

DAMAGES AS THE APPROPRIATE REMEDY FOR
“ABUSE” OF AN EASEMENT: MOVING TOWARD
CONSISTENCY, EFFICIENCY, AND FAIRNESS IN
PROPERTY LAW

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INTRODUCTION

The current majority position—what I will label the American rule—is that the proper remedy for “abuse” or “misuse”¹ 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) the dominant tenant’s servicing of nondominant land does not pose an unreasonable burden on the servient estate;² 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.³ I call

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¹ 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 other than 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. William B. Stoebuck & Dale A. Whitman, *The Law Of Property* § 8.9, at 461 (3d ed. 2000).

² Whether a burden is unreasonable is measured against the standard contemplated by the parties at the inception of the easement. The standard originates in the parties’ agreement, but courts utilize surrounding circumstances to help them determine what is reasonably anticipated by the parties. *See id.* §8.9. This measure, as described below, is the predominant measure of the dominant tenant’s intensity of use of the easement. *See infra* Part I.

³ An earlier commentator on this area 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, 649, 652-54 (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. My proposal, which includes a second prong, better fits the existing case law and is normatively more attractive than Kratovil’s.

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 Kra-

this the *Brown* rule after the Washington Supreme Court case, *Brown v. Voss*,⁴ where it found its most prominent statement.⁵

Recently, the American rule has been challenged. Some courts have ruled that the proper remedy 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 a more efficient and fair remedy than injunctive relief, at least under the two conditions—what I label the *Brown* conditions—outlined above.

There are good reasons for the *Brown* rule, but they are reasons that do not run to most property relationships. Adopting the *Brown* rule would result in a limited change because it applies only when the *Brown* conditions are present. In those limited circumstances the reasons supporting the *Brown* rule—efficiency and fairness—are of sufficient force to displace the American rule. In situations where the *Brown* conditions are not present, the American rule remains the most normatively attractive rule governing easements.

I. BACKGROUND LEGAL RULES GOVERNING THE SCOPE OF EASEMENTS APPURTENANT

Servitudes is the class of property law doctrines that traditionally included easements, real covenants, and equitable servitudes.⁶ Most states continue to follow the common law tripartite division of servitudes, despite the Restatement (Third) of Property: Servitudes' attempted unification of servitude law.⁷

tovil'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. See discussion *infra* Part II.

⁴ 715 P.2d 514 (Wash. 1986).

⁵ See *id.* at 517-18.

⁶ See, e.g., STOEBUCK & WHITMAN, *supra* note 1, §§ 8.1-8.33 (including easements, real covenants, and equitable servitudes in the chapter on servitudes).

⁷ See *Foreword to RESTATEMENT (THIRD) OF PROP.: SERVITUDES*, at ix (2000) ("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.").

An easement is the right to enter, to use land possessed by another for a specified purpose.⁸ The land benefited by an easement is the dominant estate, and the land burdened by an easement is the servient estate.⁹ The person with the right to enter and use the land of another is the dominant tenant, while the person whose property is burdened is the servient tenant.¹⁰ 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.¹¹ The dominant tenant has the right to use the servient tenant's property for purposes of a driveway while the servient 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 (a) intensity and (b) type of the use of the easement; and (2) the scope of the estate served by the easement.¹²

A 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 increased 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 first *Brown* condition incorporates this standard.

Relatedly, the dominant tenant may not 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—and the focus of this Article—is that the dominant tenant may use the easement to service only the dominant tenement: the land that was designated at the creation of

⁸ HERBERT HOVENKAMP & SHELDON F. KURTZ, PRINCIPLES OF PROPERTY LAW § 10.1.1, at 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.* § 10.1.1, at 329.

⁹ John V. Orth, *The Burden of an Easement*, 40 REAL PROP. PROB. & TR. J. 639, 640 (2006).

¹⁰ STOEBUCK & WHITMAN, *supra* note 1, § 8.2, at 440.

¹¹ *See, e.g.*, *Wetmore v. Ladies of Loretto*, Wheaton, 220 N.E.2d 491, 492 (Ill. App. Ct. 1966).

¹² *See* STOEBUCK & WHITMAN, *supra* note 1, § 8.9, at 460-61; *see also* Orth, *supra* note 9, 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 1, § 8.9, at 460. For an overview of the reasonable use test, *see* Kratovil, *supra* note 3, at 652-54.

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

¹⁵ Orth, *supra* note 9, at 640.

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 In *S.S. Kresge Co. of Michigan v. Winkelman Realty Co.*,¹⁸ the Wisconsin Supreme Court faced a suit by the servient tenant to enjoin the dominant tenant.¹⁹ The dominant tenant owned an easement, for right-of-way purposes, to service one lot.²⁰ The dominant tenant used the easement to service a store that straddled both the dominant estate and after-acquired land.²¹ The court applied the common law rule, which prohibited dominant tenants from servicing nondominant land, and ruled in favor of the plaintiff.²² The court employed the American rule and affirmed the trial court's injunction in favor of the servient tenant.²³

This second limitation, like the first, is justified by the policy that a contrary rule would permit the dominant tenant to "purchase an indefinite number of adjoining acres, and annex the right to them."²⁴ 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 is that the limitation "reflects the likely intent of the parties."²⁵ The Restatement's drafters also 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."²⁶

This second limitation—the limit to benefiting only the dominant estate—unlike the first limitation, does not permit even a "reasonable" increase of burden.²⁷ Instead, regardless of the quantum of the increased bur-

¹⁶ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 (2000) ("[A]n appurtenant easement or profit may not be used for the benefit of property other than the dominant estate."); STOEUBUCK & WHITMAN, *supra* note 1, § 8.9, at 461.

¹⁷ See *Penn Bowling Recreation Ctr., Inc. v. Hot Shoppes, Inc.*, 179 F.2d 64, 65-66 (D.C. Cir. 1949) (ruling that use of an easement to serve land purchased after creation of the easement constituted misuse of the easement).

¹⁸ 50 N.W.2d 920 (Wis. 1952).

¹⁹ *Id.* at 921.

²⁰ *Id.*

²¹ *Id.* at 920-21.

²² *Id.* at 921-22.

²³ *Id.* at 922.

²⁴ *Shroder v. Brenneman*, 23 Pa. 348, 351 (1854).

²⁵ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 cmt. b (2000); see also *id.* § 4.11 rptr.'s n. ("[T]he rule stated in this section . . . creates a presumption that after-acquired property was not intended to benefit from the easement . . .").

²⁶ *Id.* § 4.11 cmt. b.

²⁷ See *S.S. Kresge Co. of Mich. 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 . . .").

den on the servient estate caused by servicing land other than the dominant parcel, courts will, under the American rule, enjoin misuse of an easement.²⁸

The most prominent case in the twentieth century to affirm the American rule was *Penn Bowling Recreation Center, Inc. v. Hot Shoppes, Inc.*²⁹ In *Penn Bowling*, the dominant tenant used a right-of-way easement to serve property other than the dominant estate.³⁰ The court enjoined the dominant tenant from abusing the easement.³¹

The American rule held virtually unchallenged sway through the nineteenth³² and twentieth centuries.³³ The 2005 edition of *Tiffany on Real Property* summarized the status quo: “Generally, . . . where the owner of the easement makes an unauthorized or excessive use thereof, the owner of the servient estate will be given equitable relief.”³⁴

The American rule was most prominently challenged in 1986 by the Washington Supreme Court in *Brown v. Voss*.³⁵ 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.³⁶ Below, I will show that *Brown* was not, as it is often characterized,³⁷ 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.

²⁸ 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.”).

²⁹ 179 F.2d 64 (D.C. Cir. 1949).

³⁰ *Id.* at 65.

³¹ *Id.* at 67.

³² In a future article, I hope to describe the confusion among lower courts, counsel, and scholars during the nineteenth century regarding the proper remedy for abuse of an easement. Suffice it to say that all American appellate courts followed the American rule.

³³ See *Recent Decisions—Easements: Extinguishment by Material Alteration*, 28 CAL. L. REV. 644, 645 (1940) (“Where an easement has been materially altered by the owner of the easement, the servient owner may . . . sue for an injunction to prevent the acquisition of a new easement.”).

³⁴ HERBERT T. TIFFANY & BASIL JONES, *TIFFANY ON REAL PROPERTY* § 821 (2005).

³⁵ 715 P.2d 514 (Wash. 1986).

³⁶ *Id.* at 517-18.

³⁷ See Orth, *supra* note 9, 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).

