Nonuse and Easements: Creating a Pliability Regime of Private Eminent Domain

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INTRODUCTION

In their landmark work *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, Guido Calabresi and Douglas Melamed identified two distinct methods of protecting entitlements—liability rules and property standards. Under *The Cathedral*’s construction, property standards protect the entitlement holder from the nonconsensual termination of the entitlement, while liability rules protect the non-holder and allow for unilateral extinguishment of the entitlement. After creating a conceptual framework of entitlement protections, *The Cathedral* developed a means of determining when each rule should be utilized.

Following *The Cathedral*’s guidance, real property rights almost unanimously have been subject to property standards; however, whether property standards are always the most efficient means of protecting all rights in real property is questionable. One particular area of real property that is in need of close inspection is the law of servitudes. Historically considered “an unspeakable quagmire,” most of the law of servitudes has been carried forward for centuries, sometimes with little rhyme or reason. During the final decades of the twentieth century, the drafters of the *Restatement (Third) of Property on Servitudes* recognized the discombobulated nature of servitude law and went to great lengths reexamining and revising it. During the revision, the drafters struck the use of pure property standards to certain servitude doctrines and instead applied liability rules.

Not all aspects of servitude law, however, were placed under a microscope. One doctrine that has yet to be reviewed is the rule that easements may not be extinguished by nonuse. Though nonuse may be one relevant factor in determining whether an easement can be terminated, nonuse alone has been held to be insufficient to abolish an easement for centuries by both the English and American common law. Under the framework of Calabresi and Melamed, this long-standing rule against termination by nonuse constitutes a pure property rule.

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1 See Guido Calabresi and A. Douglas Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 Harv. L. Rev. 1089, 1092 (1972) [hereinafter *The Cathedral*]. Calabresi and Melamed also discussed the concept of inalienable entitlements, i.e., those entitlements that cannot be transferred between a willing buyer and willing seller. *Id.* As this article discusses only those entitlements that can be transferred between buyers and sellers, inalienable entitlements are not considered.

2 See infra Part I.


6 See infra Part I.A. Under the Restatement (Third) no servitude arrangement—be it an easement, profit, or covenant—may be terminated by nonuse alone. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. c (2000). This Article, however, focuses solely on easements.

7 Hofmeister v. Sparks, 660 N.W.2d 637 (S.D. 2003); Mueller v. Hoblyn, 887 P.2d 500 (Wyo. 1994); Parker v. Swett, 205 P. 1065 (Cal. 1922); White v. Crawford, 10 Mass. 183 (1813); Clark v. Redlich, 305 P.2d 239 (Cal. App. 2d 1957); Ward v. Ward, (1852) 7 Exch. 838. The rule against termination by nonuse has also been promulgated by all three Restatements. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. c (2000); RESTATEMENT (FIRST) OF PROP.: SERVITUDES § 504 cmt. d (1944).

8 See infra Part II.A.
In contrast to the common law rule is the rule regarding nonused easements in civil law jurisdictions. Since early Roman law, civilian systems have automatically terminated easements that are not used for a statutorily-set period of time. The civil law rule represents what might be considered a quasi-property rule under the Calabresi and Melamed structure.

Despite the longevity of both the civil law rule in favor of termination by nonuse and the common law rule against termination by nonuse, courts and scholars in both legal systems have offered little justification for why nonused easements should be governed by property or quasi-property standards. The shortage of explanation is perplexing given the difference in each system’s rule, but the lacking rationale becomes more troubling upon the realization that the rules regarding nonused easements in both systems allow for the inefficient use of property. Given that a tenet of American property law is that property should be used efficiently, it is puzzling how a doctrine that potentially encourages waste has stood unscathed for so long.

This Article strives to examine nonused easements under the Calabresi and Melamed framework and evaluate what type of rule should be applied to nonused easements to promote the efficient use of real property. Before scrutinizing nonused easements, Part I of this article provides a brief overview of The Cathedral’s framework. Then, the article uses that framework to closely examine the common law and civil law doctrines concerning nonused easements. Part II analyzes the common law rule against termination by nonuse, identifies why the rule is a property standard, and demonstrates how the application of the property standard creates inefficiencies. Part III follows the same approach for the civil law rule in favor of termination by nonuse: it surveys the civil law rule, establishes the quasi-property qualities of the rule, and identifies the strengths and weaknesses of applying a quasi-property rule to nonused easements.

Reflecting upon the shortcomings of applying a property or quasi-property rule, the article then examines nonused easements from a different perspective, a liability lens. To look at nonused easements through a liability lens, Part IV of this article introduces a gloss to the Calabresi and Melamed framework recently developed by legal scholars Abraham Bell and Gideon Parchomovsky: pliability rules. The Bell and Parchomovsky gloss questions the static application of the Calabresi and Melamed framework and argues that property and liability rules can be applied dynamically as pliability rules. Under the Bell and Parchomovsky theory, when a triggering event occurs, the law can change what type of rule is applied. Part V proposes applying pliability rules to easements once they fall into a state of nonuse. The pliability rule recommended by this article is a system of private eminent domain based on nonuse. Under this theory, the holder of the servient estate may terminate a nonused easement if certain conditions

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9 In referring to jurisdictions based on the civil law, this Article only refers to jurisdictions based on French civil law; jurisdictions based on German civil law are not considered.
10 See infra Part III.A.
11 Id.
12 See infra Part II.B; Part III.B.
15 Id. at 5.
16 Id. at 31–32.
are met, and, in turn, the holder of the nonused easement receives just compensation. The details of such a system, possible criticisms of its application, and responses for those critiques are contained in Part V. The Article ends by questioning whether the concept of private eminent domain based on nonuse might be applied to other real property doctrines.

**PART I. THE CALABRESI AND MELAMED FRAMEWORK**

In *The Cathedral*, Calabresi and Melamed created a new framework for examining entitlements. Their construct made two great contributions to legal scholarship: first, it provided a means of classifying rules to protect entitlements, and second, it gave guidance as to when each entitlement-protecting rule should be employed.

In essence, Calabresi and Melamed crafted two lenses through which entitlement protections may be viewed: property standards and liability rules. Property standards refer to entitlement protections in favor of the entitlement holder, while liability rules favor the nonholder of the entitlement. Property standards protect the holder of the entitlement because they require the parties to enter into a voluntary transaction to alter the entitlement; under a property rule, the nonholder may only amend the arrangement if the holder of the entitlement agrees. Liability rules, on the other hand, favor the nonholder of the entitlement because under a liability scheme, the nonholder can extinguish the entitlement by paying an objectively determined value. Thus, under a liability rule, unilateral termination by the nonholder is allowed provided the nonholder compensates the holder for that termination.

To illustrate how property rules and liability operate, Calabresi and Melamed used a hypothetical landowner and polluting factory based on the not-so-hypothetical case *Boomer v. Atlantic Cement Co.* The scholars then described a dichotomy of legal remedies based on whether the landowner or the factory held the entitlement and what type of rule was applied. When the entitlement of being free from pollution was held by the landowner, two possible rules resulted: Rule 1, a property rule, gave the landowner the right to unilaterally stop the factory from polluting; Rule 2, a liability rule, allowed the factory to continue polluting so long as the factory paid damages to the landowner. When the entitlement of having the right to pollute was held by the factory, two different rules resulted: Rule 3, a property rule, allowed the factory to freely pollute without making any payment to the landowner; Rule 4, a liability rule, gave the landowner the ability to stop the pollution by paying the polluter just compensation. With these four rules, Calabresi and Melamed created a complete framework of how entitlements could be protected.

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17 *The Cathedral, supra* note 1, at 1092.
19 *The Cathedral, supra* note 1, at 1092.
20 *Id.*
21 *Id.*
23 *The Cathedral, supra* note 1, at 1115–16.
24 *Id.* at 1116.
Understanding how entitlements could be protected allowed Calabresi and Melamed to determine when each set of rules should be employed. The predominant factor guiding when each rule should apply they suggested was efficiency.\footnote{Id. at 1110.  Calabresi and Melamed also suggested that society’s distributive goals should guide when property standards or liability rules are used.  This Article, however, focuses on the efficiency arguments made in \textit{The Cathedral}.} If the market valuation of the entitlement is inefficient or simply unavailable, then \textit{The Cathedral} recommends the use of liability rules.\footnote{Id. at 1110.} On the other hand, when transactions between the holder and nonholder are relatively cost-free and values can readily be assigned, then property standards should be utilized.\footnote{Id. at 1118.} In such situations, parties are presumed to be able to organize a deal among themselves, so liability rules—which inherently require the involvement of a neutral third party arbitrator, such as a judge—are unnecessary. In short, Calabresi and Melamed asserted that when it is known with certainty which party can most efficiently bear the cost of the entitlement, property standards should govern the entitlement because the market will encourage the person who can bear the entitlement’s cost most efficiently to do so.\footnote{Id. at 1119.} When, however, it is unknown who is the most efficient bearer of costs, liability rules should be applied because a neutral third party will be necessary to insure that freeloaders and holdouts do not disrupt the market.\footnote{Id.}

In theory, \textit{The Cathedral}’s rule is simplistically elegant\footnote{See Guido Calabresi, \textit{Remarks: The Simple Virtues of the Cathedral}, 106 \textsc{Yale} L. J. 2201, 2202 (1997).}; in practice, though, it is frequently difficult to ascertain who can bear the costs most efficiently.\footnote{Id. at 1118–22.} Calabresi and Melamed highlighted this dilemma by discussing the hypothetical polluting factory and neighboring landowner.\footnote{That a change in the type of rule applied may occur is the crux of the Bell and Parchomovsky gloss. \textit{See infra} Part IV.} Abstract guesses may be made as to whether the polluter or pollutee is in the best position to handle the costs of the pollution, but realistically such a determination is based on a host of factors such as size of the parties, number of parties, amount of pollution, cost of alternatives, harm of pollution, etc. Even if light was shed on every possible relevant factor, the status of the parties may change over time, thus shifting who is the best bearer of the burden.\footnote{E.g., Ariel L Bendor, \textit{Prior Restraint, Incommensurability, and the Constitutionalism of Means}, 68 \textsc{Fordham} L. Rev. 289 (1999) (using the Calabresi and Melamed framework to examine free speech); Thomas F. Cotter, \textit{Fair Use and Copyright Overenforcement}, 93 \textsc{Iowa} L. Rev. 1271 (2008) (using the Calabresi and Melamed framework to examine copyright law); Lovett, \textit{supra} note 4 (using the Calabresi and Melamed framework to examine easement relocation).}

\section*{PART II. THE INEFFICIENCY OF LOOKING THROUGH A PROPERTY LENS: THE AMERICAN COMMON LAW RULE AGAINST TERMINATION BY NONUSE}

Though the practical application of the Calabresi and Melamed framework may be difficult, it nonetheless remains a useful tool in understanding how society protects particular entitlements and whether the method applied is efficient. As such, scholars routinely rely on \textit{The Cathedral}’s structure to evaluate legal doctrines.\footnote{E.g., Ariel L Bendor, \textit{Prior Restraint, Incommensurability, and the Constitutionalism of Means}, 68 \textsc{Fordham} L. Rev. 289 (1999) (using the Calabresi and Melamed framework to examine free speech); Thomas F. Cotter, \textit{Fair Use and Copyright Overenforcement}, 93 \textsc{Iowa} L. Rev. 1271 (2008) (using the Calabresi and Melamed framework to examine copyright law); Lovett, \textit{supra} note 4 (using the Calabresi and Melamed framework to examine easement relocation).} One doctrine that has yet to be scrutinized is
the common law rule against terminating easements by mere nonuse, a classic property rule. Though nonused easements appear to have some of the characteristics that, according to Calabresi and Melamed, make them suitable for being governed by a property regime, the use of property rules creates inefficiencies.

