

## EASEMENTS AND CHANGE

John A. Lovett\*

*Disputes over easement relocation have a long and tortured history in American law, much more complex than the orthodox view of easement law has acknowledged. The majority mutual consent rule evolved over two centuries, but courts and judges in some states have always resisted remorseless application of the rule. Outside of the United States, many countries have employed versions of the civil law servitude relocation rule first adopted in France in 1804 and used in Louisiana for two centuries. Promulgation of Section 4.8(3) of the Restatement (Third) of Property: Servitudes in 2000 lead to a significant re-evaluation of easement relocation law in the United States. Today some form of unilateral relocation is permitted in at least half of the states and courts in five states have adopted robust versions of the Restatement approach to easement relocation.*

*The Uniform Easement Relocation Act (“the U.E.R.A.”), approved and recommended to state legislatures by the Uniform Law Commission in July 2020, offers state legislatures a chance to unify American easement relocation law. The U.E.R.A. builds upon the doctrinal innovation of the Restatement but refines and strengthens the Restatement approach to easement relocation. It establishes a significant but nuanced easement relocation right and nests it within a carefully constructed easement relocation procedural regime. The U.E.R.A. will provide greater flexibility for servient estate owners, allow for useful development of servient estates, but will not impose any material easement-related harm on an easement holder. The U.E.R.A. promises to promote more mutual accommodation between servient estate owners and easement holders. It also more accurately situates easements in the architecture of American property law.*

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\* De Van D. Daggett, Jr. Distinguished Professor, Loyola University New Orleans College of Law; Reporter, Uniform Easement Relocation Act, Uniform Law Commission. The author gratefully acknowledges helpful comments on earlier drafts provided by Greg Alexander, Jane Baron, Bethany Berger, Sara Bronin, Hanoch Dagan, Nestor Davidson, Rashmi Dyal-Chand, Susan French, Alexandra Klass, Tim Mulvaney, Chris Odinet, Robin Malloy, Chris Serkin, Joe Singer, James C. Smith, and Robert Verchick. All errors and omissions are those of the author.

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#### INTRODUCTION

Imagine a parcel of land burdened by an easement established sixty years ago in favor of an adjoining parcel of land. The easement gives the owner of the dominant estate, the adjoining parcel, a right of access across the burdened parcel, the servient estate, to and from a nearby public road. Although the servient estate is located near a growing population center and the local zoning ordinance would allow construction of seven new houses on the servient estate, the current location of the easement bisects several of the potential lots and thus would prevent construction of several of the houses.<sup>1</sup>

Now, suppose the servient estate owner develops a plan to relocate the easement. The easement's new location will make room for all seven lots and houses. The new driveway on the relocated easement will be just as wide and safe to use as the current one. The easement will terminate at the same points on the public road and the dominant estate. The servient estate owner will pay all costs of relocating the easement, including planning, construction, and preparation and recordation of a written instrument documenting the relocation. The servient estate owner will also assure that the dominant estate owner enjoys uninterrupted use of the easement in its current location until the new driveway is inspected and complete.

If the dominant estate owner rejects these plans, does the servient estate owner have any recourse? In some U.S. states, the servient estate owner would have a reasonable prospect of obtaining judicial relief because a servient estate owner enjoys a right—quite robust in some states and more

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<sup>1</sup>This hypothetical is loosely based on the facts of *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053 (Mass. 2004). For detailed discussion of *M.P.M. Builders*, see *infra* notes 188–92.

limited in others—to relocate an easement to a more convenient location, at the servient estate owner’s expense, provided the new location offers the same functional benefit to the easement holder.<sup>2</sup> In the other states and the District of Columbia, the opposite rule, commonly known as the “mutual consent rule,” generally prevails: even if the proposed relocation will not cause any material harm to the easement holder and will greatly benefit the servient estate owner, a servient estate owner cannot relocate an easement unless the easement holder consents.<sup>3</sup>

This predicament has frustrated servient estate owners seeking to develop their land, not to mention their real estate lawyers, for many decades. Fortunately, a practical solution to this problem and the resulting disharmony in American property law is now at hand. On July 15, 2020, the Uniform Law Commission (the “ULC,” formerly known as the National Conference of Commissioners of Uniform State Laws), approved and recommended to the states a new uniform act, the Uniform Easement Relocation Act (“the U.E.R.A.” or “the Act”) that offers a carefully balanced, judicially controlled mechanism to help landowners, their lawyers, and courts solve this recurring problem that has interfered with the productive development of land burdened by an easement in many states.<sup>4</sup> During the past two years, the U.E.R.A. was introduced in five state legislatures<sup>5</sup> and has been adopted in Nebraska and Utah.<sup>6</sup> Other state legislatures will likely consider the Act in the near future as they focus on reigniting stagnant economies and addressing the chronic undersupply of housing in the United States.

The U.E.R.A. solves the problem presented by the mutual consent rule by giving the owner of a servient estate the right to relocate an easement to another location on the servient estate, or to other land, at the servient estate

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<sup>2</sup> See *infra* Parts I.B, I.C.1, I.E.1, and I.F.

<sup>3</sup> See *infra* Part I.E. 2–3.

<sup>4</sup> UNIF. EASEMENT RELOCATION ACT (UNIF. L. COMM’N 2020); see also Easement Relocation Act, UNIFORM LAW COMMISSION, <https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails> (last visited July 20, 2021).

<sup>5</sup> S.B. 164, 73d Gen. Assemb., Reg. Sess. (Colo. 2021); L.B. 501, 107th Leg., Reg. Sess. (Neb. 2021); S.B. 106, 81st Leg., Reg. Sess. (Nev. 2021); H.B. 414, 64th Leg., Gen. Sess. (Utah 2021); S.B. 266, 85th Leg., Reg. Sess. (W. Va. 2021); For more details see Easement Relocation Act, UNIF. L. COMM’N, <https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails> (last visited July 20, 2021).

<sup>6</sup> 2021 Neb. L.B. 501 (enacting NEB. REV. STAT. § 76-2,128 et seq.); 2022 Utah H.B. 132 (enacting UTAH CODE § 57-13c-101 et seq.).

owner's expense, provided the relocation does not materially reduce the utility of the easement, increase the burden on the easement holder in its use or enjoyment of the easement, impair the easement-related purpose for which the easement was created, or impair the physical condition, use, or value of the dominant estate served by the easement.<sup>7</sup> The U.E.R.A. carefully circumscribes this right by requiring a servient estate owner to obtain judicial approval for an easement relocation opposed by an easement holder.<sup>8</sup> The Act also excludes several categories of easements from its scope.<sup>9</sup> Finally, the Act provides many other important safeguards for the easement holder and other potentially affected interest holders.<sup>10</sup>

As with all uniform acts promulgated by the ULC, wide adoption of the U.E.R.A. will resolve significant conflicts between the states. As intimated above, before 2000, courts in many states employed the mutual consent rule.<sup>11</sup> This rule, however, was not uniformly followed. From time to time some state courts permitted unilateral easement relocation by a servient estate owner when the benefits of relocation for the servient estate owner were large and the impact on the easement holder was minimal or non-existent.<sup>12</sup> Other courts effectively condoned unilateral easement relocations by rejecting a dominant estate owner's request for injunctive relief based on equitable balancing principles.<sup>13</sup> Further, a number of state statutes allow easement relocation in particular circumstances.<sup>14</sup> One state, Louisiana, has always allowed a servitude (the civil law analogue of an easement) to be relocated at the servient estate owner's expense as long as the new location is equally convenient for the dominant estate owner.<sup>15</sup>

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<sup>7</sup> UNIF. EASEMENT RELOCATION ACT §§ 4(1)–(3), (6); *see also id.* § 7 (assigning expenses of relocation to the servient estate owner).

<sup>8</sup> *See generally id.* §§ 5–6.

<sup>9</sup> *See id.* § 3(b)(1).

<sup>10</sup> *See id.* § 5(b)(1)(B)–(D) (requiring service of summons and complaint); *id.* § 8 (imposing duty of good faith); *id.* § 9(a) (requiring recordation of relocation affidavit and protecting easement holder's ability to use easement until necessary improvements are complete); *id.* § 9(b) (detailing limited effect of relocation and addressing priority).

<sup>11</sup> *See infra* Part II.A.

<sup>12</sup> *See infra* Part II.B(1).

<sup>13</sup> *See infra* Part II.B(2).

<sup>14</sup> *See infra* Part II.F.

<sup>15</sup> LA. CIV. CODE ANN. art. 748 (2021), discussed *infra* Part II.C. The Commonwealth of Puerto Rico has also long employed the same civil law servitude relocation rule. P.R. LAWS ANN. tit. 31 § 1673 (2020); P.R. CODIGO CIV. 481 (1930).

In 2000, the American Law Institute, following Louisiana's civil-law-inspired servitude relocation rule, promulgated Section 4.8(3) of the *Restatement Third of Property: Servitudes* ("the Restatement").<sup>16</sup> The Restatement rule allows a servient estate owner to relocate an easement, at the servient estate owner's expense, if the relocation does not lessen the utility of the easement, increase the burden on the easement holder in its use or enjoyment of the easement, or frustrate the easement's purpose.<sup>17</sup> Following the promulgation of Section 4.8(3), a number of state courts, including the state supreme courts of Colorado, South Dakota, and Massachusetts, adopted a robust version of the Restatement.<sup>18</sup> Some courts adopted the Restatement but limited its application to undefined easements or other particular kinds of easements.<sup>19</sup> Other state courts rejected the Restatement approach.<sup>20</sup> The U.E.R.A. builds upon Section 4.8(3) of the Restatement but adds new substantive and procedural safeguards and addresses issues not addressed by the Restatement but implicated by a statutory unilateral relocation right.<sup>21</sup>

This Article makes the case for adoption of the U.E.R.A. It argues that the U.E.R.A. establishes a carefully balanced statutory regime that protects the interests of an easement holder in its use and enjoyment of an easement and protects the physical condition, use, and value of a dominant estate but also offers a servient estate owner a crucial safety valve. It allows a servient estate owner to escape the deadlock that can result from application of the traditional mutual consent rule, particularly to the extent that rule allows an easement holder to permanently block a reasonable easement relocation request or demand a ransom payment.<sup>22</sup> At a broader level, the U.E.R.A. will enable the legal system to achieve the often significant aggregate social and economic benefits that can result from a successful easement relocation

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<sup>16</sup>RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3) (Am. L. Inst. 2000), discussed *infra* Part II D.

<sup>17</sup>*Id.*

<sup>18</sup>See *infra* Part I.E.1.

<sup>19</sup>See *infra* Part I.E.2.

<sup>20</sup>See *infra* Part I.E.3.

<sup>21</sup>In addition to excluding certain categories of easements from its scope and requiring that a servient estate owner file a civil action, Unif. Easement Relocation Act §§ 3–4, the act also protects the easement holder's interest in maintaining uninterrupted use and enjoyment of the easement until necessary improvements are complete. *Id.* § 9(b).

<sup>22</sup>See generally *infra* Part III.A–B.

without imposing any material harm on the easement holder.<sup>23</sup> Rather than produce more litigation and uncertainty as some critics of the Restatement (or any deviation from the mutual rule have suggested), the U.E.R.A. will lead to greater cooperation and accommodation between servient estate owners and easement holders, could well lower the cost of easements, and will ultimately facilitate the use of easements in private land use planning.<sup>24</sup> Finally, the U.E.R.A. helps rebalance the rights of both parties in an easement relationship by giving the servient estate owner, as well as the easement holder, a reasonable opportunity to adopt to changing circumstances, particularly economic and land use changes that might not have been anticipated at the time the easement was created.<sup>25</sup>

Part I of this article lays out the legal landscape prior to promulgation of the U.E.R.A, including: (A) the development of the mutual consent rule over two centuries of American case law; (B) the emergence of minority approaches allowing unilateral easement relocation in certain circumstances; (C) Louisiana's lengthy experience with servitude relocation under its Civil Code; (D) the dispersion of the civil law rule originating in France to other civil law jurisdictions and the appearance of flexible approaches to easement and servitude relocation in other common law and mixed jurisdictions; (E) the arrival of Section 4.8(3) of the Restatement; (F) judicial reactions to the Restatement, including decisions adopting its approach in whole or in part and decisions rejecting it; and finally; (F) other state statutes that already allow for easement relocation in specialized circumstances.

Next, Part II provides a section by section exposition of the Act, highlighting not only the benefits the Act provides to a servient estate owner but also the numerous substantive and procedural safeguards for easement holders and other interested parties. By explaining the structure and details of the Act and demonstrating the Act's responsiveness to objections raised about the Restatement, the article reveals that the U.E.R.A. establishes a meaningful but nuanced easement relocation right, nested within a carefully constructed procedural regime that enhances flexibility for a servient estate owner and allows useful development of a servient estate without imposing any material easement-related harm on an easement holder. Part III articulates the primary justifications for adoption of the U.E.R.A while

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<sup>23</sup> See generally *infra* Part III.B.

<sup>24</sup> See generally *infra* Part III.A.

<sup>25</sup> See generally *infra* Part III.C–E.

responding to other arguments made in opposition to the Restatement. Part IV concludes.

## I. EASEMENT AND SERVITUDE RELOCATION BEFORE THE U.E.R.A.

### A. *The Rise of the American Mutual Consent Rule*

Before 2000, under the majority common law rule, a servient estate owner whose property was burdened by an easement could not relocate the easement without the easement holder's consent.<sup>26</sup> This rule emerged early in the nineteenth century, sometimes in response to an attempt by an easement holder to change the location of an easement without the burdened landowner's consent.<sup>27</sup> In the second half of the nineteenth century, and particularly in the twentieth century, the rule hardened into its current categorical form that rigidly requires a servient estate owner to obtain consent for an easement relocation even when a proposed relocation would not cause any material harm to the easement holder and would provide substantial benefits to the servient estate owner.<sup>28</sup> As the following discussion also reveals, this rule is somewhat anomalous in the law of easements. In many other situations, the law of easements relies—without controversy it seems—on open-textured reasonableness standards to govern the long-term relationship between the servient estate owner and the easement holder.<sup>29</sup>

#### 1. The Nineteenth Century: A Tentative Start Toward Formalism

Although its precise origins in the common law are unclear,<sup>30</sup> the mutual consent rule emerged in U.S. case law during the first half of the nineteenth century. One early decision restricting unilateral easement relocation appears

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<sup>26</sup> See, e.g., *Stamatis v. Johnson*, 224 P.2d 201, 202–03 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1951); *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999). See also JON W. BRUCE & JAMES W. ELY, JR., *THE LAW OF EASEMENTS AND LICENSES IN LAND* § 7.13 (2021).

<sup>27</sup> See generally *infra* Part I.A.1.

<sup>28</sup> See generally *infra* Part I.A.2.

<sup>29</sup> See generally *infra* Part I.A.2.

<sup>30</sup> The origins and history of the English version of the mutual consent rule are beyond the scope of this article. However, the first edition of Gale's influential treatise on the law of easements, published in 1839, acknowledges the rule in the context of ways of necessity. See C.J. GALE & T.D. WHATLEY, *A TREATISE ON THE LAW OF EASEMENTS* 248 (1839) (observing, without citation to any authority, that “[i]f, however, the right of way has once been assigned, its course cannot be altered by either party without the consent of the other”).



in an 1815 New York case, *Wynkoop v. Burger*, in which the owner of land burdened with a right of way sought to alter a portion of its route, after the route had been established by the initial parties' conduct.<sup>31</sup> Although the easement holder tacitly accepted one alteration, the court rejected the servient estate owner's attempt to make another, noting that "it would be extremely unjust to allow the plaintiff in error to be changing this road whenever he pleased" and that the proposed second alteration "is evidently injurious to the defendant in error, as it increases the distance of travelling, in a small degree."<sup>32</sup> As it may only reflect a narrow, context-specific finding that the proposed relocation would burden the easement holder, *Wynkoop* hardly stands for an immutable rule denying a servient estate owner the right to relocate an easement in all cases.

In 1858, the Supreme Judicial Court of Massachusetts rendered another important easement relocation decision in *Jennison v. Walker*.<sup>33</sup> In this case, the servient estate owner had granted an easement to a neighboring property owner in 1800, allowing the neighbor the right to lay and maintain an aqueduct from a spring located on the servient estate to the dominant estate.<sup>34</sup> After 1818, however, the dominant estate owner stopped using the aqueduct, and the servient estate owner destroyed a portion of the aqueduct.<sup>35</sup> In 1855, the dominant estate owner, "the grantee" of the easement in the court's phrasing, went on the servient estate unilaterally, cleared out and walled up a reservoir that served as the water source for the aqueduct, and laid lead pipes to his own land in a direction different from the former aqueduct because a railroad now crossed that route.<sup>36</sup> After the servient estate owner sued and the trial court ruled in his favor granting nominal damages, the Massachusetts Supreme Judicial Court affirmed.<sup>37</sup>

Writing for the majority, Justice Bigelow not only found that the easement had likely terminated due to non-user,<sup>38</sup> but also stated that once an easement's location has been effectively fixed by the conduct of the parties, "it cannot be changed at the pleasure of the grantee."<sup>39</sup> Justice Bigelow

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<sup>31</sup> 12 Johns 222, 223 (NY 1815).