II. COURTS SHOULD ADOPT THE *BROWN* RULE IN PLACE OF THE AMERICAN RULE

A. *Brown v. Voss's 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.³⁸ 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.³⁹ 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.⁴⁰

The Washington Supreme Court affirmed the trial court's denial of an injunction against the dominant tenant.⁴¹ The Supreme Court first stated that the dominant tenant's use of the easement to serve a nondominant parcel was "a misuse of the easement."⁴² It then relied on courts' equitable discretion to hold that misuse of an easement does not necessarily require an injunction.⁴³ 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.⁴⁴

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 non-injunctive relief. Earlier American courts had also ordered damages when the two *Brown* conditions were met. For example, in *National Lead Co. v. Kanawha Block Co.*,⁴⁵ the court ruled that "the degree of the actual burden is a material and appropriate element in consideration of the application for

³⁸ *Brown*, 715 P.2d at 515. For an overview of *Brown* and an argument that it was mistaken, see McClaran, *supra* note 37, at 295. For background on the *Brown* litigation, see Elizabeth J. Samuels, *Stories out of School: Teaching the Case of Brown v. Voss*, 16 *CARDOZO L. REV.* 1445 (1995).

³⁹ *Brown*, 715 P.2d at 515.

⁴⁰ *Id.* at 516.

⁴¹ *Id.* at 517-18.

⁴² *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.'" (alteration in original) (quoting *Nat'l Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D.W. Va. 1968), *aff'd per curiam*, 409 F.2d 1309 (4th Cir. 1969))).

⁴³ *Id.*

⁴⁴ *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." HOVENKAMP & KURTZ, *supra* note 8, § 10.1.3, at 386-87.

⁴⁵ 288 F. Supp. 357 (S.D.W. Va. 1968), *aff'd per curiam*, 409 F.2d 1309 (4th Cir. 1969).

injunctive relief.”⁴⁶ 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.⁴⁷ Like the later *Brown* Court,⁴⁸ the district court relied on the principles governing equitable relief—the relative cost and benefit of an injunction, and its equitable discretion—to order that the servient tenant’s remedy was damages.⁴⁹

Illinois courts have also denied injunctive relief when the *Brown* conditions are present.⁵⁰ In *Wetmore v. Ladies of Loretto, Wheaton*, 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.⁵¹ Then, the servient tenant sold the dominant tenant another tract.⁵² 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.⁵³

The *Wetmore* Court refused to enjoin the 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.”⁵⁴

This line of cases builds on the inherent equitable authority of courts.⁵⁵ Courts use their discretion and issue injunctive relief only if they are satisfied that it will “provide significant benefits that are greater than its costs or disadvantages.”⁵⁶ As a result, “an injunction that would bear heavily on the defendant without benefiting the plaintiff will usually be refused.”⁵⁷ Carry-

⁴⁶ *Id.* at 364.

⁴⁷ *Id.*

⁴⁸ The *Brown* Court cited *National Lead Co. v. Kanawha Block Co. Brown*, 715 P.2d at 517.

⁴⁹ *Nat’l Lead Co.*, 288 F. Supp. at 365.

⁵⁰ *Wetmore v. Ladies of Loretto, Wheaton*, 220 N.E.2d 491, 497 (Ill. App. Ct. 1966).

⁵¹ *Id.* at 492-93.

⁵² *Id.*

⁵³ *Id.* at 497.

⁵⁴ *Id.*

⁵⁵ See *Nat’l 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 9, 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 to the easement owner if extension is denied.”); see also BRUCE & ELY, *supra* note 28, § 8:14 (“Courts exercise discretion in fashioning equitable relief . . .”).

⁵⁶ 42 AM. JUR. 2D *Injunctions* § 35 (2005); 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.”).

⁵⁷ *Id.*; see also RESTATEMENT (SECOND) OF TORTS § 941 (1977) (listing the relative hardship that would flow from granting an injunction as one of the factors that courts must consider when deciding whether to enjoin tortious activity).

ing 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.⁵⁸

This was the approach taken in *Chafin v. Gay Coal & Coke Co.*,⁵⁹ where the court rejected the servient tenant's request for an injunction and instead authorized damages.⁶⁰ In *Chafin*, the dominant tenant, a coal mining company, used its right-of-way easement to remove coal from nondominant land.⁶¹ The court first found that “[i]t is questionable if 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.”⁶² 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.⁶³ Other courts have ruled similarly.⁶⁴

This line of cases supports the test I propose that courts adopt to determine 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; 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.⁶⁵ 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 [the servient tenant].”⁶⁶ Other courts have used similar analyses, both in this context⁶⁷ and in others.⁶⁸

⁵⁸ See 42 AM. JUR. 2D *Injunctions* § 35 (2005) (“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.”).

⁵⁹ 156 S.E. 47 (W. Va. 1930).

⁶⁰ *Id.* at 50.

⁶¹ *Id.* at 49.

⁶² *Id.* at 49-50.

⁶³ *Id.* at 50.

⁶⁴ *E.g.*, *Carbone v. Vigliotti*, 610 A.2d 565, 569 (Conn. 1992); *Ogle v. Trotter*, 495 S.W.2d 558, 566-67 (Tenn. Ct. App. 1973).

⁶⁵ See 1 DAN B. DOBBS, *DOBBS LAW OF REMEDIES: DAMAGES—EQUITY—RESTITUTION* § 5.1, at 713 (2d ed. 1993) (“Assessment of injunction cases increasingly requires [courts] . . . to consider the costs and benefits of an injunction.”).

⁶⁶ *Nat'l Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D.W. Va. 1968), *aff'd per curiam*, 409 F.2d 1309 (4th Cir. 1969).

⁶⁷ See, *e.g.*, *Chafin*, 156 S.E. at 49-50 (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

Of course, factors in addition to the plaintiff-servient tenant's harm and the relative cost of an injunction have also played a role in courts' determinations. In *Brown* itself, the court questioned the servient tenant's ethical standing because he "sat by for more than a year while plaintiffs expended more than \$11,000 on their project, and that defendants' counterclaim was an effort to gain 'leverage' against plaintiffs' claim."⁶⁹ Similarly, the court in *Wetmore* observed that the servient tenant had interfered with the dominant tenants' peaceful use of their estate and had even trespassed on their property.⁷⁰ When equitable considerations weigh against issuing an injunction, courts have been more likely to rely on the *Brown* factors to achieve an equitable result.

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.⁷¹ Section 8.3, according to the Restatement (Third)'s drafters, was meant to confirm the "wide discretion in selecting remedies" judges possess after the merger of law and equity.⁷² Judges are authorized under section 8.3 to grant damages and/or injunctive relief, as appropriate to the situation.⁷³ Indeed, the Restatement (Third)'s drafters approve courts' use of the *Brown* conditions when they state that courts may take into consideration the harm, if any, done to the servient estate—the first *Brown* condition—along with the relative costs and benefits of enforcement—the second *Brown* condition—of the easement when deciding what remedy to order.⁷⁴

Courts have relied on their equitable discretion in many areas of property law where formerly 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 owner injunctive relief and thereby forcing the innocent improver to

defendant [dominant tenant] and would afford plaintiff [servient tenant] very little benefit"); *Wetmore v. Ladies of Loretto, Wheaton*, 220 N.E.2d 491, 497 (Ill. App. Ct. 1966) (same).

⁶⁸ See *BRUCE & ELY*, *supra* note 28, §7:17 ("[W]hen equity so demands, courts tolerate an easement holder's minor unilateral expansion of the servitude's dimensions as long as the servient estate owner is not materially disadvantaged.").

⁶⁹ *Brown v. Voss*, 715 P.2d 514, 518 (Wash. 1986).

⁷⁰ *Wetmore*, 220 N.E.2d at 493-94, 497.

⁷¹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.3 (2000).

⁷² *Id.* § 8.3 cmt. b.

⁷³ *Id.*

⁷⁴ *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.").

remove the improvement.⁷⁵ Traditionally, when a party built a building or some improvement on a portion of another's property and the owner successfully sued to eject the improver, courts enjoined the improver to remove the portion of his structure on the owner's property.⁷⁶

The modern trend, reflected in the innocent improver doctrine, is to award the owner the option of conveying the improved strip of land to the improver for compensation or purchasing the innocent improver's offending building.⁷⁷ Courts that have adopted the innocent improver doctrine reasoned that injunctive relief was inappropriate because the harm to the 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 owner from the injunction.⁷⁸

As under the *Brown* rule, courts that follow the innocent improver doctrine continue to recognize that one party's legal entitlement has 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 II.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 across the country, the *Brown* rule has made inroads.⁷⁹ As the Restatement (Third)'s drafters themselves recently noted, "[a] few recent cases may indicate a shift from the rule stated in this section [the American rule]."⁸⁰ At least four states have also moved in *Brown*'s direction.⁸¹ *Brown*'s deep roots in, and its consonance with, other areas of easement law, discussed below, make it easy for other courts to adopt the *Brown* rule. And its normative attractiveness, also explained below, shows that courts should adopt the *Brown* rule.