A. The Common Law Rule Against Termination by Nonuse, a Classic Property Rule

An easement is a servitude that “creates a nonpossessory right to enter and use land in the possession of another.” Additionally, an easement establishes an obligation; the holder of the land over which the easement is granted may not interfere with the uses authorized by the easement agreement. In such a relationship, the burdened estate is referred to as the servient estate; the land that is benefitted by the arrangement is called the dominant estate.

Like most property doctrines, the rules governing easements strive to encourage efficiency in land transfers. They achieve this goal by running with the land, meaning that future successors to the servient estate and dominant estates are automatically benefitted and burdened by the easement. Automatic transfers of easements are considered efficient because they relieve successors from re-bargaining for the same, previously established easements, thereby removing repetitive transaction costs.

There are, however, instances in which one or both parties may prefer to end the easement rather than maintain the arrangement. To accommodate such situations, the American common law provides a variety of methods by which private parties may terminate the existing easement arrangement: express agreement, expiration of term, release, abandonment.

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35 *Restatement (Third) of Prop.: Servitudes* § 1.2(1) (2000). Servitudes are a “legal device that creates a right or an obligation that runs with land or an interest in land.” *Id.* § 1.1.

36 *Id.* § 1.2(1).


Under American property law, easements may also be appurtenant or in gross. *Restatement (Third) of Prop.: Servitudes* § 1.5. An appurtenant easement is one that is attached to the ownership and enjoyment of a particular tract of land, whereas an easement in gross is a personal right that is not attached to the benefit of a particular tract of land. French, *Reweaving, supra* note 2, at 1267–68. For the purposes of this article, whether an easement is appurtenant or in gross is irrelevant. Thus, this article refers interchangeably to easement benefits for dominant estate (appurtenant) and easement benefits for a particular, personal beneficiary (in gross).

38 *Supra* note 12.

39 In drafting the *Restatement (Third) of Property: Servitudes*, the drafters tried to design rules that allowed for the extinguishment of an easement when it became “obsolete, economically wasteful, or unduly burdensome.” French, *Reweaving, supra* note 2, at 1313. In other words, the drafters attempted to construct modes of termination that maintained efficient easements, but abolished inefficient easements.


41 This Article is specifically limited to the termination of easements by private parties. While some of the ideas expressed herein are modeled after methods by which the government may abolish property rights, this Article only considers private parties acting to abolish certain property rights.

42 *Restatement (Third) of Prop.: Servitudes* § 7.1.

43 *Id.* § 7.2.

44 *Id.* § 7.3.

45 *Id.* § 7.4.
merger, estoppel, prescription, and changed conditions. Absent from this list is termination by nonuse.

Simply put, nonuse does not abolish an easement in the American common law. This is true whether the easement lays unused for fifteen, twenty-seven, thirty-six, forty, or even 170 years. Once an easement is conveyed to a dominant estate, the dominant estate holder and his successors in title will maintain an interest in that easement regardless of whether the easement is used. The easement may never be used or may temporarily be used and then not used. Either way, the same rule prevails: easements are not terminable by nonuse.

While nonuse along is not a recognized means of terminating easements, it is a factor in two accepted modes of extinguishment: abandonment and prescription. To end an easement through either of these methods, the holder of the easement must not use his easement and some additional act must take place. In the context of abandonment, the holder of the dominant estate performs the additional act; in the context of prescription, the additional act is performed by holder of the servient estate.

To abandon an easement, the beneficiary of the easement must intentionally relinquish the rights created by the easement. There is no formal instrument that must be executed for the dominant estate holder to abandon his easement. Because of the lack of formality required, if the holder of the burdened estate wishes to demonstrate that the easement is abandoned, the beneficiary’s intent to abandon must be proved. Evidence of intent generally requires reliance on circumstantial evidence that is “decisive and conclusive.” To meet such a burden, nonuse

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46 Id. § 7.5.
47 Id. § 7.6.
48 Id. § 7.7.
49 Id. § 7.10.
50 Id. § 7.4 cmt. c.
53 White v. Crawford, 10 Mass. 183 (1813).
54 Arnold v. Stevens, 41 Mass. 106 (1839).
55 Pencader Assoc., Inc. v. Glasgow Trust, 446 A.2d 1097, 1101 (Del. 1982).
59 The lack of formal instrument is what separates abandonment from release. Cf. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.3.
61 Direct expressions of an intent to abandon are rarely available. “[A] servitude beneficiary who deliberately sets about divesting him or herself of a servitude interest normally uses a release.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. a.
frequently serves as one piece of evidence indicating the dominant estate holder’s intent to abandon.\textsuperscript{63} The length of the nonuse may affect the amount of evidence required to prove abandonment—the longer the nonuse, the less evidence needed.\textsuperscript{64} Though an elongated period of nonuse may necessitate less additional evidence, providing some additional evidence is crucial, as was demonstrated in Castle Associates v. Schwartz.\textsuperscript{65} In Castle, the owner of the servient estate granted an easement to the owner of the dominant estate in 1903.\textsuperscript{66} The easement was never used.\textsuperscript{67} In 1976, the existence of the “forgotten easement” was revealed through a title search performed by successors-in-title to the original dominant estate holder.\textsuperscript{68} The New York court held that despite the seventy-three years of nonuse, the burdened landowner failed to prove abandonment because he did not offer additional evidence signaling that the benefitted landowner intended to abandon the easement.\textsuperscript{69}

Whereas termination by abandonment concentrates on the conduct of the holder of the dominant estate, termination by prescription focuses on the actions of the holder of the servient estate.\textsuperscript{70} To terminate an easement by prescription, the burdened party must demonstrate that he adversely used the easement,\textsuperscript{71} and that his use was open, notorious, and continuous without interruption for the statutorily-mandated period of time.\textsuperscript{72} Nonuse impacts prescription because by the beneficiary’s nonuse, the servient estate holder is able to possess the easement continuously without interruption. If the dominant estate holder uses his easement amid the adverse possession, the running of prescription ceases because the adverse use of the easement by the burdened party is no longer continuous and without interruption. As such, nonuse by the beneficiary is necessary to prove termination by prescription, but that nonuse must be accompanied by the adverse use of the easement by the holder of the servient estate.

While nonuse may be relevant to determining whether an easement should be extinguished, nonuse by itself does not terminate an easement at common law.\textsuperscript{73} This doctrine


\textsuperscript{64} RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. c.


\textsuperscript{66} Id. at 484–85.

\textsuperscript{67} Id. at 482.

\textsuperscript{68} Id. at 486.

\textsuperscript{69} Id. at 487.

\textsuperscript{70} Matoush v. Lovingood, 177 P.3d 1262, 1270 (Colo. 2008); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. b (2000).

\textsuperscript{71} Not just any use constitutes an adverse use. In order for use of the easement by the owner of the servient estate to be adverse, the use must be “incompatible or irreconcilable with the easement holder’s right to use the easement.” Matoush, 177 P.3d at 1265. Accord Peasel v. Dunakey, 279 S.W.3d 543, 546 (Mo. App. 2009); Rowe v. Lavanway, 904 A.2d 78, 84 (Vt. 2006).

\textsuperscript{72} Matoush, 177 P.3d at 1265; Creech v. Noyes, 87 S.W.3d 880, 885 (Mo. App. 2002). See also Mueller v. Hoblyn, 887 P.2d 500 (Wyo. 1994) (distinguishing between prescription extinguishing ownership and prescription extinguishing easements).

\textsuperscript{73} Supra notes 49–54.
represents a classic property rule within the Calabresi and Melamed framework because the holder of the easement is protected from the nonconsensual extinguishment of the easement by the nonholder of the easement. In other words, the burdened party cannot unilaterally remove the easement from his estate; he must obtain the beneficiary’s consent to rid his estate of the easement.\footnote{The only means by which the servient estate holder may abolish the easement without the consent of the dominant estate holder is through prescription. However, even prescription arguably requires the consent of the dominant estate holder, in that he can at any point in time stop the running of the prescriptive period by simply using the easement.}

### B. The Inefficiency in Applying a Property Rule

According to Calabresi and Melamed, property rules should be employed when transaction costs are low.\footnote{The Cathedral, supra note 1, at 1118.} Given that the parties involved in a nonused easement are easily identifiable and usually small in number, it appears at first glance that transaction costs for altering nonused easements are relatively low, thus making property rules the ideal type of rule to govern the situation. However, by closely observing how the rule against termination by nonuse affects nonused easements, it becomes clear that applying a property standard to the doctrine creates inefficiency. This inefficiency is created because of the parties’ inability to predict the future, the societal loss created, the encouragement of speculative purchasing, and the possibility of holdups by the dominant estate.

1. Inability to Predict the Future

When the holders of a servient estate and dominant estate enter into an easement arrangement, the price of the easement should reflect the amount that both parties value the easement. For example, suppose that Sara owns Blackacre in fee simple and grants an easement for $100 to David. David’s easement consists of a right to drive across Blackacre. At the time in which Sara, the servient estate holder, and David, the dominant estate holder, enter into this agreement, it can be presumed that they both value the easement at $100. How each determines his personal value of the easement differs between the parties.

David’s valuation of the easement is determined by his predicted use of the easement. Suppose that instead of driving across Blackacre, David could take an alternate route and still reach the same destination point. David will then value each individual use of the easement...
across Blackacre at the cost he would have to pay to take the alternate route. If taking an alternate route costs David $1, then every use David makes of the easement is worth $1 to him. David’s value of the easement should naturally factor in how many times he expects to use the easement and the cost for each use. Therefore, when David agrees to pay $100 for the easement, it can be presumed that he expects he will use the easement at least 100 times.

Sara’s value of the easement is similarly based on her next-best option, though Sara’s opportunity cost refers to what else she could do with Blackacre. If the next best thing Sara could do with Blackacre is farm wheat, then Sara must predict the amount of wheat she will be unable to farm due to David’s easement. When Sara charges David $100, $100 should equal what Sara expects she could have gained had she used Blackacre to farm wheat. Thus, in a perfect market, Sara and David will determine their individual values for the easement and will only enter into an easement arrangement if those values match. If David thinks he will use the easement only 100 times at $1 per use, but Sara believes she can grow $1,000,000 worth of wheat on the land where David desires his easement, there will be no deal because Sara will be unwilling to sell the easement for $100 and David will be unwilling to pay the $1,000,000 Sara will demand.