<sup>32</sup> *Id.*

<sup>33</sup> See 77 Mass. (11 Gray) 423 (1858).

<sup>34</sup> *Id.* at 423.

<sup>35</sup> *Id.*

<sup>36</sup> *Id.* at 423–24.

<sup>37</sup> *Id.* at 423–25.

<sup>38</sup> *Id.* at 425–26.

<sup>39</sup> *Id.* at 426.

framed his rationale for limiting the ability of the grantee, the dominant estate owner, to modulate the location of an easement in terms of “[c]onvenience and justice,” recognizing that if the court were to establish a rule indulging the dominant estate owner here “it would be open to questions of great doubt and difficulty, and would make the servient estate in great measure subject to the unrestrained control of the owner of the easement.”<sup>40</sup> Citing *Wynkoop* and one other decision similarly restraining an easement grantee, the court added, “[i]t has therefore been held that the course of a way, when once established, cannot be altered by either party without the consent of the other.”<sup>41</sup> The decision in *Jennison* reveals the glimmering emergence of the mutual consent rule, but apparently as dicta, and, quite significantly, only after the court rejected the notion that a *dominant estate owner* could claim an unfettered right to relocate an easement, reasoning that such a rule would excessively subjugate the servient estate to the dominant estate owner’s control.

In his 1863 monograph, *A Treatise on the American Law of Easements and Servitudes*, Emory Washburn, the Busby Professor of Law at Harvard, did not articulate the mutual consent rule but cited two other decisions in support of the proposition that a servient estate owner and an easement holder could enter an oral agreement to discontinue an old right of way and replace it with a new one in a different location and that the agreement would be binding once the physical relocation took place.<sup>42</sup> A more stringent version of the mutual consent rule, however, began to emerge soon after publication of Washburn’s treatise.

In its 1866 decision in *Gore v. Fitch*, the Supreme Judicial Court of Maine addressed the obstruction of a right of way created by express grant in 1849.<sup>43</sup> The right of way at issue in *Gore* featured a defined width and passed by the rear of two houses in a particular direction.<sup>44</sup> The court ultimately rejected the servient estate owner’s attempt to change the right of way from its well

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<sup>40</sup> *Id.*

<sup>41</sup> *Id.* at 426–27. The other decision cited in *Jennison* was *Jones v. Percival*, 22 Mass. (5 Pick.) 485, 494–95 (1827) (rejecting a plea that a landowner acquired an unrestricted right to pass anywhere over a neighbor’s salt marsh by prescription and adding that, even if the claimant had been granted such an easement, once its location had been fixed, the grantee should not have a right to change its course unilaterally).

<sup>42</sup> EMORY WASHBURN, *TREATISE ON THE AMERICAN LAW OF EASEMENTS AND SERVITUDES* 200 (1863) (discussing and quoting *Pope v. Devereaux*, 71 Mass. (5 Gray) 409 (1855), and *Smith v. Lee*, 80 Mass. (14 Gray) 473, 480 (1860)).

<sup>43</sup> 54 Me. 41, 43 (1866).

<sup>44</sup> *Id.*

understood position to a new one.<sup>45</sup> Adopting a more formalistic approach that would be repeated many years later by the same court,<sup>46</sup> the court in *Gore* reasoned:

The day after its execution the rights of the grantee were the same as plaintiff's rights [today]. Whatever was conveyed could not be reclaimed and new rights substituted. The conveyance left nothing optional with the grantor. It was absolute; it was unchangeable by him alone.<sup>47</sup>

Thirty years later, Leonard Jones' *Treatise on the Law of Easements*, published in 1898, stated an equally abstract, concise, and categorical version of the rule—"a way once located cannot be changed by either party without the consent of the other."<sup>48</sup> Interestingly, Jones relied heavily on *Jennison*, which, as noted above, actually involved judicial restraint on the ability of a dominant estate owner to change the location of an easement once the location had become fixed.<sup>49</sup> In addition, although he cited five other nineteenth century decisions involving a servient estate owner seeking to relocate an easement in support of his version of the mutual consent rule,<sup>50</sup> Jones also cited several decisions, besides *Jennison*, that similarly concerned an easement holder (often a railroad company) seeking to change the route of an easement or otherwise change the terms of a right of way agreement.<sup>51</sup>

## 2. The Twentieth Century: Crystallization and its Discontents

The categorical version of the mutual consent rule crystallized over the course of the twentieth century, particularly in several frequently cited

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<sup>45</sup> *Id.* at 45–46.

<sup>46</sup> *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980) (quoting *Gore*, 54 Me. at 45).

<sup>47</sup> *Gore*, 54 Me. at 45.

<sup>48</sup> LEONARD A. JONES, A TREATISE ON THE LAW OF EASEMENTS § 352, at 283 (1898).

<sup>49</sup> *See id.* (citing *Jennison v. Walker*, 77 Mass. (11 Gray) 423, 426 (1858); *id.* § 344, at 279–80.

<sup>50</sup> JONES, *supra* note 48, § 352, at 283, n.3 (citing *Manning v. Port Reading R. Co.*, 33 A. 802 (N.J. 1896); *Chandler v. Jamaica Pond Aqueduct Corp.*, 125 Mass. 544, 550 (1878); *Bannon v. Angier*, 84 Mass. (2 Allen) 128, 129 (1861); *Smith v. Lee*, 80 Mass. (14 Gray) 473, 480 (1860)).

<sup>51</sup> JONES, *supra* note 48, § 352, at 283, n.3 (citing *Wood v. Mich. Air-Line Ry. Co.*, 51 N.W. 263, 264–65 (Mich. 1892); *Palfrey v. Foster*, 17 So. 425, 426 (La. 1895); *St. Joseph Cnty. v. S. Bend & M. St. Ry. Co.*, 20 N.E. 499 (Ind. 1889); *but see id.* (also citing *Keating v. Hayden*, 30 Ill. App. 433, 434–35 (1888) (dominant estate owner was justified in refusing to use old road across servient estate after parties had agreed to and implemented a new road in slightly different location)).

appellate court decisions.<sup>52</sup> Interestingly, though, a number of these decisions reveal the tenuousness of the rule as a matter of legal policy. Appellate courts often had to reverse rulings of trial court judges who resisted a remorseless application of the mutual consent rule, especially in cases involving easements created in the distant past, long before the current owners acquired their property, and when the current easement location caused either actual harm to the servient estate owner or prevented useful development of the servient estate and a relocation would have caused little or no injury to the easement holder.<sup>53</sup> Some of the cases also reveal a crucial asymmetry at the heart of easement relationships. On one hand, under the common law, an easement holder generally can make any use of an easement that is reasonably convenient or necessary to enjoy an easement for its intended purpose,<sup>54</sup> and can even alter the manner, frequency, and intensity of use of an easement in light of changing technological developments.<sup>55</sup> On the other hand, under the mutual consent rule, the servient estate owner cannot alter the location of an easement to facilitate development of the servient estate regardless of any exogenous changes in the surrounding area or the reasonableness of the proposed relocation.<sup>56</sup>

The Washington Supreme Court's decision in *White Bros. & Crum Co. v. Watson* is the first twentieth century decision that played a significant role in entrenching the mutual consent rule but also reveals its potential for abuse and social and economic waste.<sup>57</sup> Ironically, like many of its nineteenth century precursors, the dispute actually involved a dominant estate owner seeking to relocate an easement,<sup>58</sup> in this instance an irrigation easement over mountainous land acquired by the dominant estate owner's predecessors under the doctrine of prior appropriation.<sup>59</sup> The dispute arose after a severe

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<sup>52</sup> See, e.g., *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952); *Davis v. Bruk*, 411 A.2d 660, 664 (Me. 1980).

<sup>53</sup> See, e.g., *Smith v. Jackson*, 104 S.E. 169, 170 (N.C. 1920); *Sakansky v. Wein*, 169 A. 1, 2 (N.H. 1933); *Davis*, 411 A.2d at 661–62, 664–66.

<sup>54</sup> See BRUCE & ELY, *supra* note 26, § 8.3 (emphasizing the open-ended, flexible, even “elastic” nature of an easement holder’s right to use an easement and the correlative nature of judicial inquiry into the scope of easement holder’s use rights).

<sup>55</sup> *Id.* §§ 8.3–8.4; 25 AM. JUR. 2D *Easements and Licenses* § 74 (2021). The well-established rule allowing an easement holder significant flexibility to intensify the use of an easement also appears in the RESTATEMENT, *supra* note 16, at § 4.10.

<sup>56</sup> BRUCE & ELY, *supra* note 26.

<sup>57</sup> See generally 117 P. 497 (Wash. 1911).

<sup>58</sup> *Id.* at 498.

<sup>59</sup> *Id.*

flood destroyed the dominant estate owner's flume and ditch and washed away a creek's banks at the source of the waters located on the servient estate.<sup>60</sup> If the easement could not be modified in response to the flood, most of the water flowing to the dominant estate would be lost to percolation and evaporation, thus rendering the dominant estate unfit for cultivation.<sup>61</sup> When the dominant estate owner proposed to move the point of diversion a modest distance upstream, construct a cement dam, and lay a pipe along the existing right of way, the servient estate owners refused to consent even though it presented no risk of injury to the servient estate.<sup>62</sup>

After a great deal of turmoil, the Washington Supreme Court eventually affirmed a trial court judgment in favor of the servient estate owners, holding that the dominant estate owner could not make any change in the source point for the water, or the length, location, or means of the water's conveyance through the easement, without the consent of the servient estate owner because the easement became "fixed and determined" at the time of its creation.<sup>63</sup> Indeed, the court unconditionally sustained the servient estate owners' refusal to cooperate and rejected the dominant estate owner's request for a flexible interpretation of the parties' rights, effectively rendering the easement's location unalterable and treating the dominant estate owner's request for an equitable adjustment to the easement's location and other attributes as a potentially coercive private taking despite the potential benefits for all parties.<sup>64</sup> Warning that "[n]o amount of hardship in a given case would justify the establishment of such a precedent,"<sup>65</sup> the court denied it had any capacity "to measure the comparative needs of private parties and compel a transfer to the one most needing and who might best utilize the property."<sup>66</sup>

Nine years later, in *Smith v. Jackson*, a trial court would have allowed a servient estate owner to plough an ancient right of way established by prescription that was causing erosion and interfering with the servient owner's farming activities.<sup>67</sup> Even though the servient estate owner had constructed a new right of way providing the dominant estate even shorter

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<sup>60</sup> *Id.*

<sup>61</sup> *Id.*

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at 499.

<sup>64</sup> *Id.*

<sup>65</sup> *Id.*

<sup>66</sup> *Id.*

<sup>67</sup> *Smith v. Jackson*, 104 S.E. 169, 169–70 (N.C. 1920).

access to a public road,<sup>68</sup> the North Carolina Supreme Court reversed the trial court, castigating the judge for even permitting the relevant testimony and emphasizing that “[i]t was the title to the easement which was the issue to be decided, and not whether it was injurious to the defendants’ farm.”<sup>69</sup> According to the court, all that matters in a case involving a problematic easement location is the “title,” not the easement’s mode of creation or its ongoing impact on the servient estate.

In *Sakansky v. Wien*, another crucial building block in the emerging mutual consent wall, the New Hampshire Supreme Court applied similar logic to reject a special master’s recommendation allowing a servient estate owner to make adjustments in an eighteen-foot-wide right of way established by an 1849 deed.<sup>70</sup> To develop his property the servient estate owner proposed a building, albeit one that would include an eight-foot-high opening for the right of way in its original location, and a new right of way next to the building that would provide additional access to the dominant estate for any vehicles that could not fit through the opening.<sup>71</sup> Noting that “neither party had any absolute or unlimited right in the old right of way,” the special master approved the plan using a “rule of reasonableness.”<sup>72</sup> The New Hampshire Supreme Court rejected this equitable solution, however, acknowledging that although a “rule of reason” should govern the rights of the dominant and servient estate owner generally,<sup>73</sup> the dominant estate owner could insist upon use of the easement in its original location, no matter how unreasonable that insistence might be.<sup>74</sup> The rigidity of the mutual consent rule, as formulated here in *Sakansky*, stands out amidst the general fluidity of other rules governing an ongoing easement relationship, particularly the rule that an easement holder is generally entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servient estate,<sup>75</sup> and rules that give an easement holder fairly wide discretion to use, repair, and maintain an easement based on open-textured reasonableness standards

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<sup>68</sup> *Id.* at 170.

<sup>69</sup> *Id.*

<sup>70</sup> 169 A. 1, 1–2 (N.H. 1933).

<sup>71</sup> *Id.* at 2.

<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.* at 3.

<sup>75</sup> RESTATEMENT, *supra* note 16, at § 4.9. *See also* BRUCE & ELY, *supra* note 26, § 8.3, discussed *supra* note 54.

that take account of the use-based interests of the servient estate owner or other easement holders.<sup>76</sup>

As the twentieth century unfolded, courts increasingly applied the mutual consent rule in this rote and formalistic fashion, disregarding any benefits that an easement relocation could produce for the proponent and the insignificance of harm to the objector.<sup>77</sup> General treatises like *Corpus Juris* and *American Jurisprudence* reinforced judicial perceptions of the immutability of the mutual consent rule with terse statements of their own.<sup>78</sup> One of these frequently cited treatises, *American Jurisprudence*, also offered what turned into a commonplace rationalization for the rule by suggesting that “treating the location as variable would incite litigation and depreciate the value and discourage the improvement of the land upon which the easement is charged.”<sup>79</sup> Although it offered essentially no justification for this rationalization,<sup>80</sup> the treatise’s suggestion that variability of an easement would lessen the burdened estate’s value and impede development makes sense only in the context of cases, like *Jennison v. Walker*, involving a

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<sup>76</sup>RESTATEMENT, *supra* note 16, at § 4.10 (stating that a servitude holder is “entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude” and that “the manner, frequency, and intensity of use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate), § 4.12 (stating that “holders of separate servitudes creating rights to use the same property must exercise their rights so that they do not *unreasonably interfere* with each other”) (emphasis added), § 4.13 (stating that except to the extent the terms of an instrument provide otherwise, a servitude holder has a duty “to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude . . . to the extent necessary to (a) prevent *unreasonable interference* with the enjoyment of the servient estate . . .”) (emphasis added).

<sup>77</sup>*See, e.g.,* *Beville v. Allen*, 237 P. 184, 185 (Ariz. 1925); *Edgell v. Divver*, 402 A.2d 395, 397–98 (Del. Ct. Ch. 1979).

<sup>78</sup>19 C. J. *Easements* § 215, at 973 (1920); 17 AM. JUR. *Easements* § 87, at 988–89 (1938).

<sup>79</sup>17 AM. JUR. *Easements* § 87, at 989.

<sup>80</sup>The only authority cited by the *American Jurisprudence* authors for this important claim is “Annotation: 5 L.R.A. (N.S.) 854 [1907]”, which actually refers to a long-forgotten, annotated case report series known as *Lawyers Reports Annotated (New Series)* whose own references are quite obscure, citing merely one California Supreme Court decision, *Winslow v. City of Vallejo*, 84 Pac. 191 (Ca. 1906), which held that a city enjoying a right of way to lay a pipe on a servient estate did not have the right to lay additional pipes unless that right was clearly given by grant. It seems that the *American Jurisprudence* authors invented their litigation incitement and property value depreciation rationalizations more or less out of thin air.

dominant estate owner's attempt to relocate an easement<sup>81</sup> or attempts to transform a fixed easement into a floating easement.<sup>82</sup>

Two more notable decisions, one from Arizona and the other from Maine, consolidated this drift toward formalism, property abstraction, and disregard for social and economic waste in easement relocation doctrine by restating the mutual consent rule in the context of easement relocation proposals that would have clearly facilitated useful development on servient estates.<sup>83</sup> Moreover, by adding new rationalizations for the mutual consent rule, these two decisions substantially impeded the development of an alternative, more flexible approach.

First, in *Stamatis v. Johnson*, the Arizona Supreme Court rejected a servient estate owner's proposal to relocate a prescriptive irrigation easement only twenty-six feet to facilitate a plan to build a residential subdivision, even though the servient owner estate offered to replace the irrigation ditch located in the original right of way with a modern, underground, concrete pipeline that would have furnished water in the same quantity and just as conveniently as the old ditch.<sup>84</sup> Importantly, the supreme court justified its application of the mutual consent rule by pointing to several of the earlier twentieth century decisions discussed above,<sup>85</sup> and by asserting, in reliance on the thinly supported *American Jurisprudence* rationalization mentioned above, that the opposite approach, allowing the location of an easement to be varied when the benefits of relocation are substantial and the relocation would not harm the easement holder, would "incite litigation" and lower the value of and discourage investment in the parcels affected by the easement.<sup>86</sup> Writing in dissent, however, Justice Udall expressed frustration with the majority's holding, which effectively ordered the "reopening of an old, unsightly,

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<sup>81</sup> See generally 77 Mass. (11 Gray) 423 (1858).

<sup>82</sup> See *Hannah v. Pogue*, 147 P.2d 572, 575 (Cal. 1944) (justifying the rule that an easement holder cannot change location of an easement, even if the proposed change would cause no harm to or actually benefit the servient estate owner, because such a right would transform an easement with a fixed location into a "floating easement").