⁷⁵ 41 AM. JUR. 2D *Improvements* § 19 (2005).

⁷⁶ 57 A.L.R. 263 § 4 (1958).

⁷⁷ See 41 AM. JUR. 2D *Improvements* § 19 (2005) (stating that such a remedy is available).

⁷⁸ *Pakulski v. Ludwiczewski*, 289 N.W. 231, 234 (Mich. 1939); see also DOBBS, *supra* note 65, § 5.10, at 816 (describing the equitable balancing that occurs).

⁷⁹ See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY § 32.09[B] (2d ed. 2007) (finding that "modern decisions have begun to erode [the] traditional standard").

⁸⁰ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 rptr.'s n. (2000).

⁸¹ See *Carbone v. Vigliotti*, 610 A.2d 565 (Conn. 1992); *Wetmore v. Ladies of Loretto*, Wheaton, 220 N.E.2d 491 (Ill. App. Ct. 1966); *Ogle v. Trotter*, 495 S.W.2d 558 (Tenn. Ct. App. 1973); *Chafin v. Gay Coal & Coke Co.*, 156 S.E. 47 (W. Va. 1930); see also *Beenan v. Pawelek*, 96 N.Y.S.2d 204, 214 (Sup. Ct. 1949) (refusing to enjoin a dominant tenant's servicing of a small strip of nondominant land because there was no "greater burden on the use of the right of way"), *aff'd mem.*, 96 N.Y.S.2d 312 (App. Div. 1950).

B. *The Brown Rule Better Fits 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 and remedies toward using contract concepts and remedies. Guido Calabresi and A. Douglas Melamed most prominently described this distinction.⁸² Property rules, according to Calabresi and Melamed, give the holder of an entitlement a right to sell the entitlement on the holder's terms.⁸³ 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 not a veto of a transfer of the entitlement.⁸⁴

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."⁸⁵ A liability rule permits the transfer of an entitlement from its holder to another upon the payment of its value set by "an external, objective standard."⁸⁶ Theft and traditional nuisance rules are examples of areas that employ property rules, while eminent domain and negligence are examples of liability rules.⁸⁷ 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."⁸⁸

In addition to differences in remedies, contract and property law traditionally have employed relatively distinct rules and principles. For example, below I discuss contract law's adoption—and the refusal to adopt by property law—of the doctrine of mutuality of covenants.⁸⁹ 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.⁹⁰ I will next discuss a few

⁸² See Guido Calabresi & A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972).

⁸³ *Id.* at 1092.

⁸⁴ *Id.*

⁸⁵ *Id.* at 1105.

⁸⁶ *Id.*

⁸⁷ *Id.* at 1105-27.

⁸⁸ Ian Ayres & J.M. Balkin, *Legal Entitlements as Auctions: Property Rules, Liability Rules, and Beyond*, 106 YALE L.J. 703, 704 (1996).

⁸⁹ See *infra* text accompanying notes 97-115.

⁹⁰ In fact, one of the most startling aspects of teaching property law is the consistency of this change across broad swaths of property doctrine.

of the prominent examples of doctrinal change. One prominent area in which the law has undergone dramatic change is the lease.⁹¹ A lease was traditionally classified as a conveyance of an interest in land.⁹² A lease was the agreement between a landlord and tenant authorizing the tenant to possess the landlord's land⁹³ for a determinate period or at the landlord's will.⁹⁴ The common law treated a lease as a conveyance of a nonfreehold estate in land.⁹⁵ The landlord conveyed to the tenant, through the lease, a leasehold estate, which entitled the tenant to exclusive possession of the parcel.⁹⁶

To modern eyes, the most remarkable aspect of the common law's use of property concepts to understand leaseholds is that the covenants in the lease were independent.⁹⁷ "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."⁹⁸ 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.⁹⁹

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.¹⁰⁰ Courts initially found violations of the covenant of quiet enjoyment only when the landlord actually evicted the

⁹¹ 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 (1982); John Forrester Hicks, *The Contractual Nature of Real Property Leases*, 24 BAYLOR L. REV. 443 (1972).

⁹² See 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND *140, *143-44.

⁹³ 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. STOEBCUK & WHITMAN, *supra* note 1, § 6.1, at 244.

⁹⁴ *Id.*

⁹⁵ See *id.* § 6.10, at 253 (stating that at common law a "lease was usually spoken of as a conveyance and not a contract").

⁹⁶ HOVENKAMP & KURTZ, *supra* note 8, § 9.1, at 266 (stating that a leasehold grants "exclusive possession and control of the land in the tenant").

⁹⁷ See *id.* § 9.8, at 270 (stating that this feature of the common law is a "commonly agreed shortcoming[']").

⁹⁸ *Id.* § 9.8 n.3; see also STOEBCUK & WHITMAN, *supra* note 1, § 6.10, at 253 ("[W]hen the law of contract developed the concept of dependency 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 landlord-tenant law . . .").

⁹⁹ See, e.g., STOEBCUK & WHITMAN, *supra* note 1, § 6.32 (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).

¹⁰⁰ See generally *id.* §§ 6.32-.33 ("[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.").

tenant, but later they extended the doctrine to include constructive eviction,¹⁰¹ which I discuss below.

A related movement occurred when 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.¹⁰² Indeed, even if the lessee bargained for an explicit covenant in the lease obligating the landlord to provide services or to repair the parcel, breach of these covenants did not entitle the tenant to refuse to pay rent or terminate the lease¹⁰³ because of the independency of lease covenants.¹⁰⁴

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.¹⁰⁵ A tenant could claim constructive eviction—and, most importantly, be relieved of paying rent—if the tenement became uninhabitable.¹⁰⁶ This expansion made lease covenants mutually dependent¹⁰⁷ and relied on the contract rationale of failure of consideration.¹⁰⁸

Because of limitations of constructive eviction,¹⁰⁹ and the realities of modern urban residential life,¹¹⁰ courts further undermined the independency of covenants by creating the doctrine of implied warranty of habitability.¹¹¹ This doctrine implied in all residential leases a covenant that landlords would maintain the residential premises so as to be suitable for human habitation.¹¹² Tenants, upon breach of this covenant by the landlord, have the panoply of contract remedies from which to choose, including deduc-

¹⁰¹ *Id.* § 6.33, at 284.

¹⁰² *Id.* § 6.36, at 289.

¹⁰³ *Id.* § 6.36, at 292-93.

¹⁰⁴ Glendon, *supra* note 91, at 511. Property law had not, as contract law had, adopted the doctrine of mutuality of covenants. *Id.*

¹⁰⁵ 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 91, 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 (1951).

¹⁰⁶ 49 AM. JUR. 2D *Landlord and Tenant* § 523 (2006).

¹⁰⁷ See Glendon, *supra* note 91, 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.”).

¹⁰⁸ *Id.*

¹⁰⁹ For example, to claim constructive eviction, a tenant was required to vacate the premises. *Id.* at 513.

¹¹⁰ Primarily, the fact that urban dwellers, unlike their rural ancestors, sought decent residential dwellings with their concomitant services rather than productive farmland. *Hilder v. St. Peter*, 478 A.2d 202, 207 (Vt. 1984).

¹¹¹ See generally 52 C.J.S. *Landlord and Tenant* § 687 (2006).

¹¹² *Id.*

tion from rent, cancellation of the leasehold, and repair and deduction from rent.¹¹³ This change in the residential lease context is being repeated with commercial leases.¹¹⁴

Much of this movement has consciously been one of adopting contract concepts. For example, courts that adopted the doctrines of constructive eviction and implied warranty of habitability explicitly relied on and moved towards contract doctrines.¹¹⁵

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 and remedies in place of property concepts and remedies. In nuisance, for example, courts have moved away from automatically abating (enjoining) nuisances.¹¹⁶ Instead, courts today will, consistent with the Restatement (Second) of Torts § 826(b),¹¹⁷ grant damages.¹¹⁸

The most famous instance of this was the Court of Appeals of New York's decision in *Boomer v. Atlantic Cement Co.*¹¹⁹ 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.¹²⁰ 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.¹²¹ The court therefore refused to apply a property rule and instead employed the contract norm of damages.¹²²

¹¹³ See Glendon, *supra* note 91, at 532 ("Court decisions recognizing implied warranties of habitability have generally extended to the tenant all the usual contract remedies for breach of warranty.").