The problem with subjecting easements to a property rule is that David and Sara are temporally constrained in their ability to predict the amount they value the easement. David may be able to predict the amount that he will use the easement during the subsequent month or even year, but any prediction David makes about the amount of his use of the easement ten years down the road is nothing more than speculation. Similarly, the ability of Sara to predict her opportunity cost for granting the easement is time limited. Moreover, neither party will know the value of the easement arrangement to their successors.

The problem with imposing a property rule like the rule against termination by nonuse is that as conditions change, Sara, the servient estate holder, is prevented from altering the easement arrangement, but David is not. If the easement somehow becomes a burden on David, then he may execute a release or abandon it. Or, if David and his successors simply have no desire to use the easement, they can easily cease their use. All of these options come at no cost to David. While David has an easy, cost-free method of escaping the easement agreement, Sara and her successors remain bound by the original agreement, regardless of whether David and David’s successors stop using the easement entirely, thus indicating that they no longer value the easement. So long as the dominant estate holder does not take affirmative steps to release the

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76 Professor Richard A. Epstein argues that thought contracting parties may not be able to accurately predict the future, they are “aware of the difficulties of dealing with future uncertainty,” and contract accordingly. Richard A. Epstein, Covenants and Constitutions, 73 CORNELL L. REV. 906, 924–25 (1988) [hereinafter Epstein, Covenants]. Professor Epstein may be correct that parties to servitude arrangements take into account the uncertain future when entering into the original arrangement, the problem with the strict property rule is that it never allows courts to step in to remedy issues that arise. But even Professor Epstein admits that “the parties’ inability to draft with perfect foresight and completeness necessarily means that courts will have to engage in some ‘interstitial legislation’ in construing the terms of the basic agreement.” Id. at 923 (footnote omitted). However, the rule at issue here, the rule against termination by nonuse, does not allow for even such “interstitial legislation.”

77 For a discussion of how speculative purchasing creates inefficiencies, see infra Part II.B.3.


80 Id. § 7.A.
servient estate holder or does not demonstrate an intent to abandon the easement, the servient estate remains burdened with the easement and the agreement established by the original valuations. As such, Sara must continue not interfering with David’s authorized use, despite the fact that he is never using the never using the easement. In the hypothetical, this means that despite David’s nonuse, Sara must continue to not grow wheat.

Theoretically, the concern that parties’ valuation of an easement will change over time is addressed by the changed-conditions doctrine. The rationale underlying the changed-conditions rule is to prevent obsolete servitudes from interfering with desirable uses of land. However, because courts have looked at easements through a property lens, the changed-conditions doctrine has been applied with great hesitation and some courts will simply not apply a changed-conditions doctrine to easements. The test developed by the Restatement (Third) provides a fairly restrictive test for when conditions are changed such that an easement may be terminated or modified:

(1) When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purposes for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude.

(2) If the purpose of a servitude can be accomplished, but because of changed conditions the servient estate is no longer suitable for uses permitted by the servitude, a court may modify the servitude to permit other uses under conditions designed to preserve the benefits of the original servitude.

Under the Restatement (Third), only when the easement is impossible and unable to be modified may it be terminated. In the case of Sara and David, David’s mere nonuse of the easement does not render the easement “impossible.” Thus, there is no reason why under the changed-conditions doctrine David’s nonuse should automatically free Sara’s estate of the easement.

Moreover, and more troubling, the changed-conditions doctrine does not come to Sara’s aid when David stops using the easement and her opportunity costs change. Suppose instead of growing wheat for $100, now Sara can develop Blackacre into a mega shopping complex that would be worth $1,000,000. Even though David is still not using the easement and Sara would now place a much higher value on the easement, the changed-conditions doctrine does not operate to terminate the easement. The changed-conditions doctrine might help to modify the easement arrangement, but only if the benefits of the original easement can be preserved. Thus, the narrowly drawn changed-conditions doctrine provides little to no benefit when the originally

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81 See Id. § 7.10.
82 Id. § 7.10 cmt. a.
83 Id. § 7.10 cmt. a; Chevy Chase Village v. Jaggers, 275 A.2d 167 (Md. Ct. App. 1971) (The change in condition must be “so radical as to render perpetuation of the restriction of no substantial benefit to the dominant estate, and to defeat the object or purpose of the restriction.”). The very idea of a changed-conditions doctrine has been criticized by scholars because it allows for the interference of property rights. E.g., Robert Ellickson, Alternates to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Control, 40 U. CHI. L. REV. 681, 716–17 (1973); Richard A. Epstein, Notice and Freedom of Contract in the Law of Servitudes, 55 S. CAL. L. REV. 1353, 1364–68 (1982).
84 Waldorp v. Brevard, 62 S.E.2d 512, 515 (N.C. 1950); Cortese v. U.S., 782 F.2d 845, 851 (9th Cir. 1986) (implying the changed conditions doctrine only applies to covenants and not to easements).
predicted use of the easement, and in turn the value of the easement, changes. As the use and value change, so too does the efficiency of applying a property standard.

2. Creation of Societal Loss

In some respects, the fact that the law does not provide a remedy for the servient estate holder in the case of a nonused easement is not troubling. While parties like Sara and David may not be able to accurately predict how much they will value the easement in the future, they still voluntarily opted to enter into the easement arrangement; if Sara was truly concerned that she would be unable to foresee the future possible utility of Blackacre, she never should have entered into the agreement. When Sara conveyed the easement to David, she took the risk that over time, $100 would be less than her opportunity costs for Blackacre. Viewed in this light, perhaps the law should not provide a safety net for Sara simply because years down the road she (or her successors) realizes that she entered into a bad deal.

The problem with this rationale is that more individuals than just Sara and her successors lose from her bad investment: society also loses from a nonused easement. If David stops using the easement, Sara still may not engage in activities that would prevent David from using the easement. In as much as farming wheat would prevent David from driving across Blackacre, Sara is precluded from doing it. Society loses from this preclusion because if Sara could farm wheat on Blackacre, she would purchase items like seed, fertilizer, plows, and tractors. She might employ field hands. And at the end of the wheat-farming season, she would likely sell the wheat. All of these activities have a positive economic impact on society. Society’s loss becomes more egregious as Sara’s opportunity costs rise. If Blackacre can be converted from a tract of land suited for wheat growing to a tract of land suited for a mega shopping complex, then society, albeit indirectly, has lost out on that opportunity cost. So long as the easement runs across Blackacre, Sara will be unable to engage in such activities, thereby denying society the potential benefits.

Obviously society suffers the same loss when David uses the easement, for Sara is prevented from farming wheat then, too. However, when David uses the easement, the loss to society is less bothersome because it is balanced by David’s gains. Every time David uses the easement, he receives a benefit from the use. Though society may be foregoing Sara’s opportunity costs, David’s gains from his use of the easement counterbalance society’s loss. Admittedly, David’s gains may not be equivalent to what society stands to gain by utilizing Blackacre, but at least if David gains something, society’s loss is more palatable. When David fails to use the easement, however, no one is gaining from the existence of the easement; instead, everyone is only losing.

To at least some extent, the rule that easements may be terminated by prescription mitigates the societal loss from David’s nonuse. When David stops using the easement, Sara

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86 While this article describes the changed conditions doctrine as “narrowly drawn,” it must be noted that the current changed conditions doctrine is broader in scope than it used to be. Cf. RESTATEMENT (FIRST) OF PROP. § 564 (1944).

In discussing the need to allow courts to at least minimally change contracts, Professor Stewart Sterk points out, “no one believes that contracting parties are blessed with perfect foresight.” Stewart E. Sterk, Foresight and the Law of Servitudes, 73 CORNELL L. REV. 956, 957 (1988). To remedy the inadequate foresight of the parties, contract law allows numerous “escape valves” by which courts may remedy contracts. Id. at 961. The rule against termination by nonuse, however, is lacking in the escape valves highlighted by Professor Sterk.

87 Professor Epstein raises this same argument in his comparison of covenants and constitutions. See Epstein, Covenants, supra note 76, at 921–23.
may adversely use the easement, thus commencing the running of prescription. In other words, once David stops using the easement, Sara can farm her wheat (or develop her mega shopping complex). If David continues to not use the easement and Sara continues in her adverse, hostile, open, and notorious wheat growing, then at the end of the prescriptive period, David’s easement will be extinguished. In this sense, prescription acts as a self-help remedy for Sara because Sara can utilize David’s nonuse of the easement to terminate David’s easement without his express consent.

Though prescription lessens the potential loss to society due to David’s nonuse, it is a far from perfect solution. David can interrupt and stop the running of the prescriptive period at any moment by simply using this easement. This makes attempting to terminate an easement by prescription quite risky for Sara because at any point, David may use the easement, thus quashing any investment Sara made. When presented with this type of situation, the chances that Sara will purposefully engage in an adverse use so as to terminate the easement are slim, particularly if the desired adverse use involves a large investment, such as building a mega shopping mall complex.

3. Encouraging Speculation and Division in Land

Because the rule against termination by nonuse is a classic property rule, dominant estate holders like David are allowed—and arguably encouraged—to engage in speculative purchasing. Suppose instead of intending to drive across Sara’s land once a day, in reality David wishes to purchase the easement because he believes that one day, Blackacre will transform into an Eden-like garden that will allow David to achieve eternal bliss when he drives across it. Until that day arrives, however, David has no intention of utilizing the easement. In this case, David will buy the easement now and simply not use it until the day of bliss arrives.

The problem with allowing David to speculate about the future use of the easement is that because he has no ability to accurately predict the future, his speculative purchase of the easement on Blackacre is a gamble at best. While the law generally allows individuals to gamble when entering contracts, contract law also places restrictions on when the gambling party must ante up. For example, the law prohibits indefinite option contracts. Instead, option contracts must be exercised in the time period provided by the parties, and if no time limitation is stated, within a reasonable time. Courts have strictly enforced time limitations for option contracts because “any relaxation of terms would substantively extend the option contract to subject one party to greater obligations than he bargained for.” With easements, however, there is no

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88 Supra Part II.A.
89 See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.4 cmt. b.
90 For an account of how bad-faith adverse possession may actually produce efficiency, see Lee Anne Fennell, Efficient Trespass: The Case for “Bad Faith” Adverse Possession, 100 NW. U.L. REV. 1037 (2006).
91 In contrast to the arguments raised in this Article, Judge Posner has harshly critiqued comments regarding speculation as a negative. POSNER, supra note 12, at 49.
92 See Part II.B.1.
restriction on when David must act on his speculation. Thus, an easement acts like a perpetual option.