<sup>83</sup> *Stamatis v. Johnson*, 224 P.2d 201 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952); *Davis v. Bruk*, 411 A.2d 660 (Me. 1980).

<sup>84</sup> 224 P.2d at 202–03.

<sup>85</sup> *Id.* at 203 (citing and discussing *White Bros. & Crum Co. v. Watson*, 117 P. 497, 497 (Wash. 1911), *Beville v. Allen*, 237 P. 184, 185 (Ariz. 1925), and *Hannah*, 147 P.2d at 575).

<sup>86</sup> *Stamatis*, 224 P.2d at 203 (quoting 17 AM. JUR. *Easements* § 87 (1938)). As discussed *supra* note 79, the *American Jurisprudence* treatise writers were likely contemplating cases in which an easement holder sought to change the location of an easement, rather than, as in *Stamatis*, a proposal by a servient estate owner to relocate an easement.



wasteful, open irrigation ditch down the center of a ‘blacktop public street’ . . . just to satisfy the whim of the plaintiff,” commenting that it “shocked [his] conscience.”<sup>87</sup> According to Justice Udall, the court could have easily exercised “its broad, equitable powers” and found a way to do “justice between the parties, without perpetuating for all times an archaic and dangerous instrumentality of irrigation.”<sup>88</sup>

Thirty years later, in *Davis v. Bruk*, the Maine Supreme Court vacated a trial court judgment permitting a servient estate owner to relocate, at her own expense, a vehicular right of way that passed close enough to her house to put it at risk of damage and put the servient owner and her guests in physical peril.<sup>89</sup> The Maine Supreme Court bolstered its reliance on the mutual consent rule by first quoting or discussing several of the leading decisions cited above,<sup>90</sup> including the absolutist conception of an easement offered more than a hundred years earlier in *Gore v. Fitch*.<sup>91</sup> More important, the court rejected the servient estate owner’s plea to narrow the scope of the mutual consent rule and permit unilateral relocation by the servient estate owner when (1) the change of location is slight, (2) the servient owner bears the expense of relocation, (3) the relocated easement retains the same terminal points, and (4) the new location is just as or more convenient than the old location to the dominant estate owner.<sup>92</sup> Echoing *Stamatis*,<sup>93</sup> the *Davis* court rejected this plea for moderation and flexibility because it would introduce “uncertainty into land ownership” and “proliferate litigation which the general rule as prevails in Maine has tended to prevent.”<sup>94</sup> In addition, the court suggested that allowing any scope for unilateral easement relocation by the servient estate owner would deprive the dominant estate owner “of the security of his property rights in the servient estate” and could lead to “harassment.”<sup>95</sup> Finally, the *Davis* court advanced another rationale for maintenance of the mutual consent rule, one that would become a staple of future law and economics-oriented defenses of the rule—the notion that all

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<sup>87</sup> *Id.* at 204 (Udall, J., dissenting).

<sup>88</sup> *Id.*

<sup>89</sup> 411 A.2d 660, 661–62, 664–66 (Me. 1980).

<sup>90</sup> *Id.* at 664–65 (quoting *Sakansky v. Wein*, 169 A. 1, 3 (N.H. 1933)) (citing and discussing *Smith v. Jackson*, 104 S.E. 169, 170 (N.C. 1920)).

<sup>91</sup> *Id.* at 665 (quoting and discussing *Gore v. Fitch*, 54 Me. 41, 45 (1866)).

<sup>92</sup> *Id.* at 665 (emphasis added).

<sup>93</sup> 224 P.2d at 203.

<sup>94</sup> 411 A.2d at 665.

<sup>95</sup> *Id.*

market participants in transactions involving land burdened and benefitted by an easement have fully incorporated the common law default rule into their bargains.<sup>96</sup> As the *Davis* court explained:

A unilateral relocation rule could confer an *economic windfall* on the servient owner, who presumably purchased the land at a price which reflected the restraints existing on the property. Such a rule would relieve him of such restraints to the detriment of the owner of the dominant estate whose settled expectations would be derailed with impunity.<sup>97</sup>

It is worth noting that the *Davis* court did not offer any empirical evidence for this claim.

In short, with *Stamatis v. Johnson* and *Davis v. Bruk*, the common law mutual consent rule crystallized into a seemingly iron-clad, formalistic “property rule” prohibiting any kind of judicially controlled, *ex post* readjustment of an easement’s location using an “in-kind” liability rule.<sup>98</sup> Courts justified the rule with a cluster of repeated arguments: (1) allowing any non-consensual *ex post* relocation by the servient owner will “incite litigation” and produce “uncertainty” for easement holders;<sup>99</sup> (2) an easement represents an absolute property right, no less robust than a fee simple absolute;<sup>100</sup> and (3) allowing any form of unilateral easement relocation for servient estate owners, no matter how constrained, could produce windfall gains and losses because all market participants presumably have perfect knowledge of the common law default rule when they enter into transactions involving land burdened and benefitted by an easement.<sup>101</sup> Years later, academic commentary critical of Section 4.8(3) of the Restatement

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<sup>96</sup> See *infra* Part III.B.

<sup>97</sup> 411 A.2d at 665.

<sup>98</sup> See John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 9–26, 43–77 (2005) (conceptualizing the debate over Section 4.8(3) of the Restatement in light of the “property rule” and “liability rule” paradigm and arguing for a refined “pliability rule” approach to easement relocation).

<sup>99</sup> *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz. 1952); *Davis*, 411 A.2d at 665.

<sup>100</sup> *White Bros. & Crum Co. v. Watson*, 117 P. 497, 499 (Wash. 1911); *Smith v. Jackson*, 104 S.E. 169, 170 (N.C. 1920); *Davis*, 411 A.2d at 665.

<sup>101</sup> *Davis*, 411 A.2d at 665.

essentially repeated these same arguments, with only modest additional justifications.<sup>102</sup>

### *B. Judicial Resistance to the Mutual Consent Rule*

Although the mutual consent rule assumed a dominant position in American common law by the middle-to-late twentieth century,<sup>103</sup> the rule was never quite as monolithic and universal as its judicial and academic advocates have claimed. Some courts always refused to follow the rule and approved unilateral easement relocation by a servient estate owner in a variety of factual circumstances. Some courts carved out an exception permitting unilateral easement relocation if the relocated easement provides the same functional benefits to the easement holder, the servient estate owner absorbs all costs, and the relocation does not materially inconvenience the easement holder.<sup>104</sup> Other courts drew on equitable balancing principles and effectively approved a servient estate owner's unilateral relocation of an easement by denying injunctive relief to the easement holder when the degree of change in the location of the easement was modest, the interests of the servient estate owner were substantial, or the easement holder acquiesced to the relocation.<sup>105</sup>

#### 1. Same Functional Benefit and No Inconvenience

A number of decisions, sometimes overlooked by subsequent commentators or courts, refused to follow the majority mutual consent rule and adopted a more flexible approach to easement relocation that focused on the functional purpose of an easement rather than formalistic conceptions. For example, in *Brown v. Bradbury*, a 1943 decision, the Colorado Supreme Court affirmed a unilateral easement relocation by relying on equity and earlier Colorado case law indicating that an irrigation ditch could be modified if it still provided “adequate and satisfactory means” for an easement holder

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<sup>102</sup> See *infra* Part IV.

<sup>103</sup> See, e.g., 28A CORPUS JURIS SECUNDUM §§ 211–12, at 420–23 (2008); 25 AM JUR. 2D. *Easements and Licenses* § 69, at 565–66 (2004); 7 THOMPSON ON REAL PROPERTY § 60.04(c)(ii) at 460 (David Thomas ed. 1994). Curiously, one particularly influential mid-twentieth century treatise did not mention the problem of easement relocation at all in its lengthy chapter on easements. JAMES A. CASNER, ED., AMERICAN LAW OF PROPERTY, VOL. II, § 8.1 et seq. (1952) (authored by Oliver S. Rundell).

<sup>104</sup> BRUCE & ELY, *supra* note 26, § 7:16, at 489. See *infra* Part I.B.1.

<sup>105</sup> BRUCE & ELY, *supra* note 26, § 7:16, at 489. See *infra* Part I.B.2.

to receive its water.<sup>106</sup> In *Brown*, the servient estate owner unilaterally filled an old, unmaintained irrigation ditch easement located in the middle of his estate next to his house, and constructed a new ditch next to another reserved right of way at the edge of his estate, to reduce the risk that his young child would slip and drown in the old ditch and to enhance the land's overall utility.<sup>107</sup> Finding that the relocated ditch was "equal in efficiency to the old one for the purpose intended" and that the dominant estate owner suffered no resulting injury, the Colorado Supreme Court affirmed the trial court's rejection of the dominant estate owner's request for an injunction requiring the servient estate owner to reconstruct and restore the ditch to its former location, concluding that the trial court decision was "extremely fair."<sup>108</sup> In a subsequent decision, the Colorado Supreme Court partially limited the *Brown* doctrine but still relied on it to hold that a trial court could refuse to order a servient estate owner to restore a relocated ditch easement to its former location and instead fashion alternative relief "where other equities have arisen."<sup>109</sup>

In *Cozby v. Armstrong*, a 1947 Texas Court of Civil Appeals decision, the defendant, a servient estate owner, attempted to divert a right of way that passed directly in front of her house to a new location.<sup>110</sup> After a trial, a jury found that (1) the dominant estate owners' use of the old road deprived the servient estate owner of the reasonable and practical use of her residence and a portion of her land, and (2) the new road built by the servient estate owner was just as suitable, convenient, and economical for the dominant estate owners as the old one.<sup>111</sup> After acknowledging the mutual consent rule but also case law suggesting that an easement holder cannot abuse an easement so as to prevent the servient estate owner from making a reasonable use of its property,<sup>112</sup> the Court of Civil Appeals upheld the jury determination and reversed the trial court ruling in favor of the dominant estate owner.<sup>113</sup> The court emphasized that the new location benefited the servient estate owner by preventing automobile dust and light from entering her house and by

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<sup>106</sup> 135 P.2d 1013, 1014 (Col. 1943).

<sup>107</sup> *Id.* at 1013.

<sup>108</sup> *Id.* at 1013–14.

<sup>109</sup> *Valley Dev. Co. v. Weeks*, 364 P.2d 730, 732 (Col. 1961).

<sup>110</sup> 205 S.W.2d 403, 405 (Tex. App.—Fort Worth 1947, writ ref'd n.r.e.).

<sup>111</sup> *Id.* at 407.

<sup>112</sup> *Id.* at 407–08.

<sup>113</sup> *Id.* at 408.

generally expanding the utility of the servient estate.<sup>114</sup> It also noted that, despite its greater length and a new turn, the new route still “did not discommode” the dominant estate owners because the termini had not changed and the number of gates had actually been reduced.<sup>115</sup> In short, the court allowed the relocation to stand because it “was not so drastic as to impair the rights and title of the appurtenant easement.”<sup>116</sup>

A decade later, in *Millison v. Laughlin*, the Maryland Court of Appeals drew on similar principles in holding that the holder of a quasi-easement for an electric line had the right to maintain the line across the servient estate but did not have the right to insist that the appurtenances, including the electricity poles, remain in the exact same location.<sup>117</sup> Notably, the court explained its decision by drawing on previous Maryland decisions that supported the proposition that “a servient owner may modify the instrumentalities of the easement if by doing so he does not materially affect the rights of the dominant owner,”<sup>118</sup> and by noting case law from other jurisdictions which “support the doctrine that the owner of a servient tenement may make minor changes in the instrumentalities of the easement so long as he does not interfere in any substantial degree with the enjoyment of the easement by the dominant owner.”<sup>119</sup> In the late 1990s, a Pennsylvania court also approved a servient estate owner’s request to relocate a prescriptive easement in circumstances reminiscent of all of these decisions.<sup>120</sup> Finally, Kentucky courts have also regularly allowed roadway easements to be modified unilaterally as long as the modification does not alter the termini of the easement and the relocation does not produce material inconvenience for the easement holder.<sup>121</sup>

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<sup>114</sup> *Id.*

<sup>115</sup> *Id.*

<sup>116</sup> *Id.*

<sup>117</sup> 142 A.2d 810, 813–16 (Md. 1958).

<sup>118</sup> *Id.* at 815.

<sup>119</sup> *Id.* at 816.

<sup>120</sup> *Soderberg v. Weisel*, 687 A.2d 839, 844 (Pa. Super. Ct. 1997) (approving relocation when new location would not unreasonably interfere with use and enjoyment of easement, termini are unchanged, and the relocated easement would eliminate a safety risk to the servient estate owner’s young children).

<sup>121</sup> *Wells v. Sanor*, 151 S.W.3d 819, 823 (Ky. Ct. App. 2004); *Stewart v. Compton*, 549 S.W.2d 832, 833 (Ky. Ct. App. 1977); *Terry v. Boston*, 54 S.W.2d 909, 909–910 (Ky. 1932). *But see* *Adams v. Pergrem*, No. 2006-CA-001861-MR, 2007 WL 4277900, at \*3 (Ky. Ct. App. Dec. 7, 2007) (incorrectly citing *Wells* in dicta as supporting mutual consent rule). In *Wells*, the court also suggested in dicta that Kentucky’s minority rule allowing unilateral relocation may only apply to

The willingness of courts in this sporadic but never completely repressed line of decisions to modify an easement as long as the modification does not materially affect or substantially interfere with the use of an easement is significant. These decisions reveal that some courts have always been willing to exercise judicial discretion and bend the mutual consent rule to provide a measure of flexibility for servient estate owners.

## 2. Equitable Balancing at the Remedy Stage

During the last two decades of the twentieth century, a number of judicial decisions also injected flexibility into easement relocation disputes by focusing on remedies or other equitable factors. Several decisions acknowledged the majority mutual consent rule but effectively condoned unilateral easement relocations by rejecting easement holder requests for injunctive relief after a unilateral easement relocation had occurred, typically by noting that the easement holder had suffered no real damage because of the relocation and that the cost of reestablishing the original easement would be substantial.<sup>122</sup> Other decisions allowed unilateral easement relocations to stand primarily on the basis that an easement holder signaled acquiescence by not objecting timely and thus leading the servient estate owner to assume consent had been granted,<sup>123</sup> or because the scope of the relocation was small and an easement holder acquiesced for a relatively long period.<sup>124</sup> Several decisions have also permitted unilateral relocations of non-express easements

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easements created by prescription. *Wells*, 150 S.W.3d at 824 n.2 (citing *Gabbard v. Campbell*, 176 S.W.2d 411 (Ky. 1943)).

<sup>122</sup>*Vossen v. Forrester*, 963 P.2d 157, 161–62 (Or. Ct. App. 1998); *Umphres v. J.R. Mayer Enters., Inc.*, 889 S.W.2d 86, 90 (Mo. Ct. App. 1994); *Kline v. Bernardville Ass'n, Inc.*, 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993); *Mackin v. Mackin*, 439 A.2d 1086, 1088, 1090 (Conn. 1982).

<sup>123</sup>*See, e.g., Proulx v. D'Urso*, 805 N.E.2d 994, 997 (Mass. App. 2004); *Anderson v. De Vries*, 93 N.E.2d 251, 255 (Mass. 1950); *Bruyton v. Murch*, 457 S.E.2d 81, 84 (Vt. 1995); *Ericsson v. Braukman*, 824 P.2d 1174, 1177 (Or. Ct. App. 1992).

<sup>124</sup>*S. Star Cent. Gas Pipeline, Inc. v. Murray*, 190 S.W.3d 423, 430–31 (Mo. Ct. App. 2006).

to stand on similar equitable grounds, particularly in the case of easements created by implication<sup>125</sup> or necessity.<sup>126</sup>

### *C. The Civil Law Approach: Louisiana and the World*

#### 1. Louisiana

Grounded in its civil law tradition and borrowing from the first modern civil code in the world, the 1804 French Civil Code (also known as the Code Napoleon),<sup>127</sup> Louisiana has long provided that a conventional servitude may be relocated unilaterally by the servient estate owner.<sup>128</sup> According to Article 748 of the Louisiana Civil Code, a dominant estate owner must accept the relocation of a servitude if three conditions are met: (1) the servitude's original location "has become more burdensome for the owner of the servient estate" or "prevents him from making useful improvements on his estate;" (2) the new location is "equally convenient" for the exercise of the servitude; and (3) "[a]ll expenses of relocation are borne by the owner of the servient

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<sup>125</sup>Enos v. Casey Mountain, Inc., 532 So.2d 703, 706 (Fla. Dist. Ct. App. 1988); Millson v. Laughlin, 142 A.2d 810, 813–816 (Md. 1958). See also Bubis v. Kassin, 803 A.2d 146, 151–52 (N.J. App. Div. 2002) (denying dominant estate owners' request for injunctive relief and allowing relocation of an implied beach access easement because enforcement of the easement in its original location "would have a severe adverse effect upon the [servient owners'] beneficial enjoyment of their property," and this adverse effect "substantially outweighs the inconvenience to [the dominant owners] in being required to walk [a longer distance to the beach]").