¹¹⁴ 52 C.J.S. *Landlord and Tenant* § 686 (2006) ("[A]ccording to some authorities, there is an implied warranty of suitability by the landlord in a commercial lease that the premises are suitable for their intended commercial purpose.").

¹¹⁵ See, e.g., *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1075 (D.C. Cir. 1970) (relying on "a belief that leases of urban dwelling units should be interpreted and construed like any other contract" to apply the doctrine of implied warranty of habitability); *Dyett v. Pendleton*, 8 Cow. 727, 732-33 (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").

¹¹⁶ See SHELDON F. KURTZ & HERBERT HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 789 (5th ed., 2007) (describing the movement toward damages in the nineteenth century).

¹¹⁷ RESTATEMENT (SECOND) OF TORTS § 826(b) (1979).

¹¹⁸ See HOVENKAMP & KURTZ, *supra* note 8, § 11.1, at 424 ("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.").

¹¹⁹ 257 N.E.2d 870 (N.Y. 1970).

¹²⁰ *Id.* at 871, 875.

¹²¹ *Id.* at 873 & n.*.

¹²² See also *Spur Indus., Inc. v. Del E. Webb Dev. Co.*, 494 P.2d 700, 706, 708 (Ariz. 1972) (holding that the plaintiff who "c[ame] to the nuisance" must pay damages to compensate the defendant tortfeasor for the cost of moving).

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 relatively little benefit.

In the context of servitudes specifically, courts have likewise more readily employed contract concepts and remedies in place of property concepts and remedies. 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.¹²³ 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.¹²⁴ The Restatement (Third) of Property also adopts this position.¹²⁵ It permits a servient tenant to unilaterally alter 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.¹²⁶

The Restatement (Third) of Property elsewhere further evidences property law's movement toward contract concepts.¹²⁷ For instance, section 2.1 provides that a servitude is created if the servient tenant “enters into a contract . . . to create a servitude.”¹²⁸ The Restatement's drafters also state that the Restatement “adopt[ed] the model of interpretation used in contract law.”¹²⁹

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 legal 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.¹³⁰ One, if not the primary reason for its rejection is that ancient lights did not fit with the pro-

¹²³ BRUCE & ELY, *supra* note 28, § 7:16.

¹²⁴ *Id.*

¹²⁵ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000).

¹²⁶ *Id.* This rule “applies unless expressly negated by the easement instrument.” *Id.* § 4.8 cmt. f.

¹²⁷ See *Abington Ltd. P'ship v. Heublein*, 717 A.2d 1232, 1240 (Conn. 1998) (“Those provisions [of the Restatement (Third) of Property] adopt a contracts oriented view of the law of easements and servitudes.”).

¹²⁸ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.1(1)(a) (2000).

¹²⁹ *Id.* ch. 4 intro. n.

¹³⁰ MORTON J. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW: 1780-1860*, at 44-47 (1977).

development legal doctrines that dominated American property law.¹³¹ 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,¹³² its enormous, rich landmass. Ancient lights impeded urban industrial development by permitting landowners to acquire prescriptive easements to air and light.¹³³ For this reason, it never found a home in American law.¹³⁴

Another example of American property law's pro-development stance was its acceptance of the riparian common enemy doctrine.¹³⁵ The common enemy doctrine privileged an owner to eliminate surface water from his land without liability for doing so.¹³⁶ The common enemy doctrine permitted quick and unrestricted development in an environment of abundant land.¹³⁷ 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 criterion for whether to adopt a particular rule also occurs when the possible rules all plausibly fit with the surrounding legal materials. In *Tenhet v. Boswell*,¹³⁸ for instance, the California Supreme Court decided the effect of a joint tenant's lease of his interest in a joint tenancy.¹³⁹ The court held that the joint tenant's lease did not sever the joint tenancy.¹⁴⁰ 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.¹⁴¹

To reach its decision, the *Tenhet* Court reviewed the surrounding legal materials. The court looked to statutes which provided that severance of a joint tenancy must be done explicitly and not by implication.¹⁴² The court also noted that previous case law had established that a mortgage did not sever a joint tenancy.¹⁴³ And perhaps central to the court's reasoning was

¹³¹ *Id.* (describing the rejection of ancient lights because of its hindrance of economic growth and expansion).

¹³² Other than its people, of course.

¹³³ HORWITZ, *supra* note 130, at 46-47.

¹³⁴ *Id.* at 44-47.

¹³⁵ See generally SPRANKLING, *supra* note 79, § 31.02[B] (discussing the common enemy doctrine).

¹³⁶ *Id.*

¹³⁷ See *State v. Deetz*, 224 N.W.2d 407, 414-16 (Wis. 1974) (abandoning the common enemy doctrine because it did not "comport[] with the realities of modern society").

¹³⁸ 554 P.2d 330 (Cal. 1976).

¹³⁹ *Id.* at 335.

¹⁴⁰ *Id.*

¹⁴¹ *Id.*

¹⁴² *Id.*

¹⁴³ *Id.* at 336-37.

the chief characteristic of joint tenancies: the right of survivorship.¹⁴⁴ 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.¹⁴⁵ 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.

Legal change often occurs when particular legal rules are found to not fit the broader legal principles that inform that area of the law.¹⁴⁶ This occurred, for instance, in the context of landlord liability for harm caused by preexisting conditions on the leased premises.¹⁴⁷ The traditional common law rule was that a landlord was not liable for harm caused by “any dangerous condition . . . which existed [on the land] when the lessee took possession.”¹⁴⁸ Courts, as common law courts often do,¹⁴⁹ created a number of exceptions to the rule¹⁵⁰ because it was perceived to be harsh.

Thereafter, courts turned toward a general negligence standard for landlord liability to tenants.¹⁵¹ 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.¹⁵² As the Utah Supreme Court recognized in *Williams v. Melby*,¹⁵³ “[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.”¹⁵⁴ 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.¹⁵⁵ With that conception of the nature of the lease gone, landlord immunity no longer fit the governing 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.¹⁵⁶

¹⁴⁴ *Tenhet*, 554 P.2d at 337.

¹⁴⁵ *Id.*

¹⁴⁶ See RONALD DWORKIN, *LAW’S EMPIRE* 225-75 (1986) (describing the necessity of a “fit” criterion); *id.* at 15-20 (describing an example of how judges use fit as a criterion to choose legal rules).

¹⁴⁷ See Glendon, *supra* note 91, at 535-36.

¹⁴⁸ RESTATEMENT (SECOND) OF TORTS § 356 (1965).

¹⁴⁹ MELVIN ARON EISENBERG, *THE NATURE OF THE COMMON LAW* 117-18 (1988).

¹⁵⁰ See RESTATEMENT (SECOND) OF TORTS §§ 357-62 (1965) (listing exceptions to the common law rule).

¹⁵¹ See Olin L. Browder, *The Taming of a Duty—The Tort Liability of Landlords*, 81 MICH. L. REV. 99, 116-41 (1982) (explaining the movement toward a general negligence standard for landlords).

¹⁵² See, e.g., *Williams v. Melby*, 699 P.2d 723, 727 (Utah 1985) (using this line of reasoning).

¹⁵³ 699 P.2d 723 (Utah 1985).

¹⁵⁴ *Id.* at 727.

¹⁵⁵ See Browder, *supra* note 151, at 101 (describing how the new conception of the lease as contract moved courts to eliminate landlord immunity from suit).

¹⁵⁶ See Glendon, *supra* note 91, at 535-36 (describing the elimination of landlord immunity from suit).

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 high degree of 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.¹⁵⁷ 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*

1. 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 at least 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 damages approach and the compensatory damages approach permit the servient tenant to recover nominal damages for this breach of legal entitlement. 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 under the first *Brown* condition—but it is a greater burden than before.

For example, assume that when hypothetical parties created an easement, level X was the reasonably anticipated intensity of use. 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 re-

¹⁵⁷ DWORKIN, *supra* note 146, at 231 (explaining that judges use normative criteria to determine which legal rule or principle is best justified).

mains 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).

An 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 also appears to be 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.¹⁵⁸

2. The *Brown* Rule Is More Efficient Than the American Rule

A powerful example of the inefficiency of the American rule is found in *McCullough v. Broad Exchange Co.*¹⁵⁹ *McCullough* involved a large office building that straddled both the dominant estate and nondominant land, and that was serviced by a right-of-way easement.¹⁶⁰ The court enjoined use of the right-of-way by the dominant tenant until the dominant tenant established that the easement would serve only the portion of the building on the dominant estate.¹⁶¹

¹⁵⁸ This Article does not address the means by which and the ability of judges and juries to determine the appropriate level of compensation to a servient tenant. Instead, I assume that the normal mode of making these determinations would apply.