The reason that perpetual options are not allowed—because it would “give all advantage to the one in whose favor the option was granted”—applies a fortiori to easements. Not only does a nonused easement force the servient estate holder to protect the dominant estate holder’s right to use the easement more than is required, but it also requires the burdened estate to lie in a perpetual state of divided possession. Though easements create a nonpossessory right in property, given that the servient estate holder must refrain from interfering with the beneficiary’s use—even when the beneficiary is not using the easement—the burdened estate is divided into two separate possessory interests. Sara may only possess portions of Blackacre to the extent that the possession does not interfere with David’s use, and David may possess portions of Blackacre in accordance with his contracted-for use. The bundle of possessory rights attached to Blackacre is divided indefinitely between Sara and David.

Given that possession is nine tenths of the law, the maxim nemo invitus ad communionem compellitur should apply equally to possessory divisions in land. Generally, the law disfavors perpetual division in the ownership of land to such a degree that partition by co-tenants is considered a matter of right. Agreements that perpetually limit the ability to partition real property are void because they prohibit the alienation of property. Unpartitioned land interests impinge upon the sale of real estate because purchasing a portion of an interest in land is frequently less desirable that purchasing an entire interest in land. Nonused easements produce a similar affect on the land they burden; estates with nonused easements are undesirable to buyers because the buyer will have to maintain protection of the dominant estate holder’s right to use the easement without reaping any benefit from the easement.

4. Giving Rise to Holdups

96 It is plausible that the “perpetual option” property will never be a problem. If David knows he will not use the easement until Blackacre transforms into Eden, then he may be inclined to inform Sara of his delayed use and allow Sara to farm Blackacre until the day of transformation arrives. Because Sara will be able to reap the benefits of Blackacre while David waits, David may hypothesize that Sara will demand less for the easement, thus lowering the contract price to David. However, Sara may alternatively realize that any transformation of Blackacre is number of years away, so she may decide to wait to contract for the easement closer to the actual date because her opportunity costs for Blackacre may change. If David is concerned that the latter will occur, he will be incentivized to not tell Sara why he is purchasing the easement or about his anticipated delayed use.

97 Clark v. Dixon, 254 So. 2d 482, 483 (La. App. 3d Cir. 1971).

98 See Depoorter and Parisi, supra note 98, at 19–23.


100 FREDERICK POLLOCK & ROBERT SAMUEL WRIGHT, AN ESSAY ON POSSESSION IN THE COMMON LAW 5 (Adamant Medi Corp. 2000) (1888).

101 No one can be forced to have common property with another. This concept has been applied in numerous cases. See, e.g., Hall v. Hamilton, 667 P.2d 350, 354–55 (Kan. 1983); Delfino v. Vealencis, 436 A.2d 27 (Conn. 1980); Ark Land Co. v. Harper, 599 S.E.2d 754, 758–59 (W. Va. 2004).


In addition to the difficulties caused by speculative purchasing, a further problem arises from the imposition of a property rule to nonused easements: the possibility of holdups. If Sara desires to rid Blackacre of the easement, she has only one option—she must strike a deal with David. Because David is the only person who can contract with Sara to rid Blackacre of the easement, David is able to hold Sara up for a price above his opportunity cost. Suppose when David and Sara enter the easement arrangement, both David and Sara have the opportunity cost of $100. If Sara’s opportunity cost increase to $300 while David’s opportunity cost remains the same, then in a free market Sara should be able to pay David $100 to rid Blackacre of the easement. By paying David $100, Sara is made better off and David is left no worse off. Thus, Sara’s backing out of the original easement agreement, or “breaching” the agreement, is efficient.

David, however, will not charge Sara $100, but instead will hold out for some price between $100 and $200. Because a David is the only person with whom Sara can realistically contract for a release of the easement, Sara will pay anything below her increased opportunity cost. While the holdup by David may not cause inefficiency per se, it does alter the price that the easement would have sold for if a free market existed.

The holdup situation is augmented when David stops using his easement. Suppose that David stops using his easement because he no longer needs to drive across Blackacre to reach his destination. The value of the easement to David is now much less than it was when he needed to drive across Blackacre. If David now has no value for the easement, so a value of $0, then in the free market, he would give the easement away. But since Sara’s opportunity cost has risen to $300, David will be able to hold Sara up for some price between $0 and $200.

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106 Professors Thomas Miceli and C.F. Sirmans point out that true holdout problem requires assembly. . . . [N]egotiations between a buyer and seller for a single parcel . . . do not constitute a holdout problem . . . because the seller’s unwillingness to sell does not affect any other transactions; it simply reflects his efforts to obtain the highest price.

Thomas J. Miceli and C.F. Sirmans, The Holdout Problem, Urban Sprawl, and Eminent Domain 5 (Nov. 2006), available at SSRN: http://ssrn.com/abstract=952511. Based on the law and economics scholars’ description, it may appear that in the case of David and Sara, no holdup can occur because David is the only seller in the market. However, Sara does have another option: she may purchase a different tract of land without an easement to pursue whatever activity she wishes to engage in but cannot because of David’s easement. As such, there is an assembly of potential sellers—David and all sellers of land. However, while Sara does technically have other options, David has a distinct selling advantage and can hold up Sara for an above-market price.


108 Professor Richard Epstein posits a similar hypothetical in his argument that liability rules should be utilized when a holdout situation may occur. See Epstein, Clear View, supra note 17, at 2094–96.

109 Sara’s increased opportunity cost is the difference in her opportunity cost without the easement and her opportunity cost with the easement. Thus, it is equal to $300 – $100, or $200.

110 The holdup by David is not technically inefficient because the parties as a whole are made better off. While Sara is not as well off as she could have been had David charged only his opportunity cost for the easement, David and Sara together are better off.
While some scholars scoff at the beneficiary who holds up the servient estate holder, Professor Carol Rose questions whether the Davids of the world are really the “rascal[s]” they are made out to be. As Professor Rose proclaims, “If we are to take servitudes seriously as property rights, then the neighbor’s holdout is perfectly legitimate.” In making such an argument, Professor Rose relies on the essence of property rights and protecting the concept of ownership to justify the holdup by the beneficiary. But even Professor Rose places a limit on how far the theory can be pushed. During the drafting of the Restatement (Third) on Property: Servitudes, Professor Rose recommended that when entering an easement agreement, parties should be required to “state a limited length of time that they think the [easement] will enhance the development.” Once the parties have established the intended lifespan of the easement, then Professor Rose suggests that courts may get involved in the dispute. When the court must get involved to settle disputes ex post and assign rights, the rule being utilized is no longer a property rule, but a liability rule. Thus, even Professor Rose who utilizes property rules to suggest that the beneficiary who holds up the burdened party may not be such a bad guy after all, places a limit on how long the law should examine easements through a property lens; once the time period established by the parties has passed, Rose recommends that the easement be viewed under a liability lens.

PART III. THE INEFFECTIVENESS OF LOOKING THROUGH A QUASI-PROPERTY LENS: THE CIVIL LAW RULE ALLOWING TERMINATION BY NONUSE

By not allowing mere nonuse to terminate easements, the American common law sanctions the inefficient use of easements because it allows for the possibilities of holdups, speculative purchasing, societal loss, and questionable predictions about the future. Unlike the American system, other judicial systems, such as the civil law, allow easements to be terminated by nonuse by employing quasi-property rules.

113 Id. at 1412.
114 Id.
115 Id. at 1414.
116 Id.
117 Aside from providing a different type of rule for nonused easements, the civil law is a good source to look to for understanding the common law on servitudes given that the English law on servitudes is based heavily on Roman law. See Oliver Wendell Holmes, The Common Law 367 (Dover Publications 1991).

In addition to the civil law, Islamic law also allows easements to be terminated by nonuse. Under the civil law, termination by nonuse only applies to rights relating to real property other than ownership, but Islamic law applies the doctrine of extinction by nonuse to ownership. Islamic property law—like all Islamic tradition—is religiously based, the fundamental sources being the Koran and sunna. John Makdisi, Islamic Property Law 8 (Carolina Academic Press 2005). Based on these authorities, ownership of land is considered a sacred trust between the land owner and Allah. Yahaya Y. Bambale, Acquisition and Transfer of Property in Islamic Law 4 (Malthouse Press Ltd. 2007). Because estate holders are merely serving as God’s trustees, Islamic property law emphasizes that land “should be put to continuous productive use”; to do otherwise would be to slight God. Siraj Sait & Hilary Lim, Land, Law, and Islam: Property and Human Rights in the Muslim World 11–12 (Zed Books 2006). As “[l]and ownership in Islam is linked to land use,” the nonuse of land can lead to the termination of ownership. Siraj Sait & Hilary Lim, Land, Law, and Islam: Property and Human Rights in the Muslim World.
A. The Civil Law Rule Allowing Termination by Nonuse, a Quasi-Property Rule

Servitudes in the civil law are not classified as minutely as they traditionally have been in the common law. Instead, two broad types of servitudes exist: praedial servitudes and personal servitudes. Praedial servitudes are rights in rem over a particular estate, whereas personal servitudes are rights in personam in a particular beneficiary. Though recognized as a valid form of servitude in the civil law, easements are not separately distinguished in form; they are merely considered part of the broader categories of praedial and personal servitudes.

Praedial and personal servitudes may be terminated after nonuse has occurred for an established time period. This mode of termination—referred to as prescription in the civil law—existed even before the era of Justinian. Prior to Justinian’s rise to power, servitudes could be extinguished by two years of nonuse. Justinian’s Code amended this rule such that all servitudes were extinguished after nonuse of ten or twenty years. The ten-year rule applied when the parties to the servitude arrangement were present, while the twenty-year rule applied when the parties were absent.

When drafting the Code Napoleon, the French extended the time period provided in Justinian’s Code to thirty years, though many civil law jurisdictions today maintain a period of ten or twenty years. The French viewed the perpetuation of Justinian’s rule of automatic termination by nonuse as a “just” result because the holder of the dominant estate had the.

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120 Id. at 144. This division is akin to the division of appurtenant and in gross in the common law. See supra note 36.

121 Código Civil [C.C.] art. 546 (Sp.); CIVIL CODE art. 942 (Colombia); CODICE CIVILE art. 1073 (Italy); CODE CIVIL [C. civ.] art. 706 (Fr.).


123 CODE JUST. 3.34.13–14 (Justinian 531). Justinian “restor[ed] the glory of the Roman Empire” when he became Emperor in 527. NICHOLAS, supra note 118, at 12. During his reign, he codified the law in what became known as the Corpus Iuris Civilis. Id. at 39.

124 CODE JUST. 3.34.13–14 (Justinian 531).

125 The rule that nonuse can terminate rights in real property has existed as far back as Hammurabi’s Code. Under Hammurabi, if a lessee failed to use the leased land for three years, the lessee had to return the land to the lessor. CODE HAMMURABI¶ 44.

