601, 610–11 (N.C. 1985); *Chaconas*, 465 A.2d at 383; Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.16 cmt. g.

[219] *See* 7 THOMPSON ON REAL PROPERTY, *supra* note 1, § 60.03(b)(6)(i), at 435.

[220] Singer, *supra* note 92, at 669–70. However, when the government is the successful party in an adverse possession or prescriptive easement claim, compensation should be required through a "takings" analysis. Kimberly A. Selemba, Comment, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)constitutionally "Takes" Land Dirt Cheap*, 108 PENN ST. L. REV. 657, 667 (2003).

[221] *See* Singer, *supra* note 92, at 669–70.

[222] *See* Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584, 590 (Cal. 1984); *Raab*, 124 Cal. Rptr. at 596–97. Certainly, similar arguments for and against compensation can be made in cases of adverse possession. However, this Note focuses solely on the applicability of compensation for comprehensive prescriptive easements.

[223] *See* 676 P.2d at 594 (Reynoso, J., dissenting).

[224] *Id.* at 590 (majority opinion).

[225] *Id.*

erty rights.[226] Thus, the court was reluctant to overturn prescriptive easement jurisprudence by mandating compensation for the use of property.[227]

However, the principle of compensation for prescriptive easements may be more appropriate when, unlike *Warsaw*, the use in question is comprehensive, nearing full possession of the entire property.[228] In *Warsaw*, there was no indication that the establishment of the prescriptive easement left the defendant's property with no alternative commercial use.[229] However, had the easement consumed nearly the entire parcel and resulted in a loss of much of the property's commercial value—resembling a comprehensive prescriptive easement—valid arguments for mitigation would exist.[230]

In its decision to deny compensation for the easement, the *Warsaw* court may have incorrectly relied on the underlying principles behind the doctrine of prescriptive easements—to reduce litigation and stabilize property rights.[231] In his dissenting opinion, Justice Reynoso offers support for mitigation because contrary to the goal of reducing litigation, the doctrine of prescriptive easements actually increases litigation by forcing land owners to bring suit when a trespass has occurred.[232] Thus, mitigation can soften the blow suffered by the title holder and reduce further litigation as owners of servient estates are less likely to contest prescriptive easements once compensated.[233] Furthermore, providing compensation would be unlikely to increase

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[226] *Id.* The court also emphasized the importance of the fact that the defendants acted with knowledge of the plaintiffs' continued use of that portion of the property: "[P]laintiffs should not be required to contribute to the cost of relocating encroaching structures which were erected by defendant with full knowledge of plaintiffs' claim." *Id.* at 591.

[227] *See id.* at 591.

[228] *See id.*; Raab v. Casper, 124 Cal. Rptr. 590, 596–97 (Ct. App. 1975).

[229] *See* 676 P.2d at 586–87.

[230] *See Raab*, 124 Cal. Rptr. at 596–97; 3 Powell, *supra* note 162, ¶ 405, at 34-13 to 34-15.

[231] *See* 676 P.2d at 590.

[232] *Id.* at 594 (Reynoso, J., dissenting) ("First, no litigation was reduced. Society should not be in the business of forcing an owner of land to bring suit when a trespass has occurred. Such a policy increases litigation.").

[233] *See id.*; Cordle, *supra* note 92, at 119.

> Compensation would have lessened the reward and punishment aspects in this case, ameliorated [defendant's] loss and merely required [plaintiff] to pay for its newly acquired property right. If, as the supreme court contends, reward and punishment are not the goals of prescription, it follows that *compensation is not only permissible, but appropriate.*

Id. (emphasis added).

litigation because easement disputes are based upon a conflict in property use with compensation only being an afterthought.[234]

Contrary to the beliefs of the *Warsaw* majority, ordering compensation for an easement would not create instability in property because the newly acquired rights of the easement holder would not be weakened; rather, the holder would merely be required to compensate the title holder.[235] In his dissent, Justice Reynoso further states that the traditional formation of prescriptive easements may be outdated: "modern society evidences a preference for planned use, not the ad hoc use of a trespasser. It is questionable that in the urban setting of the case at bench, such use by the trespasser is preferred by society."[236] This analysis comports with that of other scholars who have suggested that adverse possession—and perhaps also prescription—might be obsolete because of its impact on the environment through encouraging development.[237]

Compensation for comprehensive prescriptive easements also appears to be a reasonable method of mitigation because it is based on equity.[238] In *Warsaw*, the Supreme Court of California acknowledged that prescription theory may be outdated, but failed to apply its powers of equity.[239] However, prior California decisions provided compelling arguments for the application of equity: (1) equity allows for the court to adapt to each case and the new rights and wrongs that arise from it;[240] (2) equity can be applied without a foundation in

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[234] *See* Cordle, *supra* note 92, at 119 ("Perhaps the common law rule precluding liability should be reconsidered in light of the maxim, '[w]hen the reason of a rule ceases, so should the rule itself.'" (quoting Cal. Civ. Code § 3510 (West 1982))).