¹⁵⁹ 92 N.Y.S. 533 (App. Div. 1905).

¹⁶⁰ *Id.* at 534-35.

¹⁶¹ *Id.* at 536-37.

In *McCullough*, the additional burden placed on the servient estate by the dominant tenant was reasonable. As the court found, the burden imposed by servicing nondominant land was less than the dominant tenant could have imposed through use of the dominant estate alone.¹⁶² 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.¹⁶³ 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.”¹⁶⁴ 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 with no offsetting benefit.

Under the compensatory damages approach, the servient tenant could have recovered damages for any use of the easement beyond the intensity of the previous use, so long as the total use was below that originally anticipated by the parties. This would have compensated the servient tenant for any losses, while permitting the valuable use by the dominant tenant.

The *McCullough* case represents a dramatic instance of the American rule’s inefficiency. Below, I offer three arguments showing that the *Brown* rule is more efficient than the American rule.

a. *The Brown Rule as a Default Rule*

The *Brown* rule is more efficient because, ex ante, parties negotiating whether to contractually obligate themselves to either the *Brown* or American rule would likely choose the *Brown* rule. The choice of the *Brown* rule from the ex ante position is important because, if the law is able to mimic the choices parties would make, it can effectively function as the default rule from which the parties may opt out if they so choose.¹⁶⁵ By fitting the generality of cases, a default rule avoids the transaction costs associated

¹⁶² See *id.* at 536-37 (“It is manifest, therefore, that . . . 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 . . .”).

¹⁶³ See *id.* at 535-36 (describing the modifications that the dominant tenant would have to make to use the building).

¹⁶⁴ *Id.* at 536.

¹⁶⁵ See Susan F. French, *Relocating Easements: Restatement (Third), Servitudes* § 4.8(3), 38 REAL PROP. PROB. & TR. J. 1, 11 (2003) (describing default rules as “rules designed to produce the best results when the parties have not clearly manifested an intent to create a different set of entitlements”).

with bargaining towards it if it were not the default rule, costs that might impede the consummation of efficient agreements.¹⁶⁶

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 unreasonably 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 any increased use. In addition, a dominant tenant will also prefer to pay damages objectively determined by a judge or jury rather than have the amount of compensation set by a hold-out servient tenant.

From the servient tenant's perspective, there is no economically efficient reason to prefer one rule over the other. The servient tenant would be entitled, under either rule, to the same limitations on the level of burden on his estate. Further, under the compensatory damages version of the *Brown* rule, the servient tenant would receive compensation for any increase beyond the previous intensity. Additionally, as I will discuss below, empirical research has shown that persons in the servient tenant's position—able to confer a benefit on the dominant tenant without incurring any personal cost—would normally agree to an easement modification.¹⁶⁷ In other words, social norms would normally move servient tenants to prefer to permit dominant tenants to service nondominant land under the *Brown* conditions.

Similar reasoning is found in section 4.8(3) of the Restatement (Third) of Property: Servitudes.¹⁶⁸ As noted above,¹⁶⁹ 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.”¹⁷⁰ 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 stated that “the safeguards contained in the rule . . . will protect the easement owner's legitimate interests.”¹⁷¹ The conditions limiting when the servient tenant could move an easement, like the conditions I propose courts adopt under the *Brown* rule, would “increase the value of [one] estate without any significant decrease in the value of the [other] estate.”¹⁷²

¹⁶⁶ See CENZO VELJANOVSKI, *ECONOMIC PRINCIPLES OF LAW* 121-23 (2007) (discussing economic efficiency and default rules in contract law).

¹⁶⁷ See *infra* notes 197-200 and accompanying text.

¹⁶⁸ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000).

¹⁶⁹ See *supra* notes 125-126 and accompanying text.

¹⁷⁰ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000).

¹⁷¹ *Id.* §4.8 cmt. f.

¹⁷² *Id.*

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 over whether the dominant tenant's use is in fact excessive.

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. 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 from the perspective of economic efficiency it is difficult to state with certainty that servient tenants would prefer the *Brown* rule over the American rule, there is no reason to believe that an economically rational servient tenant would generally prefer one rule over the other. However, as the empirical evidence I discuss below suggests, social norms and other considerations are likely to lead servient tenants to prefer the *Brown* rule.

The *Brown* rule's ability to map onto ex ante preferences of parties makes it a good default rule permitting parties to avoid the transaction costs caused by bargaining toward their preferred position away from the American rule. The lowering of transaction costs increases the likelihood that efficient agreements will take place.

b. *The Brown Rule Lowers Transaction Costs*

Secondly, the *Brown* rule is more efficient than the American rule because it helps avoid the transaction costs created by the American rule in situations governed by the *Brown* rule and thereby fosters efficient transactions. The *Brown* rule helps overcome the transaction costs that would be associated with remaking an easement to permit it to service nondominant land. In other words, the optimal consensual transaction between the dominant and servient tenants is impeded by the existence of transaction costs. This is especially true as the number of parties grows larger, but even if the parties are in a bilateral monopoly, transaction costs can increase.¹⁷³

¹⁷³ 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 hold-out problem is created because circumstances limit each side to a single trading partner.").

When servitudes that run with the land are created by two or more parties,¹⁷⁴ the property rights to the servient parcel are partitioned or fragmented.¹⁷⁵ 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.¹⁷⁶

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."¹⁷⁷ 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."¹⁷⁸ As described by Depoorter and Parisi, the:

[I]ntuition 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.¹⁷⁹

If one party to an easement wishes to renegotiate the fragmentation, each party will have a veto.¹⁸⁰

Assume, for a moment, that the context with which we are concerned is a relatively simple one where the servient tenant has deeded to the dominant tenant an easement to drive across the servient tenant's property in

¹⁷⁴ 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.

¹⁷⁵ 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.").

¹⁷⁶ See *id.* at 18 ("In economic terms, servitudes thus present a *division of property rights* where several parties obtain exclusionary rights as to one particular estate.").

¹⁷⁷ *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 Law Sch., Law & Econ. Working Paper No. 01-13, 2001), available at http://papers.ssrn.com/paper.taf?abstract_id=264314.

¹⁷⁸ Depoorter & Parisi, *supra* note 175, at 23.

¹⁷⁹ *Id.* at 21.

¹⁸⁰ Parisi, *supra* note 177, at 10.

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.¹⁸¹ 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.”¹⁸² And these obstacles only increase as the number of parties necessary to the negotiation increases.¹⁸³

The American rule aggravates these asymmetrical transaction costs. It protects the servient tenant's entitlement with a property remedy.¹⁸⁴ 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.¹⁸⁵ 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.¹⁸⁶

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

¹⁸¹ *Id.* at 21-22.

¹⁸² *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, 307 (2004) (arguing that when two parties negotiate they “can often” come to a mutually beneficial arrangement), and Elizabeth Hoffman & Matthew L. 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 LAW* § 3.8 (7th ed. 2007) (finding that negotiations in bilateral monopolies may result in large surpluses from negotiation going to one party), and 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).

¹⁸³ See Depoorter & Parisi, *supra* note 175, at 22 (“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.”).

¹⁸⁴ See Weiser, *supra* note 182, at 278 (arguing similarly).

¹⁸⁵ See Parisi, *supra* note 177, at 21 (“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.”).

¹⁸⁶ See *id.* (“[U]nder a liability-type remedy, the owner will not be able to extract the taker's surplus.”).

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.¹⁸⁷ “[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.”¹⁸⁸

The servient tenant, in situations where the *Brown* rule would not apply, has strong incentives to hold out. The servient tenant’s harm—under the first *Brown* condition—is low or nonexistent, and imposition of an injunction—under the second *Brown* condition—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.¹⁸⁹ This will limit transaction costs. As Richard Posner summarized this area, “[i]n conflicting use situations in which transaction costs are high, the allocation of resources to their most valuable use is facilitated by denying owners of property an injunctive remedy.”¹⁹⁰

The obstacles posed by transaction costs increase as the number of parties necessary to effectuate the transaction increases.¹⁹¹ Moving away from the bilateral monopoly hypothetical used thus far, imagine that a servient estate with a lake enclosed within it was surrounded by other parcels, and that it therefore did not have direct access to a public right-of-way. Assume further that the servient tenant (ST1) and an adjoining parcel holder (ST2) sold the right to utilize the lake in the middle of the servient estate, along with the right to ingress and egress along a specified right-of-way across ST2’s parcel, to five landholders that surrounded ST2’s parcel. Next, assume that one of the dominant tenants (DT5) proposed to service another parcel with the easement. Lastly, of course, assume that servicing the nondominant parcel would meet the *Brown* conditions. The situation is reproduced in the diagram below.