<sup>126</sup>Bode v. Bode, 494 N.W.2d 301, 304–05, 305 n.2 (Minn. Ct. App 1992); Huggins v. Wright, 774 So.2d 408, 410, 412 (Miss. 2000); Taylor v. Hays, 551 So.2d 906, 908–10 (Miss. 1989).

<sup>127</sup>C. Civ. (Fr.) art. 701 (Daloz 2020 ed.). See also THE CODE NAPOLEON OR FRENCH CIVIL CODE, translated by a Barrister of the Inner Temple, Art. 701, at 192 (1824) ("Nevertheless if this original assignment has become more burdensome to the proprietor of the estate subjected to the servitude, or if he is prevented from making there advantageous repairs, he may offer to the proprietor of the other estate, a place equally commodious for the exercise of his rights and the latter shall not be at liberty to refuse.").

<sup>128</sup>La. Civ. Code Ann. art. 748 (2021). For a detailed discussion of the history and recent experience of servitude relocation in Louisiana and another mixed jurisdiction with strong civil law roots, see John A. Lovett, *A New Way: Servitude Relocations in Scotland and Louisiana*, 9 EDIN. L. REV. 352 (2005). The source of the current code provision is Article 777 of Louisiana's 1870 Civil Code. La. Civ. Code art. 777 (1870). The 1870 Civil Code provision, and its precursors in the 1825 Louisiana Civil Code and the 1808 Digest of the Laws in Force in the Territory of Orleans, Louisiana's very first civil code, were all copied, practically verbatim from Article 701 of the 1804 French Civil Code (Code Napoleon). *Id.* at 377–80. The inspiration for Article 701 of the 1804 French Civil Code, however, is unclear. *Id.* at 378.

estate.”<sup>129</sup> Similarly, the Louisiana Civil Code allows the owner of an estate burdened by a legal servitude of passage benefitting an enclosed estate (the civil law analogue of an easement by necessity) to relocate the servitude “to a more convenient place at his own expense, provided that it affords the same facility to the owner of the enclosed estate.”<sup>130</sup>

Reported appellate court decisions applying the Louisiana Civil Code’s servitude relocation regime began to appear in the late 1920s.<sup>131</sup> In an important 1970 concurring opinion in *Denegre v. Louisiana Public Service Commission*, Justice Albert Tate, Jr. clarified that the Civil Code’s servitude relocation principles applied to all manner of conventional servitudes, whether created by express agreement, judgment, prescription, or destination of the owner (Louisiana’s version of quasi-easements implied by prior use).<sup>132</sup> Citing an important French doctrinal source, Marcel Planiol, Tate emphasized that “the plain intent of [Louisiana’s servitude relocation articles] is to permit the court to displace the site of the previous servitude, even if established by agreement or judgment, when the servitude is localized at a place too burdensome on the encumbered estate.”<sup>133</sup> Justice Tate concluded with a powerful exposition of the interlocking utilitarian and freedom-promoting rationales for the state’s servitude relocation regime, stressing that “the interests of society are furthered by the free use of land by private owners for its most advantageous social utility” and observing that “the full ownership of land is favored, as against restrictions upon its use imposed decades or even centuries in the past, provided that no prejudice is caused to property rights conferred by conventional agreement of the parties or predecessors in title.”<sup>134</sup>

Subsequent Louisiana decisions have generally stressed the necessity (or at least the advisability) of a servient estate owner seeking judicial approval before attempting to relocate a servitude without the consent of the servitude

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<sup>129</sup>La. Civ. Code Ann. art. 748 (2021).

<sup>130</sup>La. Civ. Code Ann. art. 695 (2021). See Lovett, *supra* note 128, at 379–80 (discussing historical sources of Article 695 in prior Louisiana civil codes and noting that this provision did not have a source in the Code Napoleon).

<sup>131</sup>Lovett, *supra* note 128, at 380–83 (reviewing Louisiana case law dating from 1928 through 1965).

<sup>132</sup>*Denegre v. La. Pub. Serv. Comm’n*, 242 So.2d 832, 835 n.2 (La. 1970) (Tate, J., concurring).

<sup>133</sup>*Id.* at 838–39.

<sup>134</sup>*Id.* at 839.



holder.<sup>135</sup> Over the years, Louisiana courts have frequently applied the Civil Code's servitude relocation articles, in some cases rejecting proposed servitude relocations because the new location would result in substantial inconvenience or loss of servitude utility to the dominant estate owner<sup>136</sup> and in other cases approving relocations to permit servient estate development when the new servitude location would not impair a servitude's utility.<sup>137</sup>

## 2. International Dispersion

As noted earlier, the flexible, utilitarian civil law approach to servitude relocation first appeared in Article 701 of the 1804 French Civil Code and remains unchanged in French Law today.<sup>138</sup> In North America, two other mixed jurisdictions besides Louisiana have adopted the traditional civil law approach to servitude relocation: Quebec<sup>139</sup> and Puerto Rico.<sup>140</sup>

In Europe and Latin America, many legal systems have either adopted the French approach or expanded it with their own innovations. The Belgium Civil Code, for instance, retained the exact same language (and even same article number) as used in the French Civil Code for two centuries,<sup>141</sup> with only slight modifications in language and a new section reference in its most recent incarnation.<sup>142</sup> The Civil Code of Spain essentially reproduces the text of Article 701 of the French Civil Code without any significant changes.<sup>143</sup> The Greek Civil Code reproduces the same fundamental servitude relocation

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<sup>135</sup>*Discon v. Saray, Inc.* 265 So.2d 765, 772 n.4 (La. 1972); *Hotard v. Perriloux*, 8 La. App. 476, 477 (La. Ct. App. 1928); *Brian v. Bowlus*, 399 So.2d 545, 550 (La. 1981) (Lemmon, J., concurring in part and dissenting in part on rehearing) (asserting that servient estate owner should either obtain the servitude holder's consent or "have the relocation approved and the new location fixed by the court").

<sup>136</sup>*Welch v. Plan. and Zoning Comm'n of East Baton Rouge Par.*, 220 So.3d 60, 64–68 (La. Ct. App. 2017); *Woodward v. Gehrig*, 707 So.2d 1322, 1324 (La. Ct. App. 1998); *Fuselier v. Hebert*, 526 So.2d 1169, 1172 (La. Ct. App. 1988); *Delfice Land Corp. v. Citrus Lands of La.*, 330 So.2d 631, 623–33 (La. Ct. App. 1976).

<sup>137</sup>*Coleman v. Booker*, 94 So.3d 174, 177–78 (La. Ct. App. 2012); *Ogden v. Bankston*, 398 So.2d 1037, 1043–45 (La. 1981); *Holiday City Builders v. Acadian Aviation Corp.*, 386 So.2d 1019, 1020–21 (La. Ct. App. 1980); *Ramsey v. Johnson*, 312 So.2d 671, 672 (La. Ct. App. 1975).

<sup>138</sup>C. Civ. (Fr.) art. 701 (Dalloz ed. 2020).

<sup>139</sup>Civ. Code (Quebec) art. 1186.

<sup>140</sup>P.R. Código Civ. art. 953 (2021); P.R. Código Civ. art. 953 (1930).

<sup>141</sup>Code Civil (Belgium) art. 701 (John H. Crabb trans., 1982).

<sup>142</sup>Code Civil (Belgium) art. 3.124 (2020).

<sup>143</sup>Civil Code (Spain) art. 545 (Julio Romanach, Jr. trans., 1994).

principles originally developed in France, though in slightly more abstract, functional terms.<sup>144</sup>

The modern Dutch Civil Code, in force since the early 1990s, also offers the same servitude relocation calculus first articulated in the French Civil Code by stating that a servient estate owner can change the location where an easement is exercised to another location on the servient estate at its own expense provided the relocation does not diminish “the right of the owner of the dominant property to exercise the easement.”<sup>145</sup> In another provision, however, the Dutch Civil Code permits a court to modify or even cancel an easement at the demand of a servient owner based on unforeseen changed conditions as long as twenty years have passed since the creation of the servitude.<sup>146</sup>

Interestingly, under the Italian Civil Code and the relatively new Brazilian Civil Code, a servient estate owner and a dominant estate owner are both granted a right to relocate a servitude at their own expense, although the conditions for a dominant estate owner to achieve a unilateral relocation are slightly more demanding.<sup>147</sup> In Italy, the servient estate owner can also transfer the servitude to other land it owns or even to land owned by a third party, provided the servitude continues to be equally convenient to the dominant estate owner.<sup>148</sup>

Under the influential German Civil Code, the BGB, even when the “actual use” of a real servitude is restricted to “a part of the servient piece of land,” the servient estate owner may demand removal of the servitude’s use “to another location which is equally suitable for the holder of the right, if the use on the present location is especially onerous” and the servient estate

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<sup>144</sup>Civil Code (Greece) Sec 1128 (Constantin Taliadoros trans., 2000).

<sup>145</sup>NBW (Netherlands) Book 5, art. 73(2) (1992) (THE CIVIL CODE OF THE NETHERLANDS, Hans Warendorf et al. trans., 2009).

<sup>146</sup>*Id.* art. 78.

<sup>147</sup>C.C. (Italy) art. 1068 (Mario Beltramo et al. trans. and eds., Oceana 2010) (granting servitude relocation right to servient estate owner if “the original use has become more burdensome for the servient land or interferes with work, repairs, or improvements on it,” and the new location offers the dominant estate owner “an equally convenient place for the exercise of his rights” and granting same right to dominant estate owner “if he proves that the change produces a considerable advantage for him and does not cause damage to the servient land”); C.C. (Brazil) art. 1384 (2004) (Julio Romañach, Jr. trans. Lawrence Pub. 2011) (“A servitude may be moved from one place to another by the owner of the servient estate, at his own expense, if this does not in any way diminish the advantages of the dominant estate, or by the owner of the latter, at his cost, if there were a considerable increase in the advantages and no prejudice to the servient estate.”).

<sup>148</sup>C.C. (Italy) art. 1068 (Susanna Beltramo trans. and ed. West 2012).

owner bears the cost of removal and pays in advance.<sup>149</sup> Moreover, this right to relocate a servitude applies even if “the part of the piece of land to which the use is limited is determined by legal transaction.”<sup>150</sup> Finally, the servient estate owner’s right to relocate a servitude under this provision “cannot be excluded or limited by legal transaction.”<sup>151</sup> The German Civil Code thus treats the servitude relocation principle first announced in the French Civil Code as a mandatory, nonwaivable right.

Finally, the Swiss Civil Code tracks the general principles of servitude relocation first articulated in the French Civil Code and adds that the servient estate owner’s relocation right applies “even if the particular place affected by the servitude is entered in the [land] register.”<sup>152</sup> Another article in the Swiss Civil Code goes further and provides that a predial servitude can be erased at the servient owner’s demand if the servitude has “ceased to benefit the dominant property,” and even allows the servient owner to obtain total or partial relief from the servitude by compensating the dominant estate owner if the servitude provides “some benefit to the dominant property, but this benefit if of little importance in comparison with the burden imposed on the servient owner.”<sup>153</sup>

Just as noteworthy as these developments in the civil law world, a surprising number of common law jurisdictions abroad (in Australia, New Zealand, Canada, and the United Kingdom) have also effectively embraced the same approach to easement relocation by adopting statutes that grant courts broad authority to modify or even terminate an easement when a modification or termination would not substantially injure the easement holder or changed conditions otherwise justify modification or termination.<sup>154</sup> Other common law jurisdictions, including England and

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<sup>149</sup>BGB § 1023 (S. Forrester et al., Rothman & Co. trans., 1975). See also BGB § 1023 (Simon L. Goren trans., 1994).

<sup>150</sup>BGB § 1023 (S. Forrester et al., Rothman & Co. trans., 1975).

<sup>151</sup>*Id.*

<sup>152</sup>C.C. (Switz.) § 742 (Ivy Williams, Oxford trans., 1925).

<sup>153</sup>C.C. (Switz.) § 736.

<sup>154</sup>CONVEYANCING ACT 1919 (New South Wales) § 89(1); PROPERTY LAW ACT 1974 (Queensland) § 181(1); CONVEYANCING AND LAW OF PROPERTY ACT 1884 (Tasmania) § 84C(1); Law of Property Act 2000 (NT) § 177; PROPERTY LAW ACT 2007 (New Zealand) § 317(1); PROPERTY LAW ACT (British Columbia) (RSBC 1996, c 377) § 35; PROPERTY (NORTHERN IRELAND) ORDER 1978 (SO 1978/459 (NI 4) §§ 3(1)(c), 5(1), 6(2)). *Cf.* LAND AND CONVEYANCING REFORM ACT 2009 § 50 (Republic of Ireland) (permitting modification or discharge of freehold covenants but not mentioning easements); LAW OF PROPERTY ACT 1958 § 84(1) (Victoria) (same as to restrictive covenants).

Wales and Ontario, have also considered whether existing judicial authority to modify or extinguish restrictive covenants should be expanded to allow for modification or extinction of easements.<sup>155</sup> Scotland, a mixed jurisdiction that has modernized much of its property law in recent decades, has long allowed the owner of land burdened by a predial servitude to apply to its Lands Tribunal for the discharge or modification of the servitude.<sup>156</sup>

Finally, the Supreme Court of Appeal of South Africa recently reconsidered its approach to the subject of unilateral servitude relocation.<sup>157</sup> After surveying developments around the world and noting its inherent power to develop the common law and its new constitutional duty to account for “the interests of justice,”<sup>158</sup> the court discarded South Africa’s own early twentieth century version of the mutual consent rule.<sup>159</sup> In its place, the court chose to adopt the flexible approach used in the Netherlands, France, Louisiana, and Scotland, among other jurisdictions, and fashioned a new rule allowing a servient estate owner to relocate a predial servitude without the consent of the dominant estate owner, as long as the servient estate owner

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<sup>155</sup> Although Section 84(1) of the Law of Property Act of 1925 allows landowners in England and Wales to apply for and obtain judicial discharge or modification of a restrictive covenant on the grounds of obsolescence or other utilitarian bases, the statute does not apply to easements. THE LAW OF PROPERTY ACT 1925 § 84(1) (as amended by THE LAW OF PROPERTY ACT 1969, Sch. 3, SI 2009/1307). In response to calls for reform from scholars and courts, KEVIN GRAY & SUSAN FRANCIS GRAY, ELEMENTS OF LAND LAW ¶ 5.1.85, at 636–37 (5<sup>th</sup> ed. 2009) (criticizing English mutual consent rule, noting Restatement, and recommending that unilateral relocation of an easement be allowed as an insubstantial interference with dominant estate owner’s interest “if the relocation causes him no inconvenience or loss of utility and is ‘necessary to achieve an object of substantial public and local importance and value’”) (quoting *Greenwich Healthcare National Health Service Trust v. London and Quadrant Housing Trust*, 77 P & CR 133, 138–39 (1999)), the Law Commission of England and Wales has recommended that the jurisdiction of the Lands Chamber be extended to allow for the modification or discharge of easements on similar terms on a prospective basis. LAW COMMISSION, MAKING LAND WORK: EASEMENTS, COVENANTS AND PROFITS A PRENDRE, Law. Com. No. 327, §§ 7.27-7.36, at 162–64 (2011). The Ontario Law Commission has also recommended that Ontario provincial courts’ power to modify or extinguish covenants be extended to easements. ONTARIO LAW REFORM COMMISSION, REPORT ON BASIC PRINCIPLES OF LAND LAW 154–156 (1996).

<sup>156</sup> TITLE CONDITIONS ACT 2003 (2003 asp 9) (Scotland) § 909(1)(a)(1). For a detailed discussion of Scotland’s experience with servitude relocation, see Lovett, *supra* note 128, at 363–76, 389–92.

<sup>157</sup> *Linvestment CC v. Hammersley*, 3 S.A. L. Rep. 283, 286–93 (Sup. Ct. App. 2008).

<sup>158</sup> *Id.* at 291.

<sup>159</sup> *Id.* at 292–93 (Sup. Ct. App. 2008) (overturning *Gardens Est. Ltd v. Lewis*, 1920 A.D 144, 150, and *Van Heerden v. Coetzee and Others*, 1914 AD 167, 171–72).

pays the costs of the relocation and the relocation does not prejudice the owner of the dominant tenement.<sup>160</sup>

Summing up that court's rationale, Judge Heher stressed the importance of permitting a servient estate owner a reasonable opportunity to develop the burdened land, especially when a right of way or a servitude was granted or created by prescription many years earlier, often well before the current owner even acquired the burdened land, the original contracting parties are long gone, and the surrounding environment has changed.<sup>161</sup> As Judge Heher put it: "Properly regulated flexibility will not set an unhealthy precedent or encourage abuse. Nor will it cheapen the value of registered title or prejudice third parties."<sup>162</sup> If a leading South African court can see its way toward a new rule on servitude relocation so forthrightly after considering developments across numerous legal systems, perhaps American legislatures should take note.