[235] *See Warsaw*, 676 P.2d at 594 (Reynoso, J., dissenting) ("[T]he possession of the easement has in fact been protected; plaintiffs are only required to pay for the easement.").

[236] *Id.*

[237] *See supra* note 21.

[238] *See Warsaw*, 676 P.2d at 592–93 (Reynoso, J., dissenting); Cordle, *supra* note 92, at 120.

[239] *Warsaw*, 676 P.2d at 590.

[240] *In re* Estate of Vargas, 111 Cal. Rptr. 779, 781 (Ct. App. 1974) ("Equity acts 'in order to meet the requirements of every case, and to satisfy the needs of a progressive social condition, in which new primary rights and duties are constantly arising, and new kinds of wrongs are constantly committed.'" (quoting Wuest v. Wuest, 127 P.2d 934, 937 (Cal. Dist. Ct. App. 1942))); Cordle, *supra* note 92, at 120–21.

precedent;[241] and (3) equity provides the court with flexibility in dealing with novel claims.[242]

Thus, while compensating for comprehensive prescriptive easements may be a novel pursuit and stands opposed to centuries of jurisprudence, it appears to be a reasonable method of mitigation.[243] Compensation would preserve the underlying principles behind prescription while potentially adapting to modern concerns such as environmentally sound land use.[244] In addition, application of equity would allow for just compensation that adequately balances the rights and the wrongs of both parties in comprehensive prescriptive easement cases.[245]

Conclusion

Adverse possession and prescriptive easements serve to settle land disputes through the redistribution of property rights. A thorough evaluation of their respective requirements reveals many similarities. However, only adverse possession—with the greater evidentiary burden of proving possession—results in a complete transfer of title. Yet, while intended to grant a mere right of use similar to any other easement, the comprehensive prescriptive easement establishes a right of use so vast and encompassing that it awards de facto possession. This new property right is troubling because a comprehensive prescriptive easement rewards the successful claimant with a right of near possession without the application of the more stringent requirements of adverse possession.

Two relatively subtle alterations to the adversity requirement of prescription will lessen the dilemma of comprehensive prescriptive easements. First, rather than being forced to reward trespass, the universal adoption of a good faith requirement will enable courts to grant prescriptive easements to only the "innocent" land users. Sec-

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[241] Times-Mirror Co. v. Superior Court, 44 P.2d 547, 557 (Cal. 1935) ("Equity does not wait upon precedent which exactly squares with the facts in controversy, but will assert itself in those situations where right and justice would be defeated but for its intervention."); Cordle, *supra* note 92, at 120–21.

[242] MacFarlane v. Peters, 163 Cal. Rptr. 655, 657 (Ct. App. 1980) ("While sitting in its equitable capacity, a court may avail itself of powers broad, flexible and capable of being expanded to deal with novel cases and conditions." (citing S. Pac. Co. v. Robinson, 64 P. 572, 573 (Cal. 1901))); Cordle, *supra* note 92, at 120–21.

[243] *See Warsaw*, 676 P.2d at 594 (Reynoso, J., dissenting).

[244] *See id.*; *supra* note 21.

[245] *See Warsaw*, 676 P.2d at 592–93 (Reynoso, J., dissenting); Cordle, *supra* note 92, at 120–21.

ond, a presumption of permissive use will ensure that the courts award property rights to only the worthy users of land who can prove their use was against the will of the owner. By impeding the process of proving adversity, these two modifications will allow the granting of comprehensive prescriptive easements—and easements in general—to only those parties worthy of gaining a significant new property right.

Finally, once a court grants a comprehensive prescriptive easement, compensating the aggrieved land owner serves as a fair and equitable method for mitigation. While certainly a radical concept within the doctrines of both adverse possession and prescription, compensation for only comprehensive prescriptive easements represents a fair solution that acknowledges the property rights of both parties.

Thus, the adaptations discussed above represent both subtle and radical methods in dealing with the challenge posed by comprehensive prescriptive easements. An assessment of these alternatives reveals both strengths and limitations regarding public policy and practical concerns. At the very least, this examination of comprehensive prescriptive easements may prove useful in forcing courts to acknowledge the inequity of awarding a right of de facto possession while requiring only proof of prescriptive use.