¹⁸⁷ See *id.* at 19 (“In the presence of high transaction costs, liability rules are thus more likely to induce efficient reallocation of rights and resources.”).

¹⁸⁸ *Id.* at 26.

¹⁸⁹ 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.

¹⁹⁰ POSNER, *supra* note 182, § 3.10, at 68-69.

¹⁹¹ See *id.* § 3.8, at 62 (finding that economists identify “a large number of parties to a transaction” as an important source of transaction costs).

c. *The Brown Rule Applies Only to a Limited Subset of All Abuse Cases: Idiosyncratic Servient Tenants*

The *Brown* rule is also more efficient because of the relatively unique circumstances to which it applies. The law, for a number of reasons, generally affords a servient tenant an injunction if the dominant tenant services nondominant land.¹⁹⁵ The legal rule prohibiting a dominant tenant from servicing nondominant land is clear, both in its allocation of the respective property entitlements and also, especially, regarding whether the dominant tenant has violated the rule.¹⁹⁶ This clarity reduces the servient tenant's costs of monitoring the dominant tenant's compliance with the scope of the easement. If the dominant tenant initiates abuse of the easement, the servient tenant can admonish the dominant tenant before the dominant tenant expends resources in abusing the easement. It also increases the servient tenant's ability to enforce the scope of the easement by threatening to bring and, if need be, bringing a suit whose likelihood of success is high. This regime makes bargaining relatively more simple.

The *Brown* rule, however, applies to a specific subset of all abuse cases. For this subset, characterized by the two *Brown* conditions, there are strong reasons to believe that the *Brown* rule is more effective than the American rule in creating the background legal norms that permit efficient transactions to take place.

There are at least three reasons to believe that, under the *Brown* conditions, transaction costs often impede efficient transactions. This is because, when the *Brown* conditions apply, servient tenants who refuse to bargain with their dominant tenants over an easement modification are likely doing so with idiosyncratic motivations. These are often motivations to which the law should and does give little, if any, weight.

The first reason is that the servient tenant has already indicated, by selling an easement, his preference regarding the level of interference with the use and enjoyment of his estate that he is willing to tolerate. The servient tenant sold to the dominant tenant the right to use the servient tenement—the right to a certain level of interference with the servient tenant's use and enjoyment of the servient estate.

The first *Brown* condition ensures that the dominant tenant's use is consistent with the servient tenant's revealed preferences. The dominant tenant's use of the easement—and the level of his interference with the servient tenant's use and enjoyment of the servient estate—remains consistent with the servient tenant's expressed wishes. An economically rational servient tenant will not, therefore, claim that the dominant tenant's use of the easement is inconsistent with his revealed preferences. Instead, one would

¹⁹⁵ See *supra* Introduction & Part I. My special thanks to Eric Claeys for raising these points.

¹⁹⁶ See Kratovil, *supra* note 3, at 650-51.

expect the servient tenant to bargain with the dominant tenant for a modification.

The second reason is that, so long as the first *Brown* condition holds true and the servient tenant is not exposed to any greater intensity of use of the easement, empirical evidence indicates that most people would permit the dominant tenant to increase the value of the dominant estate.¹⁹⁷ For example, David Sally found, after reviewing thirty-five years of published prisoners' dilemma experiments, that self-interest did not explain the data.¹⁹⁸ Specifically, persons "are very likely to engage in 'other-regarding behavior' . . . when they perceive that they can confer a benefit on the other without incurring any significant personal cost."¹⁹⁹

Other-regarding behavior is even more likely to occur, Sally observed, if the parties had an ongoing communicative relationship.²⁰⁰ The context in which the *Brown* rule most often applies is that of neighbors who have the type of relationship most likely to elicit other-regarding behavior. This empirical evidence suggests that if the servient tenant has not negotiated with the dominant tenant to modify the easement's scope, he did so for idiosyncratic reasons.

The lack of harm to the servient tenant, coupled with the empirical data showing that most people would, in these situations, agree to an easement modification, suggests the operation of motivations not shared by most persons in the servient tenant's position. These motivations may be powerful enough to prevent efficient negotiations. The *Brown* rule gives the dominant tenant a legal tool to encourage negotiations despite the existence of the servient tenant's idiosyncratic motivations.

The third reason is that the servient tenant may also raise transaction costs based on motivations regarding which the law generally does not give value. One such example is the classic spite fence situation.²⁰¹ Regardless of the idiosyncratic satisfaction the tortfeasor may derive from spiting his neighbor, "his conduct has no utility that the law will recognize."²⁰² Spite fences are one category of a larger class of actions, which, while normally permitted or privileged, are prohibited or punished because of a malicious motive.²⁰³ Courts and scholars have concluded that actions prompted by

¹⁹⁷ See French, *supra* note 165, at 12.

¹⁹⁸ David Sally, *Conversation and Cooperation in Social Dilemmas: A Meta-Analysis of Experiments from 1958 to 1992*, 7 RATIONALITY & SOC'Y 58, 86-87 (1995).

¹⁹⁹ See French, *supra* note 165, at 12 (citing Sally, *supra* note 198, at 60).

²⁰⁰ Sally, *supra* note 198, at 78, 80.

²⁰¹ See *Rattigan v. Wile*, 841 N.E.2d 680, 687 (Mass. 2006) (stating that the law does not recognize any utility if the tortfeasor's purpose "is to annoy and harm his neighbor").

²⁰² RESTATEMENT (SECOND) OF TORTS § 829 cmt. c (1979).

²⁰³ See Ward Farnsworth, *The Economics of Enmity*, 69 U. CHI. L. REV. 211, 234-37 (2002) (noting the areas of the law in which this occurs).

such motivations are inefficient because they cause more harm than the value they create, if any.²⁰⁴

The cases to which the *Brown* rule applies in this area are replete with instances where the servient tenant's actions indicated such motivations were at work. The servient tenant, in these situations, would refuse to bargain with the dominant tenant for alteration of the easement's scope, not because the dominant tenant was offering insufficient consideration, but simply to spite the dominant tenant. For instance, in *Wetmore*, the relationship between the dominant and servient tenants "deteriorated" and the servient tenant began to take matters into his own hands including "frighten[ing] the young people at the convent, as well as the Sisters."²⁰⁵ The servient tenant, as related by the court's opinion, took actions that indicate his motivation was simply to harm the servient tenants.

The opportunity for a servient tenant to engage in transaction-inhibiting behavior is increased by the existence of the second *Brown* condition. When the *Brown* rule applies, the servient tenant possesses a large "stick" to figuratively hold over the dominant tenant's head: an injunction that will cause substantially more harm to the dominant tenant than benefit to the servient tenant. With this leverage, the servient tenant can refuse to bargain for legally unprivileged reasons—such as spite—or raise the costs of negotiating to such an extent that negotiations flounder.

In addition to the cases to which the *Brown* rule applies, which make application of the American rule counterproductive to efficient transactions, there are reasons to question whether the American rule is superior to the *Brown* rule, even outside of the *Brown* rule context. Primary among these reasons is the widespread dominance of the reasonable use standard in easement law. As noted above in Part I, the primary limitation on a dominant tenant's use of an easement is that the intensity of the use must be within the reasonably anticipated use of the parties.²⁰⁶ The fact that this standard is so widespread in easement law and, more importantly still, that it appears to function reasonably well, undermines the claim that the American rule is required because it provides a clearer rule than would the *Brown* rule, which incorporates the reasonable use standard in the first *Brown* condition. In fact, one scholar has argued, based in part on this reasoning, that the reasonable use standard should apply to the abuse of easement context.²⁰⁷ If the reasonable use standard functions reasonably well, then the *Brown* rule's use of that standard to the exclusion of the American rule, results in little lost clarity.

²⁰⁴ See, e.g., *id.* at 235-36.

²⁰⁵ *Wetmore v. Ladies of Loretto*, Wheaton, 220 N.E.2d 491, 493 (Ill. App. Ct. 1966).

²⁰⁶ See STOEBUCK & WHITMAN, *supra* note 1, § 8.9, at 460.

²⁰⁷ See Kratovil, *supra* note 3, at 649, 659 (arguing that the "unreasonable increase of burden rule" should apply to appurtenant easements used to service non-dominant lands).

Relatedly, as noted earlier, one of the reasons for using the American rule is because it is a clear rule that offers a reasonable proxy for intensity of use. However, the dominance of the reasonable use standard in easement law shows that the scope of the estate served by an easement—the limit that an easement service only dominant land—is not a good proxy for intensity of use. Intensity of use by the dominant tenant is dependent on a host of factors not related to the size of the estate served by the easement. For instance, whether the easement is for commercial or noncommercial purposes may result in dramatically different rates of usage. These factors are incorporated in the reasonable use standard.