126 CODE JUST. 3.34.14 (Justinian 531).

127 Id.


129 E.g., C.C. art. 546 (Sp.); C.C. art. 1073 (Italy).
unilateral ability to interrupt the running of the prescriptive period.\textsuperscript{130} An interruption occurred by either the beneficiary using the easement or obtaining an acknowledgement of his right in the easement from either a court or the servient estate holder.\textsuperscript{131}

Looking at nonused easements in the civil law through the framework of Calabresi and Melamed, the rule that nonused easements are automatically terminated after a certain period of nonuse might be considered a quasi-property rule. The automatic termination of easements by nonuse is like a property rule in that whether the easement ends is in the hands of the holder of the easement, the beneficiary. As long as the dominant estate holder uses the easement, it will continue to exist. If the arrangement between David and Sara was that David could drive across Chateau Noir, then so long as David uses the easement on the last day of the twenty-ninth year, his easement would remain intact for at least the next thirty years.\textsuperscript{132} Prior to the thirty-year mark, however, the easement cannot be terminated without David’s consent. Thus, the civilian rule is like a property rule.

Where the rule differs from a traditional property rule, though, is that once thirty years pass, the servitude will be terminated without David’s consent if he has not used it. That the easement may terminate without David’s consent is a liability-like feature of the civil law rule. However, to consider the civil law rule a liability rule would be incorrect given that the nonholder of the servitude, Sara, cannot terminate the servitude at her whim—the termination will only occur based on the inaction of David. Moreover, Sara need not compensate David for the extinguishment; the servitude simply vanishes as a matter of law. Thus, the civil law rule is a property rule with a few liability rule features, or more simply put, the rule is a quasi-property rule.

\section*{B. \textit{The Inefficiency in Applying a Quasi-Property Rule}}

The inefficiencies of the American common law against termination by nonuse are caused by the application of a property rule to nonused easements.\textsuperscript{133} Given that the civil law does not view easements under a pure property lens, but instead looks through a quasi-property lens, some of the problems created in the common law are remedied. One noted problem of the common law is that because it does not allow the servient estate holder to easily alter the arrangement, the burdened party is essentially required to predict his future opportunity costs, as well as the opportunity costs of his successors.\textsuperscript{134} Because parties are unable to forecast their long term opportunity costs, the common law creates the possibility of long term loss for the servient estate holder. This is not as great of a problem under the civil law because the law

\textsuperscript{130} M. PLANIOL, TREATISE ON THE CIVIL LAW, VOL. 1, PART 2 758 (La. State Law Inst. trans., 1959) (1939).

\textsuperscript{131} Id.

\textsuperscript{132} C. CIV. art. 706 (Fr.).

\textsuperscript{133} See Part II.B.

\textsuperscript{134} See Part II.B.1.
automatically removes the easement after a certain period of nonuse.135 Thus, there is a temporal restriction on the amount of loss that can the servient estate holder may accumulate. A similar limitation is placed on the amount of societal loss that can be suffered under the civil law rule.136 Whereas the American rule allows for these gains to go perpetually unrecognized, the civil law rule provides a cap on how long the societal loss may continue.

Because the quasi-property rule of the civil law does not allow nonuse to continue indefinitely, long-term speculative purchasing on the part of the dominant estate holder is also discouraged.137 Beneficiaries, like David, may forecast that Blackacre will eventually transform into Eden, but David must act on that speculation within an established time frame. The civil law rule is not a perfect remedy in this regard because David does have the ability to interrupt the prescriptive period by merely using the easement, but the civil law rule may lessen speculative purchasing to some extent.

The civil law rule also provides at least some (albeit minimal) relief for the holdup problem that arises under the common law.138 Because the civil law places a time limit on how long an easement can remain unused, the dominant estate holder is restricted in how long he may hold out in negotiations with the holder of the servient estate. This is a less-than-perfect solution for the holdup problem, however, because the dominant estate holder has the option of using the easement and restarting the prescriptive period, thereby restarting the period in which he may holdup the servient estate holder.

Thus, looking at nonused easements through a quasi-property lens remedies some of the inefficiencies created by the common law property rule; however, the quasi-property lens also creates its own inefficiencies. These inefficiencies stem from the inability of a governing body to predict parties’ optimal level of use and the promotion of the overuse or underuse of easements.

1. Inability to Predict Optimal Use

By providing a minimum amount of time within which an easement must be used, the civil law sets a floor for the quantity of use the dominant estate holder must make of the easement. Put another way, civilian systems have pre-determined the maximum amount of nonuse for which parties may contract in an easement arrangement. While this time period may be shortened by the parties, it, under traditional civil law, may not be lengthened.139

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135 See Part III.A.
136 For an explanation of the societal loss suffered under the common law rule against termination by nonuse, see Part II.B.2.
137 For an explanation of how speculative purchasing is allowed under the common law rule, see Part II.B.3.
138 See Part II.B.4 for an explanation of how the common law rule allows for the dominant estate holder to holdup the servient estate holder.
139 Ober v. McGinty, 66 So. 2d 385 (La. App. 2d Cir. 1953); Le Bleu v. Le Bleu, 206 So. 2d 551 (La. App. 3d Cir. 1967); Bodcaw Lumber Co. v. Magnolia Petroleum Co., 120 So. 389 (La. 1929); BAUDRY-LACANTINERIE & TISSIER, supra note 121, no. 96 at 56.
140 Louisiana Health Service & Indem. Co. v. McNamara, 561 So. 2d 712 (La. 1990); BAUDRY-LACANTINERIE & TISSIER, supra note 121, no. 96 at 56.

Under traditional civil law, contractual freedom as it applied to prescription was quite limited. For example, under the Greek Civil Code, all transactions amending the conditions of prescription are null and void. Astikos Kodikas [A.K.] [Civil Code] art. 275 (Greece). Under French civil law, prescription could be shortened but not lengthened. E.g., Civ. Dec. 4, 1895, D. 96. 1. 241 (Fr.); Req. Nov. 15, 1909, S. 1911. 1. 253 (Fr.). However, there have been recent changes to these limitations on parties’ contractual freedom. The recent Réforme de la
The problem with setting a use floor—or nonuse ceiling—is that just as individual contracting parties are unable to predict their eternal opportunity costs,\textsuperscript{141} the government is likewise unable to predict the optimal amount of use and nonuse for a particular easement. In fact, the government is in a worse position to make forecasts regarding the use or nonuse of any particular easement because the government has no information about each individual easement or each particular dominant and servient estate holder.

Moreover, the approach civilian jurisdictions have taken in establishing prescriptive periods for nonused easements is a shotgun approach: civil law systems create one time period governing all types of easements, and even more broadly, all forms of servitudes. The problem with this approach is that a variety of types of easement arrangements exist, and the maximum level of nonuse (or minimum level of use), is not necessarily the same for each easement situation. David may contract for the right to drive across Blackacre, or he may contract for the right to lay a pipeline across the land. The optimal amount of nonuse for a pipeline arrangement between David and Sara is likely not the same as the optimal amount of nonuse for a right-of-way between the parties. Regardless of what the most efficient time limitation is in each situation, David and Sara are in a much better position than the government is to choose that limitation.

2. Allowing Underuse or Encouraging Overuse

Assuming the government is incapable of accurately predict the optimal level of nonuse of an easement, there are two options for the time period a civilian system chooses: either the government can choose an amount less than the optimal level of use or the government can choose an amount greater than the optimal level of use. If the government picks the former, then the level of use chosen will allow for the underuse of easements. Allowing the underuse of easements gives rise to the societal loss problem that exists in the common law;\textsuperscript{142} while an easement is underused, the servient estate holder could be utilizing the estate in a more efficient manner that might create societal gains.

If the required amount of use is set too high, i.e. the time period set is too low, the overuse of easements will result. In order to maintain the easement, the beneficiary will be required to use the easement more than is optimal. This encourages a wasteful use of the easement over Blackacre by David. In other areas of property law, however, doctrines are created to discourage or prohibit the wasteful use of property.\textsuperscript{143} By setting a strict limit on the amount of nonuse, the civil law of easements promotes the overuse (and wasteful use) of property.

Like the common law property rule, the civil law quasi-property rule is far from perfect. Underuse, overuse, and predictions of optimal use are all side effects of viewing nonused easements through the civilian quasi-property lens. Recognizing the inefficiencies created in both systems, however, may allow for the deduction of a more efficient solution.

\textit{prescription en matière civile} revised French Civil Code article 2254 such that it now allows parties to increase or decrease the applicable prescription period. \textit{See} Law No. 2008-561 of June 19, 2008, Gazette du Palais, p. 2485.

\textsuperscript{141} \textit{Supra} Part II.B.1.
\textsuperscript{142} \textit{See} Part II.B.2.
\textsuperscript{143} Examples of doctrines designed to prevent the wasteful use of property include the rule of capture and the doctrine of waste. \textit{See} Howell v. Union Producing Co., 392 F.2d 95, 98–99 (5th Cir. 1968) (rule of capture); \textit{POSNER, supra} note 12 (doctrine of waste).
PART IV. THE BELL AND PARCHOMOVSKY GLOSS

The automatic application of static property or quasi-property rules to nonused easements has the potential to create inefficient results. That said, viewing easements through a property lens is not without some merit because property rules help encourage investment and development.\(^{144}\) To adequately encourage development, the holder of the easement must be able to reap all of the benefits of the land.\(^{145}\) If the easement holder cannot gain all of the benefits of the easement, he is less inclined to invest in the easement because he will not receive back the full payoff for his investment. Property rules prevent easements from being terminated at the whim of the servient estate holder. If the servient estate holder was able to unilaterally end an easement, the easement holder might be less inclined to develop the easement because he might not recognize all of the gains from his investment.

Investment and development is an excellent, if not the best, reason to apply property standards to rights in real property. When an easement becomes nonused, however, investment and development automatically cease. A nonused easement is by definition not in use, and thus not being developed.\(^{146}\)

Thus, it appears that the reason to apply property standards to easements vanishes upon nonuse, and only the aforementioned problems remain. If that is correct, in order to continuously employ the most efficient entitlement protection to easements, at the point in which an easement becomes a nonused easement, the governing rule should shift from a property standard to a liability rule; nonuse should act as a trigger for a new set of rules.

The notion that property and liability rules may be dynamic was recently discussed by legal scholars Abraham Bell and Gideon Parchomovsky.\(^{147}\) Building on the Calabresi and Melamed framework, Bell and Parchomovsky proposed that entitlement protections may shift between property and liability rules to create what they referred to as “pliability” rules.\(^{148}\) The scholars recognize six pliability rules. The first rule is the classic pliability rule which allows for the transforming of a property rule into a liability rule upon the occurrence of a triggering event.\(^{149}\) The second rule is the zero order pliability rule which allows for an initial property rule to morph into a no-liability rule meaning that upon the occurrence of the triggering event, no third party automatically gains a superior right to the original entitlement holder; instead, there is simply open, common access over the formerly protected entitlement.\(^{150}\) The third rule is the simultaneous pliability rule. Under the simultaneous pliability rule, an entitlement is governed by both liability and property rules, but there is no discrete triggering event that delineates when

\(^{144}\) See Bell and Parchomovsky, supra note 13, at 27.