#### *D. Restatement (Third) of Property: Servitudes § 4.8(3) (2000)*

In 2000, the American Law Institute altered the landscape of easement and servitude relocation law in the United States when it promulgated Section 4.8(3) of the Restatement (Third) of Property: Servitudes and essentially adopted the civil law approach long used in Louisiana and many other countries.<sup>163</sup> Under this rule, a servient estate owner can relocate an easement, without the easement holder's consent, on the following terms:

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

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<sup>160</sup>*Linvestment*, 3 S.A. L. Rep. at 292–93 (citing Lovett, *supra* note 128, as "an instructive comparative survey [that] traces the progress of the law from the common Roman roots of Scotland and the state of Louisiana until the 21st century, showing how the tide is turning from strict adherence to contractual rights toward a utilitarian power of relocation that is judicially controlled or to legislative intervention having similar effect").

<sup>161</sup>*See id.*

<sup>162</sup>*Id.* at 293. For a detailed discussion of *Linvestment*, see AJ VAN DER WALT, *THE LAW OF SERVITUDES* 421–24 (GJ Pienaar ed., 2016).

<sup>163</sup>*See* RESTATEMENT, *supra* note 16, at § 4.8(3).

- (a) significantly lessen the utility of the easement,
- (b) increase the burdens on the owner of the easement in its use and enjoyment, or
- (c) frustrate the purpose for which the easement was created.<sup>164</sup>

In the revision comments to Section 4.8, the Restatement drafters, including, presumably, the Reporter for the Restatement (Third), Professor Susan French, articulated several rationales for this new approach.<sup>165</sup> Most of the rationales are utilitarian in nature, although one is more historical. First, the drafters argued that because the new rule only allows a servient estate owner to move an easement if the change does not unduly interfere with “the legitimate interests of the easement holder,” the new rule would increase aggregate utility by increasing “the value of the servient estate without diminishing the value of the dominant estate.”<sup>166</sup> In other words, the drafters claimed that an easement relocation under the calculus of Section 4.8(3) would be “Pareto efficient,” meaning that while the servient estate is made better off by the relocation, the easement holder will not actually be any worse off, at least to the extent the easement continues to provide the same easement-related benefits to the holder.<sup>167</sup>

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<sup>164</sup>*Id.* Subsections (1) and (2) of Section 4.8 address a different question—how to determine the *original* location and dimensions of a servitude when those features are not fixed by the instrument or circumstances surrounding creation of a servitude. *Id.* at § 4.8(1)–(2). *See also id.* at cmt. (b) (explaining that subsection (1) gives the servient owner “the power to locate a servitude *in the first instance*”) (emphasis added). Unfortunately, some courts have construed the broad statement in the introductory phrase of Section 4.8 (“Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows...”) to mean that all of Section 4.8’s subparts, including subsection (3) addressing servitude relocation, are inapplicable whenever the location and dimensions of a servitude are set forth in the original instrument or otherwise defined at the outset, thus leading those courts to restrict their adoption of the Restatement to undefined easements. *See, e.g.,* Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 193–96 (Nev. 2009), discussed *infra* notes 207, 393 and accompanying text. *See also* Town of Ellettsville v. DeSpirito, 111 N.E.3d 987, 992–94 (Ind. 2018) (explaining that Restatement drafters probably did not intend for Section 4.8(3) to be restricted to undefined, unfixed easements).

<sup>165</sup>*See* RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

<sup>166</sup>*Id.*

<sup>167</sup>*See* ROBIN PAUL MALLOY, LAW IN A MARKET CONTEXT 189 (2004) (“A change in the status quo is considered to be Pareto superior if it makes at least one person better off without making anyone else worse off.”). The drafters of the Restatement did not address whether the easement holder might have some subjective reason for rejecting an easement relocation or the

Next, the drafters argued that the new rule would rebalance the rights of the servient estate owner and the easement holder in their ability to respond to changed circumstances. As the drafters noted, an easement holder already benefits from a well-established common law rule, recognized in Section 4.9 of the Restatement, which provides that “the easement holder may increase use of the easement to permit normal development of the dominant estate, if the increase does not unduly burden the servient estate.”<sup>168</sup> Allowing a servient estate owner to change an easement’s location under Section 4.8(3)’s rule of reason would be “a fair tradeoff,” the drafters argued, “for the vulnerability of the servient estate to increased use of the easement to accommodate changes in technology and development of the dominant estate.”<sup>169</sup>

This argument about achieving a more functional balance between the parties to an easement was paired with a historical claim about the mutual consent rule—namely, the observation, confirmed to some extent by the discussion in Part I.A of this article, that many of the early decisions articulating the mutual consent rule actually involved judicial efforts to prevent an easement holder from unilaterally moving an easement.<sup>170</sup> Thus, the drafters noted that the reasons typically given for constraining an easement holder from being able to move an easement unilaterally (that it “would depreciate the value of the servient estate, discourage its improvement, and incite litigation”) did not apply to servient estate owner

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theoretical counter-argument that only market exchanges are truly Pareto efficient. *See id.* at 189–90 (observing that the “classic example of a *Pareto efficient* exchange is a voluntary market exchange where, by definition (in the absence of fraud, duress, or the like), both parties are made better off, in their own estimation, by virtue of the exchange”).

<sup>168</sup>RESTATEMENT, *supra* note 16, at § 4.8 cmt. f (citing *id.* § 4.9). *See also* BRUCE & ELY, *supra* note 26, § 8:13 (acknowledging that an easement’s scope “may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate”) (footnote omitted).

<sup>169</sup>RESTATEMENT, *supra* note 16, at § 4.8 cmt. f. *See also* BRUCE & ELY, *supra* note 26, § 8:13 (observing that in “controversies over expanded usage, courts balance the dominant owner’s right to enjoy the easement and take advantage of technological innovations with the servient owner’s right to make all use of the servient land that does not interfere with the servitude” and stressing that “[s]ince these rights are relative, courts must strive to protect the interests of both parties”).

<sup>170</sup>*See* RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

attempts to move an easement, with the possible exception of the litigation incitement rationale.<sup>171</sup>

Turning to the specific concerns raised in *Stamatis v. Johnson* and *Davis v. Bruk* about the potential for an alternative rule to incite litigation, subject the easement holder to harassment, and, perhaps most important, bestow windfall gains on the servient estate owner while upsetting contractual expectations of the easement holder,<sup>172</sup> the Restatement drafters argued that the “safeguards” contained in Section 4.8(3) would “protect the easement owner’s legitimate interests.”<sup>173</sup> In a sense, this was a return to the argument about net aggregate utility, but the drafters acknowledged that even if the new rule produced some windfall gains for the servient estate owner (and windfall losses for the easement holder), this potential unfairness was outweighed by the prospect that the new rule would prevent an easement holder from blocking development of the servient estate even when a relocated servitude would serve the easement holder equally well.<sup>174</sup>

Finally, opening out to a much larger field of evaluation, the Restatement drafters suggested that the new rule’s capacity to reduce the risk that a localized easement would unduly restrict a servient estate owner’s future development value promised to make landowners more willing to grant easements, thus lowering their price in the long run, and thereby encouraging their use in private land use planning.<sup>175</sup> As the next section will show, these arguments proved to be persuasive to some judges, as a number of U.S. courts fully or partially adopted the Restatement approach.

### *E. Judicial Responses to the Restatement*

#### 1. Decisions Adopting the Restatement

During the 2000s, a number of state courts, including the state supreme courts of Colorado, South Dakota, and Massachusetts, and courts of appeal in Nebraska and Illinois, adopted the Restatement approach to easement

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<sup>171</sup> *Id.* For a discussion of the reasons the U.E.R.A. does not provide an easement holder with a reciprocal right to relocate an easement without the servient owner’s consent, see *infra* Part II.D, notes 295–302 and accompanying text.

<sup>172</sup> See *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950); *Davis v. Bruk*, 411 A.2d 660, 661–62, 664–66 (Me. 1980).

<sup>173</sup> See RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

<sup>174</sup> See *id.*

<sup>175</sup> See *id.*



relocation and applied it in a robust manner.<sup>176</sup> In two other states, New York and Nevada, courts adopted the Restatement but limited its application to undefined easements.<sup>177</sup> Other state courts adopted the Restatement but limited its application even more narrowly.<sup>178</sup>

**Robust Adoptions:** In *Roaring Fork Club, L.P. v. St. Jude's Co.*, a servient estate owner attempting to create a private fishing and golf club could not obtain consent from the owner of an adjacent dominant estate (a ranch) to modify various irrigation easements burdening the land.<sup>179</sup> After the servient estate owner altered the easements (and the accompanying irrigation ditches) unilaterally by realigning channels, diverting water flows, enclosing portions of some ditches in pipes, and making other improvements, the dominant estate owner sued, seeking restoration of the ditches to their original location and removal of any improvements.<sup>180</sup> The Colorado Supreme Court, however, ruled that the servient estate owner did not have to return to the status quo and held more generally that a servient estate owner can move or alter an irrigation easement, without a dominant estate owner's consent, if it obtains judicial authorization under the Restatement.<sup>181</sup>

In *Roaring Fork*, the court justified its adoption of the Restatement by citing the Restatement comments, academic commentary on the Restatement,<sup>182</sup> and prior judicial decisions from Colorado and other states exhibiting flexibility on easement relocation.<sup>183</sup> The court emphasized that an easement relationship should be conceptualized in terms of mutual

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<sup>176</sup> See, e.g., *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229, 1237–39 (Colo. 2001); *Clinger v. Hartshorn*, 89 P.3d 462, 469 (Colo. App. 2003); *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057–59 (Mass. 2004); *Carlin v. Cohen*, 895 N.E.2d 793, 796–99 (Mass. App. Ct. 2008); *Burkhart v. Lillehaug*, 664 N.W.2d 41, 43–44 (S.D. 2003); *Stanga v. Husman*, 694 N.W.2d 716, 718–20 (S.D. 2005); *R & S Invs. v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 879–81 (Neb. Ct. App. 2006).

<sup>177</sup> See *Lewis v. Young*, 705 N.E.2d 649, 653–54 (N.Y. 1998) (relying on a tentative draft of Section 4.8(3)); *St. James Vill., Inc. v. Cunningham*, 210 P.3d 190, 193–96 (Nev. 2009).

<sup>178</sup> See *infra* notes 207–211 and accompanying text.

<sup>179</sup> 36 P.3d at 1230.

<sup>180</sup> *Id.* at 1230–31.

<sup>181</sup> See *id.* at 1230–31, 1237, 1239.

<sup>182</sup> *Id.* at 1232, 1237.

<sup>183</sup> *Id.* at 1235–37. In addition to citing the Colorado decisions in *Brown v. Bradbury*, 135 P.2d 1013, 1014 (Colo. 1943), and *Valley Dev. Co. v. Weeks*, 364 P.2d 730, 731 (Colo. 1961), the court discussed the New York Court of Appeals decision in *Lewis v. Young*, 705 N.E.2d 649, 654–55 (N.Y. 1998) but did not limit its adoption of the Restatement to undefined easements.

accommodation and use maximization, not inflexible property rights,<sup>184</sup> and specifically rejected the windfall gains and losses argument articulated in *Davis v. Bruk* by noting that the mutual consent rule can also lead to windfalls when parties have not anticipated its effect.<sup>185</sup> Returning to its predominant theme of mutual accommodation and flexibility, the court stressed once more that “each property owner ought to be able to make the fullest use of his or her property allowed by law, subject only to the requirement that he or she not damage other vested rights holders.”<sup>186</sup>

Although it held that the particular servient estate owner in *Roaring Fork* could be liable for trespass damages because of its failure to secure advance judicial authorization for the proposed relocations,<sup>187</sup> the court expressed its confidence in judicial competence to balance the respective rights of a servient estate owner and an easement holder.<sup>188</sup> Curiously, almost as if to prove that judicial authorization for easement relocation would not be too lightly given in Colorado, several subsequent Colorado judicial decisions applied the *Roaring Fork*-Restatement framework and held that servient estate owners did not satisfy the Restatement’s conditions for relocation.<sup>189</sup>

The South Dakota Supreme Court soon followed Colorado’s example when it used the Restatement to approve a servient estate owner’s unilateral regrading and reshaping of an access road that had occurred many years earlier and that significantly improved the road’s quality.<sup>190</sup> In 2005, the same court reaffirmed its reliance on the Restatement when it approved a servient estate owner’s prior unilateral modification of an access easement (by

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<sup>184</sup> See *Roaring Fork*, 36 P.3d at 1235–37.

<sup>185</sup> See *id.* at 1237 (responding to *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980)).

<sup>186</sup> *Id.*

<sup>187</sup> See *id.* at 1234, 1237–38.

<sup>188</sup> See *id.* at 1231, 1237–38.

<sup>189</sup> See *Clinger v. Hartshorn*, 89 P.3d 462, 469 (Colo. App. 2003) (holding that relocation of a prescriptive easement used for guiding and outfitting purposes would be improper because of the increased burden potentially imposed on the dominant estate owner); *City of Boulder v. Farmer’s Reservoir & Irrigation Co.*, 214 P.3d 563, 567–69 (Colo. App. 2009) (holding that city could not alter an irrigation ditch easement by running a hiking trail through a culvert under the ditch because alteration would materially and adversely affect the easement holder’s maintenance rights).

<sup>190</sup> See *Burkhart v. Lillehaug*, 664 N.W.2d 41, 42–44 (S.D. 2003). The access road at issue in *Burkhart* was initially noted on a plat at the time of its creation, but the plat did not contain any specific survey information related to its precise location, length, width, slope, grade, or any other qualities. *Id.* at 42. Although the court noted the primitive origins of the easement, nothing in the court’s holding suggests that the court’s adoption of Section 4.8(3) hinged on the undefined nature of the easement in its original grant. *Id.* at 42–43.

creating two new corners and adding pavement) to facilitate development of an extensive planned community.<sup>191</sup>

Finally, in *M.P.M. Builders, LLC v. Dwyer*, the Supreme Judicial Court of Massachusetts approved a servient estate owner's request to replace, at its own expense, a sixty-two-year-old cartway with two new access easements at another location on the servient estate to permit the construction of houses on three of seven subdivided parcels on the servient estate.<sup>192</sup> Reversing a reluctant land court judgment in favor of the dominant estate owner,<sup>193</sup> the supreme judicial court expressly adopted the Restatement, praising it as "a sensible development in the law," and one that "strikes an appropriate balance between the interests of the respective estate owners."<sup>194</sup> To buttress its holding, the court stressed the general principle that a servient estate owner should be able to make all beneficial uses of a servient estate "as long as the purpose for which the easement was originally granted is preserved," and rejected arguments typically advanced in favor of preservation of the mutual consent rule.<sup>195</sup> Perhaps most significantly, the court in *M.P.M. Builders* addressed the tendency of some dominant estate owners to object to even a narrowly tailored, sensible request to relocate an easement that will have no material impact on the easement holder's use and enjoyment of the easement by emphasizing that an easement only "serve[s] a particular objective" and does not "grant the easement holder the power to veto other uses of the servient estate that do not interfere with that purpose."<sup>196</sup> This key insight—that a typical easement is created to serve an affirmative purpose and gives

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<sup>191</sup> See *Stanga v. Husman*, 694 N.W.2d 716, 718–20 (S.D. 2005). In *Stanga*, the court noted that the dominant estate owner could not prove that the modifications to the easement impeded access to his property. See *id.* at 719. In fact, observing that the modifications likely improved the road and were made for "legitimate planning and development purposes," the court held that the modifications were reasonable and satisfied the Section 4.8(3) criteria. See *id.* at 719–20.

<sup>192</sup> 809 N.E.2d 1053, 1055 (Mass. 2004).

<sup>193</sup> See *id.* at 1059. Apparently sympathetic to the servient estate owner's predicament, the land court judge described the case as "a clear example of an increasingly common situation where a dominant tenant is able to block development on the servient land because of the common-law rule which . . . may well be the result of unreflective repetition of a misapplied rationale." *Id.* at 1056 (alteration in original).

<sup>194</sup> *Id.* at 1057.

<sup>195</sup> See *id.* at 1057–58.

<sup>196</sup> *Id.* at 1058. The court also observed that: (1) the Restatement "does not destroy the value" of the dominant estate; (2) a relocated easement is no less certain as a property interest than the easement in its original location; and (3) the common law mutual consent rule threatened to turn a mere access easement into a possessory interest, "rather than what it is, merely a right of way." *Id.*

the easement holder a limited right to use the servient estate for that purpose but not a general veto power over other uses of the servient estate—is highlighted by the substantive criteria for easement relocation under the U.E.R.A.<sup>197</sup>

Although the court in *M.P.M. Builders* advised that a servient owner should always seek judicial authorization before embarking on a relocation and although it acknowledged that adoption of the Restatement could produce “increased litigation” in the short run, the court reasoned that desirable developments in the law, particularly ones that promote fairness and greater utility, should not be rejected merely because of the possibility of litigation.<sup>198</sup> Indeed, the court predicted that “over time, uncertainties will diminish and litigation will subside as easement holders realize that in some circumstances unilateral changes to an easement, paid for by the servient estate owner, will be enforced by courts.”<sup>199</sup> In other words, the court predicted that its adoption of the Restatement would ultimately spur more negotiation than litigation.<sup>200</sup>

The Massachusetts court’s prediction in *M.P.M. Builders* also appears to have been on target. Over the next sixteen years, only two other reported easement relocation decisions have appeared in Massachusetts. In one decision, an appellate court applied the Restatement to hold that a servient estate owner could relocate a pedestrian beach access easement to permit construction of a new house because the relocated path still protected the dominant estate owners’ privacy and did not lessen the easement’s utility.<sup>201</sup> In the second decision, the Massachusetts Supreme Judicial Court reaffirmed its commitment to the Restatement approach to easement relocation and specifically held that an easement is not disqualified from relocation or modification merely because it is located on registered land, as opposed to recorded land, or because it is defined by reference to a land court plan.<sup>202</sup>

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<sup>197</sup> See UNIF. EASEMENT RELOCATION ACT § 4(3) (UNIF. L. COMM’N 2020), discussed *infra* Part II.D, note 309312 and accompanying text.