If scope of the estate served by an easement is not a good proxy for intensity of use, then using scope does not effectively serve the policies behind the limitation. These policies include preventing overburdening the servient tenant's use of the property. Since scope is both over and under inclusive, then the reasonable use standard used throughout easement law would better serve the policy.

d. *Possible Counterarguments Considered*

One possible counterargument 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.²⁰⁸ This will occur most frequently when, as in *Brown* itself,²⁰⁹ 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.

Another potentially powerful criticism of the remedial analysis employed above, which I derived from Calabresi and Melamed's influential article,²¹⁰ is that it fails to appreciate "the in rem nature of property rights."²¹¹ Most importantly, according to Thomas W. Merrill and Henry E. Smith, in rem rights give property rights holders "the right to exclude a large and indefinite class of other persons ('the world') from the thing."²¹² Property rights holders thereby have the security to invest and develop their

²⁰⁸ See *supra* Introduction.

²⁰⁹ *Brown v. Voss*, 715 P.2d 514, 518 (Wash. 1986).

²¹⁰ Calabresi & Melamed, *supra* note 82.

²¹¹ Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 *YALE L.J.* 357, 379 (2001).

²¹² *Id.* at 360.

property because “the world” understands that it cannot interfere with that property.²¹³ A complex remedial analysis of the kind employed here runs the risk of undermining the notice function of in rem property rights.

However, the easements context strongly blunts, if not eliminates that risk. The vast majority of easements create relationships among a small number of persons, often only two property owners, the servient and dominant tenants. The parties to an easement can readily identify each other and their respective property rights. As a result, the notice function of in rem rights is met under the remedial regime created by the *Brown* rule. This situation was explicitly noted by Merrill and Smith as one not subject to their broader criticism: “When trying to demonstrate the importance of transaction costs or certain incentive effects of different rights structures, a two-party model functions as a satisfactory first approximation.”²¹⁴

3. The *Brown* Rule Is Fairer Than the American Rule

Fairness means giving each his due, his just²¹⁵ desert.²¹⁶ What is due a person depends on the circumstances in which the person finds himself.²¹⁷ 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. The first form of justice is distributive, the second, commutative.²¹⁸ Both forms of justice serve the ultimate goal of human society: human flourishing.²¹⁹

²¹³ *Id.* at 359.

²¹⁴ *Id.* at 385.

²¹⁵ For an in-depth discussion of justice, see SAINT THOMAS AQUINAS, *SUMMA THEOLOGICA* pt. II-II, at QQ. 57-61 (Fathers of the English Dominican Province trans., Benzinger Bros. 1947); ARISTOTLE, *THE ETHICS OF ARISTOTLE* bk. 5, at *1129a-*1138b (D.P. Chase trans., E.P. Dutton & Co. 1950); JOHN FINNIS, *NATURAL LAW AND NATURAL RIGHTS* 161-97 (1980). From the sources cited, it should be clear that the conception of justice that I am employing is rooted in the Aristotelian tradition.

²¹⁶ 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 priva[t]e law are rooted in the concept of commutative justice.” JAMES GORDLEY, *FOUNDATIONS OF PRIVATE LAW: PROPERTY, TORT, CONTRACT, UNJUST ENRICHMENT* 12 (2006).

²¹⁷ See *id.* at 39-40 (arguing that the laws in different societies may differ, in part because of the different circumstances facing those societies).

²¹⁸ *Id.* at 8; see FINNIS, *supra* note 215, 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.

²¹⁹ FINNIS, *supra* note 215, at 169; see also GORDLEY, *supra* note 216, at 7 (“Writers in the Aristotelian tradition believed 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.”).

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.²²⁰ As Aristotle noted, without sufficient material, cultural, religious, and intellectual resources, a human cannot live a virtuous life.²²¹ 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.²²²

Commutative justice governs the relationship between two (or a few) persons.²²³ It is related to distributive justice.²²⁴ While distributive justice ensures that society's members have what they need from the common stock, commutative justice ensures that individuals maintain their stock of goods during transactions²²⁵ with others.²²⁶ 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.²²⁷ "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."²²⁸

Assume again that the context with which we are concerned is the simple 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

²²⁰ See FINNIS, *supra* note 215, at 166-67 ("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 that needs (for the sake of the common good) to be appropriated to individuals."); GORDLEY, *supra* note 216, at 8 ("[F]or writers in the Aristotelian tradition, living a distinctively human life requires, not only virtues . . . but external things as well.")

²²¹ ARISTOTLE, *supra* note 215, bk. 1 at pt. 4, bk. 2 at *1130b, bk. 4 at *1020a-b, bk. 6 at *1144b.

²²² See GORDLEY, *supra* note 216, 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.")

²²³ See FINNIS, *supra* note 215, at 177-84 (explaining commutative justice).

²²⁴ GORDLEY, *supra* note 216, at 8 (noting that commutative justice "cannot be divorced from distributive justice").

²²⁵ "Transactions" is broadly construed to include nonconsensual encounters such as torts.

²²⁶ See GORDLEY, *supra* note 216, 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.")

²²⁷ See JOHN FINNIS, AQUINAS 200 (1998) ("A sound system of 'private law' (i.e. state law regulating private transactions) will track the moral judgments which answer th[e] question [of was this fair]. Underlying those judgments is always the principle of equality (equivalence) in the exchange." (footnote omitted)).

²²⁸ GORDLEY, *supra* note 216, at 12.

equivalent value.²²⁹ Their transaction met the requirements of commutative justice because each participant in the transaction was left similarly better off after the transaction. 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 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 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, and that there is no background legal rule addressing the issue. 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.

²²⁹ See FINNIS, *supra* note 227, at 201 (describing the "requirement of equality in mutual benefit").

The *Brown* rule, firstly, does not violate commutative justice. The dominant tenant did not violate commutative justice because the dominant tenant did not deprive the servient tenant of more of his share of society's goods than that 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—approximately 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. The servient tenant's share of peaceful use of his property remained unchanged.

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.

Second, the *Brown* rule is not only compatible with commutative justices, but it is also *required* by commutative justice. 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 needs 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 to service 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 (at least) when, under the first *Brown* condition, 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 non-dominant 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.

As an analogy, consider a hypothetical libel action. The plaintiff sued the defendant for libel. The plaintiff won and the court ordered the defendant to pay damages. The damages paid by the defendant is our legal system's mechanism for requiring the defendant to make the plaintiff whole. The defendant's libel reduced the plaintiff's stock of goods, the plaintiff's good reputation. The defendant violated commutative justice. The damages paid by the defendant restored the plaintiff's stock of goods and thereby restored commutative justice between the parties.

Suppose, however, that, in addition to ordering the defendant to pay damages, the court also enjoined the defendant from ever again writing

about the plaintiff. That remedy would violate commutative justice. Compensatory damages had already made the plaintiff whole. The injunction lessened the defendant's stock of goods—his right to free speech, for example—without any corresponding justification of making the plaintiff whole.

Likewise, under the *Brown* rule's first condition, the dominant tenant has already made the servient tenant whole through the payment of damages, if any. And imposition of an injunction would, under the second *Brown* condition, result in a dramatic reduction in the dominant tenant's stock of goods, without any offsetting justification in making the servient tenant whole. Doing so violates commutative justice.

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.²³⁰ 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.²³¹ 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."²³²

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.²³³ 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 commuta-

²³⁰ GORDLEY, *supra* note 216, at 90-91.

²³¹ *See id.* at 90.

²³² *Id.* at 99.

²³³ *See* BRUCE & ELY, *supra* note 28, § 8:2 ("When precise language is employed to create an easement, such terminology governs the extent of usage.").

tive justice for a court not to enjoin a dominant tenant who violates the provision.²³⁴

My conclusion that the *Brown* rule is fair is bolstered by the use of similar rules in other areas of property law, discussed above.²³⁵ For instance, in the nuisance context, damages instead of an injunction will be awarded if the value of the nuisance is substantially greater than its harm.²³⁶ This same rule is followed in other countries as well.²³⁷

4. Common Objections Against the *Brown* Rule Are Unpersuasive

The *Brown* rule is normatively preferable to the American rule because it is the more efficient rule and because it is fairer. 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.²³⁸ “The purpose of this rule is to prevent an increase of the burden upon the servient estate”²³⁹ The *Brown* rule meets this concern. It does so first by ensuring that an injunction is available if the dominant tenant’s servicing non-dominant land poses an unreasonable burden on the servient estate.

In *Ogle v. Trotter*,²⁴⁰ 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.²⁴¹ 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.”²⁴² The court went on to hold, as a result, that “the reason for such rule

²³⁴ 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 175, at 38.