\(^{146}\) Nonuse, in this context, means complete and total nonuse. The concept of complete and total nonuse inherently carries with it an element of time, i.e. nonuse must continue over some period of time.

\(^{147}\) See Bell and Parchomovsky, supra note 13.

To their credit, Bell and Parchomovsky note that other scholars, and perhaps even Calabresi and Melamed themselves, have flirted with the concept of dynamically applying property standards and liability rules. See id. at 25 n.102.

\(^{148}\) Id. at 5.

\(^{149}\) Id. at 31–32.

\(^{150}\) Id. at 39.
governance by one rule ends and the other begins; instead, what rule governs at any moment depends upon the type of use of the entitlement. The fourth rule created is the property rule which operates in the reverse of the classic pliability rule, meaning that the entitlement protection initially employed is a liability rule, and upon the occurrence of a triggering event, a property standard kicks in. The fifth rule is the title shifting pliability rule. This rule allows for the transfer of property standard protections from one entitlement holder to another. Finally, the sixth rule is the multiple stage pliability rule which does not restrict the number of shifts from property to liability rules (or vice versa). Instead, under the multiple stage pliability rule, the rule governing an entitlement may change multiple times based on multiple different circumstances.

The six rules described by Bell and Parchomovsky are distinct, but there is a unifying theme among them: they all allow changed circumstances to be incorporated into a legal rule by identifying the change (or changes) and allowing that change to serve as a trigger that shifts protection mode. This idea that a change in circumstance may change the mode of protection is perhaps as simplistically elegant as The Cathedral’s original structure.

PART V. THE EFFICIENCY OF LOOKING THROUGH A PLIABILITY LENS:
PRIVATE EMINENT DOMAIN BASED ON NONUSE

Applying the basic Bell and Parchomovsky theory that a triggering event may change how an entitlement is governed, nonuse could serve as the triggering event to switch from viewing easements under a property (or quasi-property) lens to looking at the easement through a different lens, namely a liability lens. It has already been demonstrated how the benefits of property rules no longer apply once an easement becomes nonused. However, to accurately determine whether nonuse should serve as a trigger to employ liability rules, the benefits of applying liability rules to nonused easements must first be identified. If benefits exist such that it is more efficient to apply liability rules to nonused easements as opposed to property standards, then nonuse is a good trigger point under the Bell and Parchomovsky gloss because it will allow the most efficient rule to always be employed. It must be determined, however, how nonuse would practically act as the trigger point.

A. Benefits of Applying Liability Rules to Nonused Easements

Liability rules give the nonholder of the entitlement the opportunity to extinguish the entitlement by paying an objectively determined value to the easement holder. In the context of nonused easements, this means that a liability rule would allow the servient estate holder to end the easement by compensating the dominant estate holder. By looking at nonused easements through a liability lens, it becomes clear that a pure liability would prevent the aforementioned

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151 Id. at 49–50.
152 Id. at 53–54.
153 Id. at 54.
154 Id. at 59.
155 Id.
156 Id. at 67.
inefficiencies of both the common law and the civil law rules. Moreover, application of a liability rule would create additional benefits.

1. Remedy Inefficiencies of the Common and Civil Law

Because liability rules allow for the termination of the agreement by the servient estate holder, an optimal level of nonuse—or at least a level of nonuse closer to the optimal level—will always result. Under liability rules, the parties to the easement decide when a nonused easement terminates, as opposed to the government deciding when an easement should terminate from nonuse. Compared to the government, the individuals in the easement will have superior knowledge about the optimal level of nonuse, thus the civil law problems created by allowing the government to decide the most efficient amount of nonuse will not arise.

Just as the government is not required to choose the optimal level of nonuse for an easement, the individual parties to an easement arrangement are also not required to predict all of their future opportunity costs under a liability regime. A liability rule would allow for changing conditions to occur; if the servient estate holder mis-forecasts her future opportunity costs, she can extinguish the easement, compensate the dominant estate holder, and then be able to recognize her actual opportunity costs.

A liability rule also discourages societal loss. Once the servient estate holder realizes that she can create greater profit from Blackacre by doing something other than protecting (or at least not interfering with) a nonused easement, the servient estate holder can terminate the easement. Upon termination of the easement, the servient estate holder is likely to engage in her new-found opportunity costs, thus creating societal gains.

Since the servient estate holder is able to terminate the easement, liability rules discourage secret, speculative purchasing by the dominant estate holder. If David purchases an easement over Blackacre with the intention of using it only when Blackacre transforms into Eden, he must tell Sara of this plan at the outset of their easement negotiations, or he will risk having the easement taken from him by Sara in return for some objective compensation. Thus, under a liability regime, David is still allowed to gamble, he just must explicitly contract to make that gamble. That a liability rule diminishes speculative purchasing may not seem like a major advancement over the application of a property standard because even when property standards are employed, the common law also allows for parties to contract around speculative purchasing. However, under the common law rule against termination by nonuse, because the easement automatically runs with the land, the onus for instigating contractual negotiations against speculative purchasing is on the servient estate holder. This is a faulty default rule because the dominant estate holder is in a better position to know whether he will be engaging in speculative purchasing as he is the speculative purchaser. As seller to the speculative purchaser, Sara has no way of knowing the underlying rationale for David’s behavior. Because David has better

Admittedly, this is the optimal level of nonuse in the servient estate holder’s eyes. However, based on the manner in which just compensation is determined, the dominant estate holder will also be encouraged to release the servient estate holder at his optimal level of nonuse. See Part V.B.2 for more information regarding just compensation.

See Part III.B.1 for a discussion of how the civil law allows the government to pre-determine the most “efficient” level of nonuse.

There is no concern under the current law of the dominant estate holder mis-forecasting his future opportunity costs; he can simply release the servient estate holder if he chooses. See Part II.B.1.

See Part II.B.2 for a discussion of how societal loss is caused by the common law rule.
information about his own speculative purchase, the burden of contracting for such behavior should be on him. A liability rule, unlike a property standard, places this burden on David. Thus, the shift in the default rule regarding which party bears the burden of instigating contractual negotiations allows for more open, and therefore more efficient, easement transactions.

Finally, holdups are largely prevented by a liability rule. A dominant estate holder cannot hold up a servient estate holder because the servient estate holder has another alternative to transacting with the dominant estate holder: the servient estate holder can obtain a court ordered objectively determined value for the easement. Because the servient estate holder has options for ridding her land of the easement, the dominant estate holder is not in the position to hold her up.

2. Produce Superior Information

In addition to solving the problems created by the common and civil law property and quasi-property rules, liability rules also produce additional benefits. As stated above, liability rules prevent the dominant estate holder from speculatively purchasing the easement without the servient estate holder’s knowledge. More broadly, using a liability lens to examine nonused easements produces clearer information for both parties throughout the entire easement arrangement.

Initially, liability rules give parties an impetus to openly negotiate with one another and discover the true incentives each party has for entering the easement arrangement. If David wants to purchase the easement as an option-like contract, liability rules demand that he reveal that information to Sara. By revealing such information to Sara, Sara can better approximate the cost of the easement to her, and in turn, she may be able to decrease societal loss. If David tells Sara that he really only wants to use the easement once Blackacre magically transforms into Eden, then Sara can contract with David to allow her to use Blackacre for farming wheat until the transformation occurs (if it ever does). In this situation, David receives what he wants—the ability to drive through Eden should it ever appear—and Sara is able to continue using Blackacre productively until the time arrives for David to use the easement. Because Sara is able to use the property while David is awaiting the transformation, she can lower the price of the easement because her opportunity costs diminish. Moreover, societal loss will not occur while David is patiently waiting for his time of use to arrive as Sara is able to utilize the land.

This production of superior information continues throughout the easement arrangement. If suddenly Blackacre becomes prime real estate for the mega shopping complex, Sara can exit the easement arrangement, so long as she pays David just compensation. If David loses faith in the second-coming of Eden, then his just compensation would be lower than if he believes the moment of the transformation is fast-approaching. Because David’s valuation of the easement is tied to his just compensation, David is encouraged to produce superior information about his own costs throughout the easement arrangement. By having up-to-date information about the opportunity costs of both Sara and David, Blackacre is kept in a constant state of efficiency.

3. Assign Risk of Nonuse to Nonusing Party

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162 How just compensation should be valued is discussed in Part V.B.2.
In addition to providing superior information, using a liability lens to look at nonused easements also places the risk of losing the easement on the appropriate party. Because a liability rule allows the servient estate holder to terminate the nonused easement, the risk of nonuse falls upon the dominant estate holder. Requiring the dominant estate holder to bear this burden makes sense because the beneficiary is the party in the position to control the nonuse. The party to the arrangement who can control whether use occurs should be the party that takes on the risk of not using the easement.

In sum, liability rules produce great benefits when applied to nonused easements. In addition to solving the problems present in the common law and civil law, applying a liability rule to nonused easements also places the risk of nonuse on the nonusing party and encourages the production of superior information, which, in turn, allows the servient estate to be kept in a constant state of efficiency. Upon this recognition that liability rules are more efficient for governing nonused easements than property standards, it becomes clear that nonuse is an ideal trigger according to the Bell and Parchomovsky pliability theory.

**B. Creating a Pliability Regime: Private Eminent Domain Based on Nonuse**

That a pliability regime might more efficiently govern easements that become nonused is the easier portion of the analysis; the harder question is how to actually implement this more efficient regime.\(^{163}\) Under the Bell and Parchomovsky theory, there are six different possibilities for how the pliability regime could be structured. Each form of the pliability rules the scholars promote might be advantageous depending upon, at a minimum, societal goals, the type of easement in question, and the parties involved in the easement arrangement. For the sake of initial analysis as to how a pliability regime might be enacted, it is simplest to utilize the classic pliability rule.

The classic pliability rule allows for the transformation of a property rule into a liability rule upon the occurrence of a triggering event. In the case of nonused easements, that triggering event would be the easement falling into a state of nonuse. Thus, prior to an easement being nonused, i.e. when the easement is a used easement, the classic property rule will apply. Once the easement becomes a nonused easement, liability rules will govern such that the servient estate holder will be allowed to take the easement away from the dominant estate holder by compensating the dominant estate holder with some objectively determined amount.

This description of a pliability rule for easements is akin to the most recognizable liability rule: eminent domain. The power of the government to seize private property and convert it to public use is the archetype of a liability rule.\(^{164}\) Under eminent domain, the government is able

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\(^{163}\) At this point, one might argue that the civil law system should actually itself be classified as a pliability rule under the Bell and Parchomovsky gloss because it allows for a shift in how the easement is protected. Though whether the dominant estate holder owns the easement does change under the civil law rule, how the easement is protected does not actually change. During the period the civil law allows for nonuse, the dominant estate holder’s right to the easement is protected by a property standard. Once the period of nonuse has run, the easement automatically reverts back in ownership to the servient estate holder. Thus, there is no longer an easement; the former easement is extinguished by confusion. As such, though the dominant estate holder’s rights shift in the civil law, there is never a second means employed to govern the easement because the easement vanishes.