<sup>198</sup> See 809 N.E.2d at 1059.

<sup>199</sup> *Id.*

<sup>200</sup> See *id.*

<sup>201</sup> See *Carlin v. Cohen*, 895 N.E.2d 793, 796–99 (Mass. App. Ct. 2008).

<sup>202</sup> See *Martin v. Simmons Props., LLC*, 2 N.E.3d 885, 893–96 (Mass. 2014). In *Martin*, the specific modification concerned a modest narrowing of the width of an access easement, not a relocation, but all parties and judges agreed that the narrowing of the width of the easement did not negatively impact the use and enjoyment of the easement by the dominant estate owner. See *id.* at 894.

A number of other appellate courts have also adopted the Restatement approach to easement relocation. Following the Colorado decision in *Roaring Fork*, the Nebraska Court of Appeals expressly adopted Section 4.8(3) to approve the relocation of a sanitary sewer lagoon easement.<sup>203</sup> As in Colorado, the court observed that Nebraska case law also recognizes that the parties to an easement “enjoy correlative rights to use the subject property” and must have “due regard for each other and should exercise that degree of care and use which a just consideration for the rights of the other demands.”<sup>204</sup>

Illinois courts have also been receptive to the Restatement. In 2009, an appellate court held that the Restatement approach is consistent with prior Illinois precedent allowing either party to an easement to make changes to the easement provided the changes are not “substantial,” and indicating that in evaluating the “substantiality” of a proposed relocation, courts should apply the factors set forth in Restatement Section 4.8(3).<sup>205</sup> In a later case, another Illinois appellate court again embraced the Restatement approach in deciding whether a servient estate owner could relocate an easement to facilitate a substantial development project.<sup>206</sup> In summary, courts in five states (Colorado, South Dakota, Massachusetts, Nebraska, and Illinois) have adopted strong versions of the Restatement, applying its utilitarian criteria to a wide variety of easements even when the locations of those easements were well established by agreement.

**Limited Adoptions:** Courts in another five states have partially adopted the Restatement approach to easement relocation by using its criteria but limiting its application to particular categories of easements. Courts in New York and Nevada, for instance, extolled the virtues of the Restatement approach but then limited its application to undefined easements, *i.e.*, those without a specified metes-and-bounds description or some other indication

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<sup>203</sup> See *R & S Invs. v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 879–81 (Neb. Ct. App. 2006).

<sup>204</sup> *Id.* at 880. Notably, even though the sanitation lagoon’s new location was farther away from the dominant estate, the Nebraska court approved the relocation and reconstruction of the sewer easement with new pipes because the relocated easement adequately met the dominant estate’s waste disposal needs and, in fact, reduced environmental problems caused by the old lagoon’s age. See *id.* at 875–77, 881.

<sup>205</sup> See *McGoey v. Brace*, 918 N.E.2d 559, 563–67, 569 (Ill. App. Ct. 2009).

<sup>206</sup> See *527 S. Clinton, LLC v. Westloop Equities, LLC*, 932 N.E.2d 1127, 1138 (Ill. App. Ct. 2010) (citing *McGoey* and the Restatement and holding that a servient estate owner may modify or relocate an easement “so long as the changes would not cause substantial harm to the dominant estate”); *527 S. Clinton, LLC v. Westloop Equities, LLC*, 7 N.E.3d 756, 768 (Ill. App. Ct. 2014) (citing and discussing *McGoey*’s “substantiality of the change” analysis with approval).

of the easement's location.<sup>207</sup> Although it initially rejected application of the Restatement to surface easements,<sup>208</sup> the Vermont Supreme Court later adopted the Restatement to address relocation of sub-surface easements.<sup>209</sup> Finally, a few courts have limited application of the Restatement to non-express easements. A Pennsylvania court approved use of the Restatement for the relocation of prescriptive easements,<sup>210</sup> and a South Carolina court, though generally praising Section 4.8(3), adopted it to approve the relocation of an easement by necessity but then indicated in dicta that an express easement should be more difficult to relocate.<sup>211</sup>

## 2. Decisions Rejecting the Restatement

Several state courts, including four state supreme courts, have clearly rejected the Restatement approach.<sup>212</sup> In most of those decisions, courts simply recite the rationales originally given for the mutual consent rule in

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<sup>207</sup> See, e.g., *Lewis v. Young*, 705 N.E.2d 649, 653–54 (N.Y. 1998) (relying on a tentative draft of Section 4.8(3) and holding that easement holder's "mere use" of an undefined easement, without more, does not preclude relocation under its terms); *St. James Vill., Inc. v. Cunningham*, 210 P.3d 190, 193–96 (Nev. 2009) (citing *Lewis* and also citing introductory language of Section 4.8 ("Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows...") to restrict application of Section 4.8(3) to undefined easements). The Restatement drafters, however, likely intended for the introductory language of Section 4.8 cited by the court in *St. James Village* to apply only to questions surrounding the initial location of an easement and not a subsequent relocation. See RESTATEMENT, *supra* note 16, at § 4.8 cmt. f (stating that Section 4.8(3)'s relocation right applies "unless expressly negated by the easement instrument").

<sup>208</sup> See *Sweezy v. Neel*, 904 A.2d 1050, 1057–58 (Vt. 2006) (rejecting Restatement approach for surface easement but allowing servient owner to "bend the easement" around a new addition to his house).

<sup>209</sup> See *Roy v. Woodstock Cmty. Tr., Inc.*, 94 A.3d 530, 537–40 (Vt. 2014).

<sup>210</sup> See *McNaughton Props., LP v. Barr*, 981 A.2d 222, 225–29 (Pa. Super. Ct. 2009) (rejecting Restatement approach as applied to express easements as a question of first impression and limiting *Soderberg v. Weisel*, 687 A.2d 839, 842 (Pa. Sup. Ct. 1997) to prescriptive easements).

<sup>211</sup> See *Goodwin v. Johnson*, 591 S.E.2d 34, 37–39 (S.C. Ct. App. 2003). See also *Sheppard v. Justin Enters.*, 646 S.E.2d 177, 179 (S.C. Ct. App. 2007) (observing that South Carolina courts have not adopted the Restatement with respect to express easements).

<sup>212</sup> See, e.g., *Weston St. Hartford, LLC v. Zebra Realty, LLC*, 219 A.3d 844, 851–54 (Conn. App. Ct. 2019); *Town of Ellettsville v. DeSpirito*, 111 N.E.3d 987, 992–97 (Ind. 2018); *Stowell v. Andrews*, 194 A.3d 953, 964–66 (N.H. 2018); *Alligood v. LaSaracina*, 999 A.2d 836, 839 (Conn. App. Ct. 2010); *AKG Real Est., LLC v. Kosterman*, 717 N.W.2d 835, 842–47 (Wisc. 2006); *MacMeekin v. Low Income Hous. Inst., Inc.*, 45 P.3d 570, 578–79 (Wash. Ct. App. 2002); *Herren v. Pettengill*, 538 S.E.2d 735, 736 (Ga. 2000).

pre-Restatement decisions. For example, the Georgia Supreme Court rejected an attempt to relocate an implied easement to facilitate a housing development on a sixty-six-acre tract of land and rejected the servient estate owner's argument for adoption of the Restatement, claiming that the mutual consent rule promotes certainty and suggesting that at the time an easement is first created, both parties must have "considered all market factors, including their respective costs and benefits," before agreeing to the transaction resulting in the easement.<sup>213</sup> In the court's view, the market should be able to overcome any resistance on the part of an easement holder to a reasonable relocation request and should produce an efficient outcome "if the benefits of relocation become substantial enough."<sup>214</sup>

A Washington appellate court decision rejected any consideration of the Restatement when it prevented a non-profit organization from moving an access easement that had been implied from prior use or created by prescription forty-three years earlier, even though the relocation would have allowed for the construction of a twenty-four-unit affordable housing development.<sup>215</sup> In this decision, the court reviewed most of the case law discussed above, examined the Restatement, and even considered the larger debate surrounding the Restatement (Third) project of incorporating a more robust changed conditions doctrine into the law of easements and servitudes generally.<sup>216</sup> In the end, however, the court adhered to the mutual consent rule because it "favors uniformity, stability, predictability and property rights" as opposed to the Restatement approach, which, in the court's view, favors "flexibility, and the development potential of the servient estate."<sup>217</sup>

The Vermont Supreme Court employed similar reasoning in refusing to adopt the Restatement as applied to an express surface easement, even though it actually sanctioned a modest "bend" in the easement to accommodate a home addition encroaching on the easement.<sup>218</sup> Courts in Connecticut and New Hampshire also recited the same rationales in rejecting invitations to

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<sup>213</sup> See *Herren*, 538 S.E.2d at 736.

<sup>214</sup> *Id.*

<sup>215</sup> See *MacMeekin*, 45 P.3d at 578–79.

<sup>216</sup> See *id.* at 575–79.

<sup>217</sup> *Id.* at 579. Although the appellate court in *MacMeekin* noted that the proposed new route involved several ninety-degree turns and its "zig-zag course" passed through the parking lot of the proposed development and thus might have produced significant inconvenience for the dominant estate owner, the trial court never had the opportunity to apply Section 4.8(3) to the merits of the proposed relocation. See *id.*

<sup>218</sup> See *Sweezy v. Neel*, 904 A.2d 1050, 1054–58 (Vt. 2006).

apply the Restatement.<sup>219</sup> The Wisconsin Supreme Court rejected an invitation to relocate a forty-five-year-old express access easement to allow the development of an eighty-acre parcel of land on similar grounds, rejecting not only application of the changed conditions rule offered in Section 7.10 of the Restatement, but also the unilateral easement relocation rule in Section 4.8(3).<sup>220</sup> Finally, the Indiana Supreme Court recently rejected an invitation to apply the Restatement to relocate a private underground sewer easement, even though relocating the easement would have caused only minimal disruption to the dominant estate owner and would have increased the buildable space on the servient estate.<sup>221</sup> That court recited many of the arguments discussed in previous decisions, alluded to confusion about the plain reading of Section 4.8, and also advanced a novel transaction cost argument based on the fact that the Restatement does not require advance judicial approval for a unilateral relocation by the servient estate owner.<sup>222</sup>

### 3. States Where Courts Continue to Apply the Mutual Consent Rule but Have Not Addressed the Restatement

Over the past twenty-five years, ever since the Restatement or its tentative draft began to be widely discussed in judicial decisions and law reviews, courts in the District of Columbia<sup>223</sup> and six states (Kansas, Maryland, Oregon, Virginia, West Virginia, and Wyoming) continued to apply the mutual consent rule without clearly rejecting or accepting the Restatement.<sup>224</sup>

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<sup>219</sup> See *Alligood v. LaSaracina*, 999 A.2d 836, 839 (Conn. App. Ct. 2010) (“[T]he attributes of the majority rule, namely, uniformity, stability, predictability and judicial economy, outweigh any increased flexibility offered by the Restatement approach.”); *Weston St. Hartford, LLC v. Zebra Realty, LLC*, 219 A.3d 844, 851–54 (Conn. App. Ct. 2019); *Stowell v. Andrews*, 194 A.3d 953, 964–66 (N.H. 2018) (same, citing most of the decisions discussed above).

<sup>220</sup> See *AKG Real Est., LLC v. Kosterman*, 717 N.W.2d 835, 842–47 (Wisc. 2006).

<sup>221</sup> See *Town of Ellettsville v. DeSpirito*, 111 N.E.3d 987, 988–89 (Ind. 2018).

<sup>222</sup> See *id.* at 992–97. For discussion of the transaction cost-lack of judicial approval argument, see *infra* Part III.A.430.

<sup>223</sup> See *Carrollsbury v. Anderson*, 791 A.2d 54, 61–64 (D.C. 2002) (rejecting proposed easement relocation under common law majority rule *and* under Section 4.8(3), but not indicating whether relocation could occur if facts permitted under Restatement approach); *Wash. Metro. Area Transit Auth. v. Georgetown Univ.*, 347 F.3d 941, 946–47 (D.C. Cir. 2003) (applying *Carrollsbury*).

<sup>224</sup> See *Rogers v. P-M Hunter’s Ridge, LLC*, 967 A.2d 807, 822–26 (Md. 2009); *Chapman v. Catron*, 647 S.E.2d 829, 833 (W. Va. 2007); *City of Ark. City v. Bruton*, 137 P.3d 508, 514 (Kan. Ct. App. 2006) (citing Restatement § 4.8, but observing that “an easement with a fixed location cannot be substantially changed or relocated without the express or implied consent of the owners



In other states where reported decisions have not addressed easement relocation disputes in this period, older decisions that either adopted or applied the mutual consent rule presumably still provide the relevant rule of decision.<sup>225</sup>

#### *F. Specialized Easement Relocation Statutes*

Over the years, four states other than Louisiana (Idaho, New Mexico, Utah, and Virginia) have enacted special statutes allowing unilateral relocation of certain kinds of easements as long as the relocated easement provides the same functional benefit to the easement holder and does not injure the holder or other users of the easement. Two Idaho statutes allow a servient estate owner to relocate an irrigation easement at its own expense if the relocation can be achieved without impeding the water flow or injuring any water user.<sup>226</sup> A New Mexico statute similarly allows for the relocation of irrigation ditches “so long as such alteration or change of location shall not interfere with the use of or access to such ditch by the owner of the dominant estate.”<sup>227</sup> In 2018, Utah enacted a statute that allows a property owner to “make reasonable changes in the location and method of delivery of a water conveyance facility located on the property owner’s real property” after

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of both the servient estate and the dominant estate”), *rev’d on other grounds*, 166 P.3d 992 (Kan. 2007); *D’Abbracci v. Shaw-Bastian*, 117 P.3d 1032, 1040–43 (Or. Ct. App. 2004); *Shooting Point, L.L.C. v. Wescoat*, 576 S.E.2d 497, 502 (Va. 2003) (upholding *Buxton v. Murch*, 457 S.E.2d 81, 84 (Va. 1995)); *R.C.R., Inc. v. Rainbow Canyon, Inc.*, 978 P.2d 581, 588 (Wyo. 1999).

<sup>225</sup> See *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950); *Edgell v. Divver*, 402 A.2d 395, 398 (Del. Ch. 1979); *White Sands, Inc. v. Sea Club V. Condo. Ass’n*, 581 So. 2d 589, 590 (Fla. Dist. Ct. App. 1990); *Fla. Power Corp. v. Hicks*, 156 So. 2d 408, 410 (Fla. Dist. Ct. App. 1963); *Bagley v. Petermeier*, 10 N.W.2d 1, 3 (Iowa 1943); *Karmuller v. Krotz*, 18 Iowa 352, 360 (1865); *Gilder v. Mitchell*, 668 A.2d 879, 881–82 (Me. 1995); *Davis v. Bruk*, 411 A.2d 660, 665–66 (Me. 1980); *Ellison v. Fellows*, 437 A.2d 278, 280 (N.H. 1981); *Sakansky v. Wein*, 169 A. 1, 2–3 (N.H. 1933); *Sussex Rural Elec. Coop. v. Twp. of Wantage*, 526 A.2d 259, 264 (N.J. Super. Ct. App. Div. 1987); *Sedillo Title Guar., Inc. v. Wagner*, 457 P.2d 361, 363 (N.M. 1969); *Holmstrom v. Lee*, 26 S.W.3d 526, 533 (Tex. App.—Austin 2000, no pet.); *Samuelson v. Alvarado*, 847 S.W.2d 319, 323 (Tex. App.—El Paso 1993, no writ); *Hollosy v. Gershkowitz*, 98 N.E.2d 314, 316 (Ohio Ct. App. 1950). *But see* *Clagg v. Baycliffs Corp.*, 695 N.E.2d 728, 730 (Ohio 1998) (holding that an implied easement over a road was statutorily limited and could be changed subject to requirements of statute governing changes to a previously recorded plat).

<sup>226</sup> See IDAHO CODE ANN. § 18-4308 (West 2021); IDAHO CODE ANN. § 42-1207 (West 2021).