²³⁵ See *supra* notes 75, 117-118 and accompanying text.

²³⁶ *Boomer v. Atl. Cement Co.*, 257 N.E.2d 870 (N.Y. 1970).

²³⁷ See GORDLEY, *supra* note 216, 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.”).

²³⁸ See, e.g., *Nat’l Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D.W. Va. 1968) (“Except for this rule, the burden upon the servient estate might be increased at the pleasure of the owner of the dominant estate.” (quoting *Shaver v. Edgell*, 37 S.E. 664, 666 (W. Va. 1900))); McClaran, *supra* note 37, at 307-10 (listing arguments against the *Brown* rule).

²³⁹ *Ogle v. Trotter*, 495 S.W.2d 558, 565 (Tenn. Ct. App. 1973) (quoting *Adams v. Winnett*, 156 S.W.2d 353, 357 (Tenn. Ct. App. 1941)).

²⁴⁰ 495 S.W.2d 558 (Tenn. Ct. App. 1973).

²⁴¹ *Id.* at 565-66.

²⁴² *Id.* at 566.

does not exist in the instant case and therefore the rule is not applicable to it.”²⁴³

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 by using the easement too intensively, courts employ a reasonableness test.²⁴⁴ 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.”²⁴⁵ This position was adopted by the Restatement (Third) of Property.²⁴⁶

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.²⁴⁷ 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.²⁴⁸

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.²⁴⁹ This also undercuts the Re-

²⁴³ *Id.*

²⁴⁴ See BRUCE & ELY, *supra* note 28, § 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.”).

²⁴⁵ SPRANKLING, *supra* note 79, § 32.09.

²⁴⁶ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 (2000) (“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.”).

²⁴⁷ Glenn v. Poole, 423 N.E.2d 1030, 1033 (Mass. App. Ct. 1981); see also BRUCE & ELY, *supra* note 28, § 8:3 (“[T]he concept of reasonableness includes a consideration of changes in the surrounding area and technological developments.”).

²⁴⁸ See Martin v. Music, 254 S.W.2d 701, 703 (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).

²⁴⁹ 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 28, § 7:17 (“[W]hen equity so demands, courts tolerate an easement holder’s minor unilateral expansion of the servitude’s dimensions as long as the servient estate owner is not materially disadvantaged.”).

statement (Third) drafters' concern that adoption of the *Brown* rule would lead to increased litigation.²⁵⁰

Under the *Brown* rule, the first criterion, 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.

Further, 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.

A second reason given by the Restatement (Third)'s authors for accepting the American rule was that it “reflects the likely intent of the parties.”²⁵¹ 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.²⁵² 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.²⁵³ 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.”²⁵⁴ 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.

²⁵⁰ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 cmt. b (2000).

²⁵¹ *Id.*

²⁵² See *supra* notes 165-72, 197-201 and accompanying text.

²⁵³ BRUCE & ELY, *supra* note 28, § 8:12 (“An easement appurtenant benefits the entire dominant estate and is apportionable among subsequent owners if the dominant estate is divided.”).

²⁵⁴ STOEBUCK & WHITMAN, *supra* note 1, § 8.9, at 462; see also *Cushman Va. Corp. v. Barnes*, 129 S.E.2d 633, 639-40 (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).

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. Conversely, 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 estate owner is not materially disadvantaged."²⁵⁵ They permit this unilateral expansion of an easement's dimensions by the dominant tenant to effectuate the easement's purpose.²⁵⁶ "If the change is slight and immaterial, or is not so substantial as to result in the creation or substitution of a new and different servitude, it is not objectionable."²⁵⁷

Relatedly, section 4.8(3) of the Restatement (Third) 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.²⁵⁸ The Restatement's drafters justified this deviation from the majority of jurisdictions²⁵⁹ by arguing that "it will increase overall utility because it will increase the value of the servient estate without diminishing the value of the dominant estate."²⁶⁰ 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 consis-

²⁵⁵ BRUCE & ELY, *supra* note 28, § 7:17.

²⁵⁶ See *Sordi v. Adenbaum*, 533 N.Y.S.2d 566, 567 (App. Div. 1988) ("To limit the dimensions of the easement to the terms of the metes and bounds description would, as a practical matter, defeat the basic purpose for which the easement was reserved, i.e., to provide a parking lot for seven cars."); see also BRUCE & ELY, *supra* note 28, § 7:17 ("It also has been held that the dimensions of an easement may be unilaterally altered in order to permit use for the easement's intended purpose.").

²⁵⁷ 25 AM. JUR. 2D *Easements and Licenses* § 84 (2004).

²⁵⁸ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (2000).

²⁵⁹ See *id.* § 4.8 cmt. f ("This subsection . . . rejects the rule espoused by the weight of authority in the United States.").

²⁶⁰ *Id.*

tent with the parties' intent.²⁶¹ For instance, the Iowa Supreme Court ruled that an easement which permitted the dominant tenant to "drive teams" included "modern vehicular traffic."²⁶² 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."²⁶³ By contrast, section 4.10 *permits* the dominant tenant to expand the "manner, frequency, and intensity of the use" so long as such increase does not "cause unreasonable damage" to the servient tenant.²⁶⁴ 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 servitude.²⁶⁵ 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.²⁶⁶ Like section 4.10, section 5.7's rule is limited to prevent an "unreasonable increase in the burden on the servient estate."²⁶⁷ The use of this reasonableness requirement is also justified by the intent of the parties to the servitude.²⁶⁸

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

²⁶¹ BRUCE & ELY, *supra* note 28, § 8:3.

²⁶² *Skow v. Goforth*, 618 N.W.2d 275, 276, 278 (Iowa 2000); *see also Hash v. Sofinowski*, 487 A.2d 32, 34 (Pa. Super. Ct. 1985) (finding that Pennsylvania courts "presum[e] that advances in technology are contemplated in the grant of the easement").

²⁶³ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 cmt. b (2000).

²⁶⁴ *Id.* § 4.10; *see also id.* § 4.8 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).

²⁶⁵ *Id.* § 4.10 cmt. f.

²⁶⁶ *Id.* § 5.7.

²⁶⁷ *Id.* §§ 5.7(1), (3).

²⁶⁸ *Id.* § 5.7 cmt. a.

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*,²⁶⁹ held that the dominant tenants' use of a right-of-way to service after-acquired residential lots did not overburden the easement.²⁷⁰ The dominant tenants wanted to build a house, half of which would sit on after-acquired lots.²⁷¹ 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.²⁷² 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 grantor of the easement understood that the lots would likely be used in a manner similar to that of several other lots in the surrounding neighborhood.²⁷³ 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.²⁷⁴

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.

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.²⁷⁵ "The rule limiting the benefit of an easement to the dominant parcel is concerned with the rights of the respective parties, rather than the actual burden on the servient parcel."²⁷⁶

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 injunc-

²⁶⁹ 610 A.2d 565 (Conn. 1992).

²⁷⁰ *Id.* at 569.

²⁷¹ *Id.* at 566-67.

²⁷² *Id.* at 569.

²⁷³ *Id.*

²⁷⁴ 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").

²⁷⁵ See, e.g., *Nat'l Lead Co. v. Kanawha Block Co.*, 288 F. Supp. 357, 364 (S.D.W. Va. 1968) (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 9, at 644 ("The burden of an easement is a legal burden. The burden exists regardless of the amount of actual use of the easement or whether any use at all is made of it." (footnote omitted)); see also BRUCE & ELY, *supra* note 28, § 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").

²⁷⁶ McClaran, *supra* note 37, at 296-97.

tion because the remedies for violation of rights are extremely diverse.²⁷⁷ The remedy afforded violation of a particular right depends on a number of factors and is the result of a prudential social choice regarding which remedy would best advance the common good.²⁷⁸ Such factors include efficiency and fairness. And the evaluation of these factors can change as social circumstances change.²⁷⁹ As I argued above, when the *Brown* conditions are present, damages is the most efficient and fair remedy for the violation of a servient tenant's right in the context of a dominant tenant using an easement to service nondominant land.

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.

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

²⁷⁷ See DOBBS, *supra* note 65, §§ 1.1-1.4, at 1-20 (providing a brief overview of the numerous remedies available for violation of rights).

²⁷⁸ For a discussion of prudential social choices, see Lee J. Strang, *An Originalist Theory of Precedent: Originalism, Nonoriginalist Precedent, and the Common Good*, 36 N.M. L. REV. 419, 438 (2006).

²⁷⁹ For example, as I argued earlier, the remedy afforded for nuisances has changed to suit changed circumstances. See *supra* notes 117-122 and accompanying text.