\(^{164}\) For a definition of eminent domain, see BLACK’S LAW DICTIONARY 562 (8th ed. 2004). Calabresi and Melamed use eminent domain as the example of a liability rule. See The Cathedral, supra note 1, at 1106–07. Bell and Parchomovsky use eminent domain as an example of a multiple stage pliability rule. See Bell and Parchomovsky, supra note 13, at 59–64. While Bell and Parchomovsky refer to eminent domain as a multiple stage pliability rule, it is used here as the basis for a classic pliability rule. The Bell and Parchomovsky analysis finds the
to unilaterally take the landowners’ land without the landowner’s consent, but is required to pay just compensation.\textsuperscript{165} By using eminent domain as the foundation for the rule, and using nonuse as the trigger point for enacting this private form of eminent domain, a system of private eminent domain based on nonused is developed. Implementation of the pliability rule private eminent domain based on nonuse requires two determinations: first, how to implement nonuse as the trigger point, and second, once nonuse occurs, how to compensate the servient estate holder.

1. Setting Nonuse as the Trigger Point
   a. Clearing the Initial Constitutional Hurdle

From an efficiency standpoint, nonuse is the appropriate trigger for the aforementioned pliability rule of private eminent domain. However, the notion of allowing the nonconsensual termination of a one individual’s property right by another private party for her personal benefit may send up red flags of an unconstitutional taking.\textsuperscript{166} Traditionally, the law has not allowed private parties to take property from other private parties for the formers’ sole benefit.\textsuperscript{167} This principle prevented a group of farmers from taking property from a railway company to build a grain elevator in \textit{Missouri Pacific Railway Co. v. Nebraska.}\textsuperscript{168} In \textit{Missouri Pacific Railway Co.}, the Nebraska State Supreme Court ordered a railway company to give the farmers the desired land for the grain elevator, but the United States Supreme Court reversed, stating that “[t]he taking by a State of the private property of one person or corporation, without the owner’s consent, for the private use of another, is not due process of law, and is a violation of the Fourteenth Article of Amendment of the Constitution of the United States.”\textsuperscript{169}

While \textit{Missouri Pacific Railway Co.} seems to be an insurmountable hurdle for private eminent domain based on nonuse to climb,\textsuperscript{170} the recent, landmark case \textit{Kelo v. City of New London} may help remove the barrier.\textsuperscript{171} The \textit{Kelo} Court held that economic development was included in the meaning of public use for the purposes of taking private land through eminent

doctrine to fall into the sixth category of pliability rules because they view the eminent domain as having three steps: first, an individual’s property is protected by a property standard; second, the individual’s property is subject to a liability rule such that the Government may take the property; third, the now Government’s property is subject to a property standard. In the case of the easement, there is no need to include the third step because the easement will be destroyed by confusion once the servient estate holder takes the easement. Thus, in the case of easements, the form of eminent domain utilized is a classic pliability rule.

\textsuperscript{165} 26 \textsc{Am. Jur. 2d Eminent Domain} § 2 (2000).

\textsuperscript{166} Though neither the servient estate holder nor the dominant estate holder might be a government entity, the Takings Clause issue must still be raised as in order for the servient estate to take the easement via a liability rule, court action will be necessary. Thus, there is a state actor involved and if the taking is unconstitutional, the rule of \textit{Shelley v. Kraemer} restricting state courts from implementing constitutionally-violating actions should apply. \textit{See} 334 U.S. 1 (1948).

\textsuperscript{167} As the majority writes in \textit{Kelo}, “[I]t has long been accepted that the sovereign may not take the property of \textit{A} for the sole purpose of transferring it to another private party \textit{B}, even though \textit{A} is paid just compensation.” \textit{Kelo}, 545 U.S. at 477.


\textsuperscript{169} \textit{Id.} at 417.


domain. In *Kelo*, the City of New London, acting on behalf of a private corporation, was permitted to take real property from individuals as part of executing a comprehensive redevelopment plan approved by the city. In reaching its decision, the Court rejected the argument of the property owners that economic development should not qualify as public use. Instead, the Court stated that “[p]romoting economic development is a traditional and long-accepted function of government. . . . [T]here is no basis for exempting economic development from our traditionally broad understanding of public purpose.”

Thus, *Kelo* provides that so long as economic development projects impact the public, such projects are within the meaning of the Fifth Amendment. While converting an individual nonused easement to return to the servient estate appears to not have the same societal impact as the economic development project in *Kelo*, there is still some public impact, and in the aggregate, the public impact could be substantial. In fact, it is arguable that the promotion of economic development rationale applies even more in the case of nonused easements. In *Kelo*, the holders of the property right used their property rights and received a benefit from those property rights: they lived in their homes. While the private corporation in *Kelo* was theoretically going to create benefits by their redevelopment plan, to determine if the redevelopment plan was efficient, any benefits created by the private corporation had to be offset by the loss of benefits by the individual property owners. In the case of nonused easements, the dominant estate holder is not actually using the easement, thus there is nothing to offset the potential benefits the servient estate holder could reap.

b. Determining the Point of Nonuse

Presuming that the taking of a nonused easement meets constitutional muster, the task must turn to determining when nonuse reaches a point such that the servient estate holder should be allowed to take the easement. As the impetus for enacting the pliability rule of private eminent domain is the promotion of continuous efficiency, the taking should only be allowed at a point when nonuse becomes inefficient. In other words, if taking the easement from the servient estate holder is more efficient than not taking the easement, then the taking should be allowed.

As efficiency is the goal, the taking of the easement should be a Pareto-superior transaction. A Pareto-superior transaction is one in which at least one person is better off and no one is worse off. For nonused easements, Pareto efficiency occurs so long as the value of the

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172 *Id.* at 484.
173 *Id.* at 473–74.
174 *Id.* at 484–85.
175 *Id.* at 485.
176 *Id.* at 469.
177 See Part II.B.2 for a discussion on societal loss from nonused easements.

Moreover, allowing private parties to take nonused easements by paying just compensation is similar to allowing parties to take nonused easements through adverse use. The only difference is that whereas the adverse possessor of the easement must take affirmative steps to use the easement, the take under a theory of private eminent domain based on nonuse must pay the dominant estate holder for the easement.

179 *Posner*, supra note 12, at 12. Generally, Pareto efficiency is not used; instead, Kaldor-Hicks efficiency is the traditional form of efficiency used to determine whether a law or policy is actually efficient. *Id.* at 13. Kaldor-Hicks efficiency states that outcome is efficient if it creates a result in which the winner could fully compensate the
land to the servient estate holder with no easement \((SE_{NE})\) minus the value of the easement to the dominant estate holder \((DE_{E})\) is greater than the value of the land to the servient estate holder with the easement \((SE_{E})\). Thus, so long as

\[
SE_{NE} - DE_{E} > SE_{E}
\]
termination of the easement is efficient. Put another way, so long as the servient estate holder values getting rid of the easement more than dominant estate holder values keeping the easement, then termination of the easement is efficient. Mathematically, this means that if

\[
SE_{NE} - SE_{E} > DE_{E}
\]
termination of the easement by the dominant estate holder is efficient. This situation is efficient because the gains made by the servient estate holder in terminating the easement are large enough that the servient estate holder can compensate the dominant estate holder for his loss while still reaping a benefit.\(^{180}\)

For example, suppose that David stops using his easement to drive across Blackacre. He values his nonused easement at $10. Sara values Blackacre with the easement at $100,000, and without the easement at $100,001. In such a situation, it would not be efficient to terminate the easement because even though David is not using the easement, he values it more than Sara values getting rid of it. If, on the other hand, David values his easement at $10, Sara values her land with the easement at $100,000, and she values Blackacre without the easement at $200,000, then it is efficient to remove the easement from Blackacre.\(^{181}\)

At this point, it may be questioned why the law must be involved if the servient estate holder values ridding her land of the easement more than the dominant estate holder values maintaining his easement; if the solution is efficient, arguably the free market would dictate that outcome already. Theoretically this is true, but recall that in practice, the dominant estate holder will hold up the servient estate holder for an amount higher than what the free market would demand.\(^{182}\) Thus, the reason the law must be involved through a pliability rule is to determine the servient estate holder’s and dominant estate holder’s value of the easement, \(SE_{E}\) and \(DE_{E}\) respectfully.\(^{183}\) As the example illustrates, determining when to terminate based on nonuse requires a factual finding of how much each party values the easement. Inarguably, such a finding will be difficult. The values of \(SE_{NE}\) and \(SE_{E}\) may be determined by the market price for selling Blackacre with and without the easement. While the numbers would be somewhat subjective, an appraisal of the property could be done with the aid of experts.

\(^{180}\) See id.

\(^{181}\) See supra note 107 for a comparison to the contract theory of efficient breach.

\(^{182}\) See supra Part II.B.4.

\(^{183}\) In The Cathedral, Calabresi and Melamed stated that if the market valuation of the entitlement is inefficient or unavailable, liability rules were the superior protective method. The Cathedral, supra note 1, at 1110. Here, there is no traditional market value for \(SE_{E}\) and \(DE_{E}\), and the value assigned by the parties themselves will be inefficient given the holdup problem. Thus, using the equation \(SE_{NE} - SE_{E} > DE_{E}\) to determine when nonuse occurs for the purpose of private eminent domain is in line with the arguments put forth in The Cathedral.

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Determining the value of the nonused easement to the dominant estate holder, $DE_E$, is far more challenging because there is no market for easements such that an appraiser could easily develop an objective value for the nonused easement. One initial concern in even attempting to give $DE_E$ a value is that the holdup problem could return: David might artificially inflate how much he values the easement, thereby effectively preventing Sara from ridding Blackacre of the easement by this system of private eminent domain based on nonuse. This concern, however, is minimized by regulating the moment at which David’s value of the nonused easement should be used to determine whether ridding Blackacre of the easement is efficient. The value of the nonused easement should be determined based on how much the dominant estate holder valued the easement the day before he knew the servient estate holder wanted to rid the servient estate of the easement.\textsuperscript{184} If the value of the easement to the beneficiary is taken the day after the dominant estate holder knows that the servient estate holder wishes to rid Blackacre of the easement, then the value of the easement to the dominant estate holder will rise exponentially because there is an increase in demand for the easement. Thus, the value of the dominant estate holder must be calculated the day before he became aware of the desires of the servient estate holder.

Putting the time at which $DE_E$ should be determined aside, there remains the issue of how to set an objective value for the nonused easements given the lack of a market for nonused easements. One possible way to accurately calculate the value of the nonused easement is through evidence that establishes how much the dominant estate holder originally valued the easement, how much the dominant estate holder originally intended to use the easement, and how much the dominant estate holder has used the easement. For example, suppose that when David purchased the easement for $100, he intended to drive across Blackacre once a week. After fifty weeks of driving across Blackacre each week, David stops. At this point, the value of the easement to David has potentially decreased. He has had fifty-one weeks of possible use, but only used the easement for fifty of those weeks. Thus, his value of the easement may be calculated as:

\[
\frac{50}{51} \times 100 = 98.04
\]

Now suppose that David continues to not the easement for 100 weeks. At this point, he has used the easement for fifty weeks and not used it for the following 100 weeks. In this case, the value of the easement to him might be calculated as:

\[
\frac{50}{150} \times 100 = 33.33
\]

The more that David fails to use the easement, the less he objectively values the easement.