<sup>227</sup> N.M. STAT. ANN. § 73-2-5 (West 2021).

notice and other procedures are followed and limits this right using a version of the three-part test stated in Section 4.8(3) of the Restatement.<sup>228</sup>

Another Idaho statute authorizes a servient estate owner to change the location of a private access road to any other part of the servient estate, at the servient estate owner's expense, if the change is "made in such a manner as not to obstruct motor vehicle travel, or to otherwise injure any person or persons using or interested in such access."<sup>229</sup> Finally, a Virginia statute, originally enacted in 1992 and updated in 2019, authorizes Virginia courts to approve the relocation of an ingress and egress easement without easement holder consent, after notice and hearing, provided the court finds that "(i) the relocation will not result in economic damage to the parties in interest, (ii) there will be no undue hardship created by the relocation, and (iii) the easement has been in existence for not less than 10 years."<sup>230</sup> Except for its explicit notice and hearing requirement and its ten-year safe harbor period during which a newly created easement cannot be subject to judicial relocation, Virginia's statute resembles the Restatement.<sup>231</sup>

As some form of unilateral easement relocation is now clearly permitted in sixteen states<sup>232</sup> and the Commonwealth of Puerto Rico,<sup>233</sup> is permitted in exceptional situations based on equitable balancing principles or for non-

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<sup>228</sup>UTAH CODE ANN. § 73-1-15.5(2)–(4) (West 2021). Just like the U.E.R.A., this Utah statute also requires the property owner to pay for the costs of relocation and requires recordation of a new instrument reflecting the change in the water facility easement's location. *Compare id.* § 73-1-15.5(6), (8), with UNIF. EASEMENT RELOCATION ACT §§ 6(b), 7, 9(a) (UNIF. L. COMM'N 2020) (requiring preparation of an order, payment of expenses, and recordation of relocation affidavit).

<sup>229</sup>IDAHO CODE ANN. § 55-313 (West 2021).

<sup>230</sup>VA. CODE ANN. § 55.1-304 (West 2021) (formerly cited as VA. ST. § 55-50) (1992 Va. Acts ch. 373; amended 2019 Va. Acts ch. 712, eff. Oct. 1, 2019). Curiously, in two decisions rendered after the adoption of this statute, the Virginia Supreme Court referenced or applied the mutual consent rule without even acknowledging the existence of the statute. *See Shooting Point, L.L.C. v. Wescoat*, 576 S.E.2d 497, 502 (Va. 2003); *Buxton v. Murch*, 457 S.E.2d 81, 84 (Va. 1995).

<sup>231</sup>*See Lovett, supra* note 98, at 47–55 (suggesting that the Virginia statute might be a useful model for reform efforts based on the Restatement).

<sup>232</sup>Those states are Louisiana, *supra* notes 127–137 and accompanying text; Kentucky, *supra* note 121 and accompanying text; Colorado, South Dakota, Massachusetts, Nebraska, and Illinois, *supra* notes 179–206206 and accompanying text; New York, Nevada, Vermont, Pennsylvania, and South Carolina, *supra* notes 207–211 and accompanying text; and Idaho, New Mexico, Utah, and Virginia, *supra* notes 226–231 and accompanying text. As Nebraska and Utah recently adopted the U.E.R.A., those states counts in this category twice, *supra* note 6.

<sup>233</sup>*See supra* note 140.

express easements in eight other states,<sup>234</sup> but is either prohibited by the common law or uncertain in the remaining states, disharmony prevails in this important area of U.S. property law. Widespread adoption of the U.E.R.A. would reduce this disharmony and provide owners of land burdened by easements across the U.S. with an equal opportunity to improve and develop their land.

## II. THE U.E.R.A.

### A. Overview

The Uniform Law Commission (ULC), also known as the National Conference of Commissioners of Uniform State Laws, officially approved and recommended the U.E.R.A. for enactment in all U.S. states, the Commonwealth of Puerto Rico, and the U.S. Virgin Islands on July 15, 2020.<sup>235</sup> The ULC drafting committee responsible for preparing the Act considered multiple versions of the Act over a two-year period.<sup>236</sup> Observers from the conservation easement community, title insurance industry, and mortgage banking industry attended numerous drafting committee meetings and contributed to the drafting process.<sup>237</sup> The Drafting Committee's final product received overwhelming support at the ULC's 129th annual meeting, with the delegations of forty-nine states, the District of Columbia, and the U.S. Virgin Islands, all voting to approve and recommend the Act.<sup>238</sup>

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<sup>234</sup>Those states are Oregon, Missouri, New Jersey, and Connecticut, *supra* note 122 (equitable balancing where the easement holder's injury is small to non-existent and harm to the servient estate owner if it had to reestablish easement would be significant); Florida, Maryland, and New Jersey, *supra* note 125 (implied easements); and Minnesota and Mississippi, *supra* note 126 (easements by necessity).

<sup>235</sup>Official versions of the U.E.R.A. can be found at *Easement Relocation Act*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?communitykey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=groupdetails> (last visited July 22, 2021).

<sup>236</sup>For the U.E.R.A. drafting committee archive, see Archive—Committee, UNIF. L. COMM'N, <https://www.uniformlaws.org/viewdocument/committee-archive-118?CommunityKey=ec690784-90d6-42c3-99ea-1e13a49c8540&tab=librarydocuments> (last visited July 22, 2021).

<sup>237</sup>*Id.*

<sup>238</sup>Nat'l Conf. of Comm'rs on Unif. State L., HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS OF THE ANNUAL CONFERENCE MEETING IN ITS 129TH YEAR 161 (2020). The delegation of commissioners from Texas was the only state delegation that voted against approving and recommending the U.E.R.A., and the delegation from the Commonwealth of Puerto Rico did not vote. *Id.*

Although the U.E.R.A. borrows important elements from Section 4.8(3) of the Restatement, it also departs from the Restatement in several respects that should make the Act even more attractive to state legislatures aiming to achieve the gains in flexibility and aggregate utility promised by the Restatement while maintaining—and even enhancing—protections for an easement holder’s interests in the use and enjoyment of an easement. First, the Act excludes certain categories of easements from relocation and prohibits relocation in several specific situations for the purpose of protecting holders of the excluded categories of easements.<sup>239</sup> Next, the Act adds several substantive conditions for a non-consensual easement relocation designed to assure that an easement holder retains all of the functional advantages of the easement and the affirmative, easement-related benefits an easement provides to a dominant estate.<sup>240</sup> Third, the Act prohibits a servient estate owner from engaging in self-help in the absence of easement holder consent by requiring a servient estate owner to file a civil action and serve a summons and complaint (or petition) on the easement holder whose easement is being relocated and on other interested persons.<sup>241</sup> The Act also specifies the contents of the complaint or petition and specifies the determinations a court must make to approve a proposed easement relocation.<sup>242</sup> Finally, the U.E.R.A. addresses several other issues likely to arise in a judicially authorized easement relocation, including expenses,<sup>243</sup> protection of the easement holder’s interests during the process of relocation,<sup>244</sup> the limited effect of a relocation under the Act,<sup>245</sup> the mandatory nature of the Act (*i.e.*, nonwaiver),<sup>246</sup> and legal transition.<sup>247</sup> The following discussion reviews all of the crucial substantive and procedural features of the Act.

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<sup>239</sup> See UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM’N 2020).

<sup>240</sup> See *id.* § 4.

<sup>241</sup> *Id.* § 5 cmt. 1.

<sup>242</sup> See *id.* §§ 5–6.

<sup>243</sup> *Id.* § 7.

<sup>244</sup> See *id.* §§ 6(10), 9 (listing requirements for an order approving relocation, including an affidavit by the servient estate owner).

<sup>245</sup> *Id.* § 10.

<sup>246</sup> *Id.* § 11.

<sup>247</sup> See *id.* § 14.

### B. Definitions

Section 2 of the U.E.R.A. defines the Act's key terms.<sup>248</sup> Because they track common understandings in U.S. property law, the Act's basic definition of an easement,<sup>249</sup> as well as of an easement holder,<sup>250</sup> will be uncontroversial. As most of the Act's other definitions are relevant to the extent they interact with the substantive and procedural provisions of the Act, discussion of these definitions, to the extent necessary, is provided below.

### C. Scope

Section 3 of the Act sets forth the kinds of easements that are eligible and ineligible for relocation, identifies two scenarios in which an easement eligible for relocation still cannot be relocated, and finally clarifies that the Act preserves party autonomy for consensual easement relocations outside the Act's scope.<sup>251</sup>

**Positive Eligibility:** First, by specifying that the Act "applies to an easement established by express grant or reservation or by prescription, implication, necessity, estoppel, or other method," Section 3(a) makes clear that the core relocation right established by the Act will apply to an easement regardless of the easement's method of creation.<sup>252</sup> This should not be controversial as judicial decisions embracing the Restatement and earlier common-law antecedents have consistently allowed servient estate owners to relocate express easements, prescriptive easements, and all manner of implied easements, including easements by necessity and easements implied

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<sup>248</sup> *Id.* § 2.

<sup>249</sup> *See id.* § 2(4) (defining "easement" to mean "a nonpossessory property interest that: (A) provides a right to enter, use, or enjoy real property owned by or in the possession of another; and (B) imposes on the owner or possessor a duty not to interfere with the entry, use, or enjoyment permitted by the instrument creating the easement"). This definition is based on RESTATEMENT, *supra* note 16, at § 1.2.

<sup>250</sup> *See* UNIF. EASEMENT RELOCATION ACT § 2(5) (UNIF. L. COMM'N 2020) (defining an "easement holder" to mean "(A) in the case of an appurtenant easement, the dominant estate owner; or (B) in the case of an easement in gross, public-utility easement, conservation easement, or negative easement, the grantee of the easement or a successor"). This definition is based on RESTATEMENT, *supra* note 16, at § 1.5.

<sup>251</sup> UNIF. EASEMENT RELOCATION ACT § 3 (UNIF. L. COMM'N 2020).

<sup>252</sup> *See id.* § 3(a).

by prior use.<sup>253</sup> In addition, Section 4.8(3) of the Restatement did not limit its reach with reference to any particular method of easement creation.<sup>254</sup>

**Exclusions:** Section 3(b)(1), however, departs substantially from the Restatement by enumerating three specific categories of easements that cannot be relocated under the Act: (1) public-utility easements; (2) conservation easements; and (3) negative easements.<sup>255</sup> The rationale for and scope of each of these exclusions deserve attention.

**Public-Utility Easements:** From the beginning of its work on the U.E.R.A., the ULC Drafting Committee charged with preparing the Act sought to exclude public-utility easements from its scope because of the ubiquity of public-utility easements and the practical concern that without such an exclusion, large and small utility companies, as well as utility cooperatives, would likely oppose passage of the Act in state legislatures.<sup>256</sup> Moreover, as public utilities generally enjoy the power of eminent domain under federal or state law in the U.S.,<sup>257</sup> the drafting committee understood that a public utility unhappy with any particular easement relocation might be tempted to exercise eminent domain and re-relocate its easement to its original location, thus leading to a potentially infinite round of easement relocations. Consequently, even though the enhanced substantive conditions for relocation established in the Act would certainly protect the holder of a public-utility easement from a harmful relocation, the Act expressly excludes public-utility easements from its scope.<sup>258</sup>

To assure the public-utility industry that its interests are not threatened by the Act, Section 2(10) defines a public-utility easement broadly to mean “a nonpossessory property interest in which the easement holder is a publicly regulated or publicly owned utility under federal law or law of this state or a

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<sup>253</sup> See *supra* Parts I.B and I.E.1–2.

<sup>254</sup> See RESTATEMENT, *supra* note 16, at § 4.8(3).

<sup>255</sup> UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM’N 2020).

<sup>256</sup> *Id.* prefatory note at 6. The Drafting Committee also learned that when a servient estate owner seeks to move a public-utility easement, the servient estate owner can often obtain consent for the relocation as long as the servient estate owner agrees to pay all expenses. *Id.*

<sup>257</sup> For detailed discussions of the historical evolution of public utilities’ eminent domain power to establish electrical transmission lines and oil and gas pipelines and current controversies surrounding the exercise of that power in the U.S., see generally James W. Coleman & Alexandra B. Klass, *Energy and Eminent Domain*, 104 MINN. L. REV. 659 (2019); Alexandra B. Klass, *Takings and Transmission*, 91 N.C. L. REV. 1079 (2013).

<sup>258</sup> UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM’N 2020).

municipality.”<sup>259</sup> This definition effectively encompasses two kinds of public utilities, both an investor-owned but publicly regulated utility and a utility owned by a governmental entity, whether a state or municipal government or an entity specifically created to own or operate a utility.<sup>260</sup> The exclusion also extends to an interstate utility, an intrastate utility, or a utility cooperative,<sup>261</sup> another term that is defined broadly to mean “a non-profit entity whose purpose is to deliver a utility service, such as electricity, oil, natural gas, water, sanitary sewer, storm water, or telecommunications, to its customers or members.”<sup>262</sup>

**Conservation Easements:** Section 3(b) of the U.E.R.A. also explicitly excludes conservation easements from the Act’s scope.<sup>263</sup> A conservation easement is a land use restriction designed to preserve the current physical status of the burdened land in perpetuity for some conservation purpose.<sup>264</sup> A conservation easement will typically be held by a governmental or non-profit entity that does not own land adjacent to or even in close proximity to the burdened land, and thus it will usually constitute an easement in gross.<sup>265</sup> Many state statutes now explicitly authorize and regulate conservation easements, often through versions of the Uniform Conservation Easement Act (U.C.E.A.), first promulgated by the ULC in 1981 and revised in 1987.<sup>266</sup>

One of the primary, although controversial, features of a conservation easement is that it creates in theory a perpetual restriction on the use of burdened land.<sup>267</sup> Indeed, to qualify for a public subsidy under Section

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<sup>259</sup>*Id.* § 2(10).

<sup>260</sup>*Id.* § 2 cmt. 9.

<sup>261</sup>*Id.*

<sup>262</sup>*Id.* § 2(18).

<sup>263</sup>*Id.* § 3(b).

<sup>264</sup>Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1575 (2007); BRUCE & ELY, *supra* note 26, § 12:2.

<sup>265</sup>Korngold, *supra* note 264, at 1575; K. King Burnett, *The Uniform Conservation Easement Act: Reflections of a Member of the Drafting Committee*, 2013 UTAH L. REV. 773, 777–78 (2013).

<sup>266</sup>UNIF. CONSERVATION EASEMENT ACT (UNIF. L. COMM’N 2007); WIS. STAT. ANN. § 700.40 (West 2021); KAN. STAT. ANN. § 58-3810 (West 2021); D.C. CODE ANN. § 42-201 (West 2021).

<sup>267</sup>*See generally* Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002) (critiquing the perpetual nature of conservation easements and questioning the assumption that present generation is competent to make land use decisions that constrain acceptable uses of property forever); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENV’T. L. REV. 421 (2005) (offering a similar critique

170(H) of the Internal Revenue Code (I.R.C.), the donation of a conservation easement to a non-profit conservation organization must state that the easement is perpetual in nature.<sup>268</sup> If the parties to a conservation easement can extinguish the easement by agreement, then the easement donation will not be deductible under Section 170(h).<sup>269</sup> Congress intentionally imposed complex, strictly construed requirements for the deductibility of conservation easement donations to prevent taxpayer abuse of this legislative benefit.<sup>270</sup> Given that Congress's purpose in establishing this deduction is to provide for the long-term conservation of land and natural resources, non-compliance with Congress's "carefully crafted" rules for the deduction, particularly the perpetual nature of the use restriction, would undermine Congress's purpose,<sup>271</sup> and, consequently, put many sizable deductible conservation easement donations at risk.<sup>272</sup>

To protect the perpetual nature of conservation easements and to assure that a conservation easement cannot be subject to a relocation under the Act and thus jeopardize the tax-deductible status of a conservation easement donation, the U.E.R.A. explicitly excludes conservation easements from its scope.<sup>273</sup> To this end, the U.E.R.A. defines a conservation easement in a manner generally consistent with the definition of a conservation easement

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and arguing that courts should have the ability to modify or terminate a conservation easement using doctrine of *cy pres* under the law of charitable trusts); Nancy A. McLaughlin, *Conservation Easements: Perpetuity and Beyond*, 34 *ECOLOGY L.Q.* 673 (2007) (same). For a superb recent summary of the debate over the perpetuity of conservation easements, see Richard J. Roddewig, *Conservation Easements & Their Critics: Is Perpetuity Truly Forever . . . and Should It Be?*, 52 *UIC J. MARSHALL L. REV.* 677 (2019).

<sup>268</sup>I.R.C. § 170(h)(2)(C)–(5)(A) (West). See also Treas. Reg. § 1.170A-14 (2018); Nancy A. McLaughlin, *Conservation Easements and the Proceeds Regulation*, 56 *REAL PROP. TR. & EST. L.J.* 111, 159 (2021) (explaining perpetuity requirement); Nancy A. McLaughlin & Ann Taylor Schwing, *Conservation Easements and Development Rights: Law and Policy*, 86 *EXEMPT ORG. TAX REV.* 539, 540 (2020) (same).

<sup>269</sup>Burnett, *supra* note 265, at 782 (citing *Carpenter v. Comm'r*, 103 T.C.M. (CCH) 1001, 1005 (2012)).

<sup>270</sup>McLaughlin & Schwing, *supra* note 268, at 539–41.