The evidence required to make such evaluations could be presented. David’s original valuation of the easement can be ascertained based on the contract price for the easement, and his actual use of the easement can be presented through his own testimony with the corroborating testimony of others who saw him use the easement. The difficult number to obtain will be how much David originally intended to use the easement. Such information could be gained through David’s testimony and through Sara’s testimony to the extent that David revealed his plans to Sara.

\textsuperscript{184} The idea of valuing property the day before a demand-altering event occurs is used for dissenters’ rights in merger agreements. \textit{See, e.g.}, NY CLS BUS CORP. § 1118(b).
That valuing the nonused easement relies heavily on David’s testimony does raise some concerns with the efficiency of instituting this idea of private eminent domain based on nonuse. Law and economics scholars James Krier and Stewart Schwab argue that when valuation by a court is too subjective, such rules are problematic.\textsuperscript{185} According to Krier and Schwab,

[j]udges will have problems assessing the correct values for the same reason private bargainers would: limited, hidden information. If parties can hide their valuations from each other, they can hide them from a judge. Judges can probably assess subjective values accurately enough when the relevant information is out in the open, but in such cases bargaining might work just as well, since it’s hard to be open and at the same time strategic.\textsuperscript{186}

In their analysis, Krier and Schwab limit their critique of liability rules to multi-party situations,\textsuperscript{187} but their point has value in the bilateral monopoly situation that arises for easements: having the information out in the open would increase the ability of a court to establish a correct value. The benefit of having private eminent domain based on nonuse is that it encourages parties to provide superior information to one another. Thus, David will be encouraged to put out in the open his intended use of the easement. If David intends to use the easement for the first fifty weeks, and then is headed to France for two years, but will be then returning to his tract of land and would like to still have use of the easement, this type of pliability rule encourages him to include such information in the easement agreement. By having such information in the agreement, courts are in a better position to calculate the actual value of the nonused easement to the dominant estate holder.

Given that the valuation of the easement to the dominant estate holder is based in part on the amount the beneficiary uses the easement, a concern might arise that such a rule would encourage overuse of the easement. If David knows that by not using the easement he may lose it, then, much like when the civil law overestimates the optimal amount of use,\textsuperscript{188} David will be inclined to use it unnecessarily. While that is certainly a concern, it is less likely to occur under this pliability regime than it will in the quasi-property regime of the civil law because parties under the aforementioned pliability system can contract around the rule. If David wants to not use the easement for an extended period of time, he will be encouraged to include that information in the original agreement. Obviously this places the onus on David to contract for his projected nonuse, but as previously stated, this is shift in who bears the burden of predicting nonuse is the more efficient solution given that David is far better equipped to predict his own nonuse than Sara is.

In order to rid Blackacre of the easement, the servient estate holder will have to sue the dominant estate holder, so the concern may arise that a system of private eminent domain based on nonuse will increase litigation. Professors Ian Ayres and Paul M. Goldbart, however, argue that liability rules do not actually increase litigation. Professors Ayres and Goldbart state that “[u]nder a liability regime, litigation costs give the parties an additional impetus to negotiate and


\textsuperscript{186} \textit{Id.} at 462.

\textsuperscript{187} \textit{Id.} at 461.

\textsuperscript{188} See \textit{supra} Part III.B.2.
hence can make liability rules more efficient than property rules.” The knowledge that there may be future litigation increases the parties’ production of information from the beginning, thus resulting in contracts better-suited for the individual desires of the parties. The superior information included in the contract leads to a lesser chance that the parties will engage in litigation in the long run.

2. Structuring the Compensation

Upon determining the point of nonuse at which private eminent domain may occur, the next question that must be answered is how to compensate the dominant estate holder. The dominant estate holder should be compensated at least the amount at which he values his current use of the easement. This means the dominant estate holder should receive, at a minimum, the value he will lose from termination of the easement. This allows the dominant estate holder to be compensated for the loss he incurs from termination of the easement, but it does not compensate the dominant estate holder for the amount of the easement that he is not using. Such compensation is unnecessary. When the dominant estate holder failed to use his easement, the servient estate holder still had the responsibility of protecting the easement for the dominant estate holder’s potential use.

For example, Sara was not able to farm wheat regardless of whether David used the easement, as farming wheat would have impeded David’s ability to drive across Blackacre had he opted to use the easement. Thus, David’s easement received more protection from Sara than it required. In receiving this extra protection, David was compensated despite his nonuse. If Sara is made to pay David for that period of nonuse, then David is being paid twice.

The secondary benefit of requiring compensation to the dominant estate holder be at least at the amount of the used easement is that it encourages him to negotiate with the servient estate holder sooner rather than later. If Sara tries to take David’s easement through private eminent domain based on nonuse, then the longer David has not used the easement, the less compensation he may receive because his value of the nonused easement grows smaller the longer the easement sits in a state of nonuse. Thus, David has an incentive to try and negotiate with Sara as soon as he knows he will no longer use the easement. At this point, he can bargain with Sara to be paid for releasing Blackacre from the burden of the easement for a higher price than he might receive from a court later on.

In addition to compensating the dominant estate holder for the nonused portion of his easement, the law should also recognize that the servient estate holder cannot merely be let off the hook for initially engaging in a bad easement arrangement. When the value of the servient estate increases such that permitting the easement to continue is inefficient for the servient estate holder, the servient estate holder should have to pay the dominant estate holder some additional amount for being released from the easement arrangement. However, the total amount the servient estate holder pays the dominant estate holder cannot exceed the increased value that servient estate holder will receive by ridding the burdened estate of the easement. In other words, the total amount paid to the dominant estate holder cannot be greater than the difference

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190 Because the compensation scheme suggested should encourage negotiation, it helps to discourage litigation, a concern addressed in Part V.B.1.
between the price of the land without the easement ($P_{NE}$) and the price of the land with the easement ($P_E$).

Thus, in total, just compensation must be somewhere between the difference of the price of the land without the easement ($P_{NE}$) and the price of the land with the easement ($P_E$), and the price of the nonused easement ($P_{NU}$). Mathematically, the amount of just compensation ($JC$) can be expressed as:

$$P_{NE} - P_E > JC > P_{NU}$$

This means that a servient estate holder will never try to rid Blackacre of the easement if the value of the easement to the dominant estate holder exceeds the increased value of the servient estate sans easement. So, when

$$P_{NU} > P_{NE} - P_E$$

Sara will not try to remove the easement from Blackacre, even if there is nonuse. This means that Sara will only be incentivized to use private eminent domain based on nonuse when a court will allow an easement to be terminated under the aforementioned inefficient nonuse standard. Under the inefficient nonuse standard, if the value of the nonused easement is greater to the dominant estate holder than the increased value of the easement-less estate to the servient estate holder, then the easement cannot be terminated.

By compensating the dominant estate holder at some amount between $P_{NU}$ and $P_{NE} - P_E$, the servient estate holder will pay less than she would under the rule against termination by nonuse. Under American rule, the dominant estate holder will hold out for the entire increased value of the servient estate, i.e. the entire value of $P_{NE} - P_E$. Additionally, the proposed system prevents the dominant estate holder from holding up the servient estate holder. In fact, all parties are encouraged to remove the easement from the servient estate as soon as the easement has become inefficient under a system of private eminent domain based on nonuse. David is encouraged to enter into an arrangement with the Sara as soon as he has stopped using the easement because that is the time when $P_{NU}$ will be the greatest. This means that the least amount that David might be compensated for the easement is at its highest point; if David waits to reach a deal with Sara one month later, then $P_{NU}$ will be lower, so he may receive less compensation. Similarly, Sara has an incentive to reach a deal with David as soon as the easement is inefficient because the longer Sara waits, the greater the difference in $P_{NE}$ and $P_E$ may become because $P_{NE}$ will (presumably) grow. As the difference in $P_{NE}$ and $P_E$ increases, the amount that Sara might have to pay David will increase.

Of course, providing compensation under the theory of private eminent domain based on nonuse does revive the earlier criticism of scholars like Krier and Schwab—the judiciary may be assigning speculative values. Certainly determining the amount of compensation due is not an easy task and demonstrates that the system presented herein is not perfect. Be that as it may, the pliability rule of private eminent domain based on nonuse is superior in terms of efficiency to the current rules under the common law and civil law systems. The rule proposed allows for the parties with the most information to establish when the nonused easement should be terminated, thereby accounting for changed conditions to both the servient and dominant estates. Private

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191 See Part V.B.1.
192 Supra notes 184–86.
eminent domain based on nonuse discourages speculative purchasing and prevents holdups by allowing the servient estate holder to unilaterally extinguish the easement. And it decreases societal loss because the nonused easement will cease to exist, thus allowing the servient estate holder to use her estate more productively. All in all, looking at nonused easements through a pliability lens is more efficient than using the property lens of the common law or the quasi-property lens of the civil law.

CONCLUSION

The American common law for centuries has examined easements through a property lens and maintained that nonuse alone does not terminate an easement. The civil law has viewed nonused easements through a quasi-property lens, allowing easements to be terminated upon a statutorily-established period of nonuse. In doing so, both systems create inefficiencies that could be remedied by governing easements with a liability rule once easements become unused. Thus, the more efficient system is to govern easements by a pliability rule of private eminent domain based on nonuse, which uses nonuse as a trigger point to shift from employing a property standard to employing a liability rule.

As developed herein, private eminent domain based on nonuse is a judicially-imposed doctrine that requires a fair amount of fact finding of the parties’ valuations for the nonused easement. The judicial fact finding necessary to implement private eminent domain inevitably will give some pause; courts, some will argue, are not the most efficient bodies for determining individuals’ valuations of rights in real property. Be that as it may, the inability of the market to efficiently govern nonused easements forces the judiciary to take on such an evaluation role.

If this article is correct in asserting that terminating easements due to their nonuse is a more efficient use of property, why not apply the same, or at least a similar, concept to other nonused real property rights? There are some obvious advantages to applying private eminent domain based on nonuse to easements—there is a clear party to bring the action (the servient estate holder), there is a clear recipient of the easement once it has been terminated (again, the servient estate holder), etc.—but that is not to say that the general concept of pliability rules may not be freshly applied to other antiquated property doctrines. If correctly employed, pliability rules stand to ensure that the entitlement-protection method governing real property rights is always the most efficient entitlement-protection method.

And perhaps that is the broader and more important point of this Article: there are an endless number of property doctrines in both the common law and the civil law that have been governed by the same, static entitlement-protection methods since their creation. But as our legal theories regarding entitlement protections grows more sophisticated, it is well worth our time to re-examine these long-standing property doctrines to determine if they still produce the most efficient results.