<sup>271</sup>*Id.*

<sup>272</sup>See McLaughlin, *supra* note 268; Nancy A. McLaughlin, *Amendment Clauses in Easements: Ensuring Protection in Perpetuity*, 168 *TAX NOTES* 819, 819–20 (2020) (discussing *Hoffman Props. II LP v. Comm'r*, 956 F.3d 832 (6th Cir. 2020) (denying taxpayer a fifteen-million-dollar deduction for a conservation easement because an easement clause violated the protected-in-perpetuity requirement)). See also *Belk v. Comm'r*, 774 F.3d 221, 226 (4th Cir. 2014) (denying a \$10.5 million deduction).

<sup>273</sup>UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020).



in U.C.E.A.<sup>274</sup> However, because some state statutes now allow for conservation purposes other than those enumerated in U.C.E.A.,<sup>275</sup> subsection 2(2)(F) of the Act specifically recognizes that other animating conservation purposes can support a conservation easement, as long as those purposes are recognized under applicable state law.<sup>276</sup>

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<sup>274</sup>The U.E.R.A. defines a conservation easement to mean:

. . . a nonpossessory property interest created for one or more of the following conservation purposes:

(A) retaining or protecting the natural, scenic, wildlife, wildlife-habitat, biological, ecological, or open-space values of real property;

(B) ensuring the availability of real property for agricultural, forest, outdoor-recreational, or open-space uses;

(C) protecting natural resources, including wetlands, grasslands, and riparian areas;

(D) maintaining or enhancing air or water quality; [or]

(E) preserving the historical, architectural, archeological, paleontological, or cultural aspects of real property; [or(F) any other purpose under [cite to applicable state law]].

*Id.* § 2(2) (alteration in original). *Compare id.* § 2(2), *with* UNIF. CONSERVATION EASEMENT ACT § 1 (UNIF. L. COMM'N 2007). Note that the definition of a conservation easement used in this section is not linked to a particular definition of a “holder” of a conservation easement, as is the case under U.C.E.A., because now other entities and persons besides a “charitable corporation, charitable association, or charitable trust,” or a “governmental body,” UNIF. CONSERVATION EASEMENT ACT § 1(2)(i), (ii), (UNIF. L. COMM'N 2007) may be entitled to hold a conservation easement. UNIF. EASEMENT RELOCATION ACT § 2 cmt. 4 (UNIF. L. COMM'N 2020).

<sup>275</sup>*Compare* NEB. REV. STAT. ANN. § 76-2,111 (West 2021) (listing the purposes for a conservation easement as “retaining or protecting the property in its natural, scenic, or open condition, assuring its availability for agricultural, horticultural, forest, recreational, wildlife habitat, or open space use, protecting air quality, water quality, or other natural resources, or for such other conservation purpose as may qualify as a charitable contribution under the Internal Revenue Code”), *with* UNIF. CONSERVATION EASEMENT ACT § 1(1) (UNIF. L. COMM'N 2007) (listing the purposes for a conservation easement as “retaining or protecting natural, scenic, or open-space values of real property, assuring its availability for agricultural, forest, recreational, or open-space use, protecting natural resources, maintaining or enhancing air or water quality, or preserving the historical, architectural, archaeological, or cultural aspects of real property”).

<sup>276</sup>UNIF. EASEMENT RELOCATION ACT § 2(2)(f) (UNIF. L. COMM'N 2020).

**Negative Easements:** Finally, similar to the Restatement,<sup>277</sup> the U.E.R.A. also excludes a negative easement from its scope.<sup>278</sup> A negative easement is defined to mean “a nonpossessory property interest whose primary purpose is to impose on a servient estate owner a duty not to engage in a specified use of the estate.”<sup>279</sup> A conservation easement is an example of a negative easement.<sup>280</sup> Other kinds of negative easements that would be excluded by Section 3(b)(2) include easements of light or view, the right of a dominant estate owner to demand greater lateral support than otherwise provided by the common law, easements preventing a servient estate owner from altering the scenic character of land, and restrictive covenants prohibiting industrial or commercial use of all or part of a servient estate.<sup>281</sup> Similarly, an environmental covenant that restricts certain uses of the burdened land for the purpose of mitigating prior environmental contamination (often called an “environmental response project”) would also be excluded under this provision.<sup>282</sup>

**Encroachment and Interference Prohibitions:** Section 3(b)(2) of the Act provides additional protection to holders of public-utility easements and conservation easements in the context of relocations of eligible easements that might land on or otherwise interfere with use or enjoyment of one of

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<sup>277</sup>RESTATEMENT, *supra* note 16, at § 4.8(3) cmt. f (stating that the rule of this section “is limited in its application to easements as defined in § 1.2, which include affirmative rights to enter and use land possessed by another, but do not include negative use rights (negative easements or restrictive covenants)”).

<sup>278</sup>UNIF. EASEMENT RELOCATION ACT § 3(b)(1) (UNIF. L. COMM’N 2020).

<sup>279</sup>*Id.* § 2(8). For discussion of the concept of a negative easement, which is generally synonymous with the term “restrictive covenant,” and of the historical evolution of negative easements, see RESTATEMENT, *supra* note 16, at §§ 1.3 cmt. c., 1.2 cmt. h. The U.E.R.A. definition of a negative easement also draws on LA. CIV. CODE ANN. art. 706 (2021) (defining “[n]egative servitudes” as “those that impose on the owner of the servient estate the duty to abstain from doing something on his estate”).

<sup>280</sup>See RESTATEMENT, *supra* note 16, at § 1.2 cmt. h.

<sup>281</sup>See *id.*; BRUCE & ELY, *supra* note 26, § 2:10 (listing a variety of negative easements).

<sup>282</sup>See UNIF. ENV’T COVENANTS ACT § 2(4) (UNIF. L. COMM’N 2003) (defining an environmental covenant as “a servitude arising under an environmental response project that imposes activity and use limitations”). The term “environmental response project” is defined in the Uniform Environmental Covenants Act Section 2(5). Although an affirmative easement connected to an environmental covenant could, in principle, be subject to relocation under the U.E.R.A., the relocation could only occur if the servient estate owner could satisfy the other requirements of the Act. However, the environmental covenant itself would be ineligible for relocation because its “primary purpose” is to restrict activities and uses of the affected real property and thus would be characterized as a “negative easement,” as defined in Section 2(8) of the U.E.R.A.

these excluded easements. This section states that an easement otherwise eligible for relocation cannot take place under the Act “if the proposed location would encroach on an area of an estate burdened by a conservation easement or would interfere with the use or enjoyment of a public-utility easement or an easement appurtenant to a conservation easement.”<sup>283</sup>

With respect to a public-utility easement, this section means that the relocation of an eligible easement cannot occur if that easement’s new location would interfere with the use or enjoyment of a public-utility easement, regardless of whether the public-utility easement is located on the original servient estate, the original dominant estate, or another estate to which the easement at issue is being relocated.<sup>284</sup> This provision should give holders of public-utility easements even greater assurance that their easements will not be negatively impacted without their consent.

Section 3(b)(2) provides similar protection for holders of conservation easements but enhances the protection in a different way. Just as with the protection provided to a public-utility easement holder, the relocation of an eligible easement cannot take place if that easement’s new location would “encroach” on an area of any estate burdened by a conservation easement, regardless of whether the new location lands on the original servient estate, the original dominant estate, or some other estate.<sup>285</sup> The Act uses the term “encroach” to recognize that the mere placement of an easement, even a relatively benign access easement, on an area of an estate burdened by a conservation easement could theoretically violate the non-development restrictions implemented by the conservation easement and thus jeopardize the tax-deductible status of a conservation easement donation.<sup>286</sup>

Section 3(b)(2) provides one more protection for conservation easement holders by also preventing an easement relocation if the new location of the easement would interfere with “the use or enjoyment of . . . an easement appurtenant to a conservation easement.”<sup>287</sup> This language protects a conservation easement holder that might depend on use of an appurtenant affirmative easement for ancillary purposes such as monitoring the land burdened by a conservation easement, enforcing the terms of the

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<sup>283</sup> UNIF. EASEMENT RELOCATION ACT § 3(b)(2) (UNIF. L. COMM’N 2020).

<sup>284</sup> *Id.* § 3(b)(2) cmt. 7.

<sup>285</sup> *Id.* § 3(b)(2) cmt. 6.

<sup>286</sup> I.R.C. § 170(h)(2)(C) (West) discussed *supra* notes 268–272 and accompanying text.

<sup>287</sup> UNIF. EASEMENT RELOCATION ACT § 3(b)(2) (UNIF. L. COMM’N 2020).

conservation easement, or providing recreational access to a portion of an estate burdened by a conservation easement.

***Consensual Relocations:*** The last sentence of Section 3 provides that the U.E.R.A. does not prevent a servient estate owner and an easement holder from relocating an easement by mutual consent.<sup>288</sup> In other words, a servient estate owner and an easement holder can always agree to relocate an easement on their own terms, without using the Act, unless a relocation of the particular easement is limited or prohibited by some other applicable law. Thus, a servient estate owner and an easement holder can relocate an easement by mutual consent to any other location on the servient estate, or even to another estate altogether, assuming the owner of that other estate consents to the relocation and the relocation does not interfere with other pre-existing property interests.

#### *D. Substantive Criteria for Relocation*

Section 4, the core of U.E.R.A., establishes the servient estate owner's right to relocate an easement eligible for relocation under Section 3 provided the proposed relocation does not materially impair the interests of the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate, or materially disrupt the use and enjoyment of the easement during the relocation.<sup>289</sup> The first three substantive conditions for an easement relocation, Sections 4(1)–(3), are drawn from the Restatement with some minor modification. Sections 4(4)–(7) are innovations not found in the Restatement.<sup>290</sup>

***No Initial Showing of Necessity:*** One immediate difference between Section 4.8(3) of the Restatement and Section 4 of the U.E.R.A. concerns the question of the necessity for the relocation. Recall that the Restatement allows an easement to be relocated by the servient estate owner “to permit normal use or development of the servient estate.”<sup>291</sup> Remember also that the Louisiana Civil Code allows a servitude to be relocated when its current location “prevents” the servient estate owner “from making useful

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<sup>288</sup> *Id.* § 3(c).

<sup>289</sup> *Id.* § 4.

<sup>290</sup> *Id.* § 4 cmt 4.

<sup>291</sup> RESTATEMENT, *supra* note 16, at § 4.8(3). *See also* Kline v. Bernardsville Ass'n, Inc., 631 A.2d 1263, 1267 (N.J. Super. Ct. App. Div. 1993) (conditioning pre-Restatement equitable balancing approach to unilateral relocation on “a strong showing of necessity” on the part of the servient estate owner).

improvements on his estate.”<sup>292</sup> In contrast, Section 4 of the U.E.R.A. contains no such predicates.<sup>293</sup> The reason for this omission is simple. The many procedural requirements and new substantive conditions for relocation found in the U.E.R.A., but not included in the Restatement or most other statutory relocation provisions, make the process of obtaining judicial approval for relocation under the U.E.R.A. quite demanding. Only a relocation that promises to alleviate some significant harm caused by the current location of the easement or promises significant developmental benefits to the servient estate owner would motivate a servient estate owner to commence a judicial relocation proceeding under the Act.<sup>294</sup> An express necessity requirement would thus be redundant and needlessly complicate a judicial relocation proceeding under the Act.

***Right to Relocate Only Belongs to Servient Estate Owner:*** Section 4 of the U.E.R.A. follows the Restatement, however, in providing that the right to relocate an easement belongs to “[a] servient estate owner,” not to the owner of a dominant estate or any other easement holder.<sup>295</sup> Consequently, the Act does not change the well-established common law rule that an easement holder may not unilaterally relocate an easement unless that right has been specifically reserved or granted in the creating instrument.<sup>296</sup> The Act thus does not follow the Italian or Brazilian models, both of which grant a dominant estate owner, as well as a servient estate owner, the right to a servitude relocation under terms roughly similar to the French Civil Code.<sup>297</sup>

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<sup>292</sup>LA. CIV. CODE ANN. art. 748 (2021).

<sup>293</sup>See UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM’N 2020).

<sup>294</sup>See, e.g., *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229, 1237–39 (Colo. 2001); *Cozby v. Armstrong*, 205 S.W.2d 403, 405 (Tex. App.—Fort Worth 1947, writ ref’d n.r.e.); *Brown v. Bradbury*, 135 P.2d 1013, 1014 (Colo. 1943).

<sup>295</sup>Compare UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM’N 2020), with Restatement, *supra* note 16, at § 4.8(3) cmt. f (stating that Section 4.8(3) “permits unilateral relocation only by the owner of the servient estate; it does not entitle the owner of the [dominant estate] to relocate the easement”).

<sup>296</sup>See *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1057–58 (Mass. 2004) (citing additional authority for the rule that easement holder may not unilaterally relocate an easement); *but cf.* *McGoey v. Brace*, 918 N.E.2d 559, 563–67 (Ill. App. Ct. 2009) (holding that the approach of Section 4.8(3) comports with prior Illinois precedent allowing either the dominant or servient estate owner to make changes to an easement as long as the changes are not “substantial”).

<sup>297</sup>Compare C.C. (It.) art. 1068 (Mario Beltrano et al. trans. and eds., Oceana 2010), and C.C. (Braz.) art. 1384 (2004), with C. Civ. (Fr.) art. 701 (Daloz ed. 2020). For details of the Italian and Brazilian codal provisions, see *supra* note 147.

Although some Restatement critics have argued, perhaps facetiously, that an easement holder should be granted a relocation right reciprocal to that afforded to the servient estate owner Section 4.8(3),<sup>298</sup> the U.E.R.A. drafting committee chose not to follow this path. As the nineteenth-century decisions discussed earlier observed, recognition of such a right would be much more likely to interfere with a servient estate owner's security and ability to plan for future use of the servient estate.<sup>299</sup> More fundamentally, giving the easement holder the right to relocate an easement without the servient estate owner's consent, even on the condition that the relocation does not interfere with the servient estate owner's use and enjoyment of the servient estate, would come to close to transforming the easement holder into a master of the servient estate owner's destiny with respect to use of the burdened land, imposing a quasi-feudal condition that American property law generally abhors.<sup>300</sup>

A final reason not to make the relocation right reciprocal is that it is difficult to envision why an easement holder that has happily used and enjoyed an easement in one location would actually need to change the easement's location. Remember that an easement holder already has a significant ability to respond to changing economic conditions and exogenous technological developments by seeking an intensification of an easement's use under the well-established common law rule allowing changes in the manner, frequency, and intensity of an easement's use, as long as the intensification does not cause unreasonable damage to the servient estate or unreasonable interference with its enjoyment.<sup>301</sup> Of course, nothing in the U.E.R.A. prevents the parties to an easement from contractually specifying that the easement holder will have a right to relocate the easement to another location on the servient estate. After all, this is precisely what a true "floating easement" does, even though courts generally attempt to pin

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<sup>298</sup>John V. Orth, *Relocating Easements: A Response to Professor French*, 38 REAL PROP. PROB. & TR. J. 643, 653 (2003) ("Why not simply make the rules symmetrical? . . . After all, the servient owner's utility would be undiminished by the change, the easement owner's utility would be increased, and the general welfare would be maximized.").

<sup>299</sup>See cases discussed *supra* Part II.A.

<sup>300</sup>See JOSEPH WILLIAM SINGER, NO FREEDOM WITHOUT REGULATION 36–54 (2015) (discussing the anti-feudal principle in American law).

<sup>301</sup>RESTATEMENT, *supra* note 16, at § 4.10 (AM. L. INST. 2000).

down the location of such an easement by examining parties' conduct and other surrounding circumstances.<sup>302</sup>

**Material Impact or Disruption:** A primary goal of the Act is to ensure that relocation of an easement does not cause *material* harm to the easement holder, security-interest holders, or owners of other interests in the servient or dominant estate. The word “materially” in the introductory portion of Section 4—the “chapeau” in the language of legislation and treaty drafters—is crucial because it modifies all of the substantive criteria articulated in Sections 4(1)–(7).<sup>303</sup> This materiality qualification supports the primary goals of the Act because it permits a relocation to proceed if the relocation will have no effect on the interests of the easement holder, a security-interest holder, or another person owning interests in the servient or dominant estate, *or* if a relocation will have some effect on one of those interests but that effect is *immaterial*, that is, negligible or trivial.<sup>304</sup> In other words, the materiality qualification provides an essential margin of elasticity for a court that must decide whether a proposed easement relocation can proceed. Without a materiality qualification in Section 4, an easement holder might be able to block a well-considered and judicious easement relocation proposal by showing a very modest, even minute, impact on the interests addressed by Sections 4(1)–(7). The presence of the materiality qualification in Section 4 is designed to prevent such an outcome.

**Sections 4(1)–(3): Restatement Redux:** Sections 4(1) through 4(3) of the Act generally track the core conditions of Section 4.8(3) of the Restatement, with a few modifications. First, Section 4(1) (“lessen the utility of the easement”) follows Section 4.8(3)(a) of the Restatement almost verbatim, except that it omits the word “significantly,” which is used in the Restatement, because the materiality qualification in the Section 4 chapeau performs the same task by giving the court a margin of elasticity to determine whether an alleged negative impact on the utility of the easement is trivial or not.<sup>305</sup>

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<sup>302</sup> See BRUCE & ELY, *supra* note 26, §§ 7:4–7:5 (describing how floating easements arise as undefined easements and explaining how courts use extrinsic evidence to determine an actual location) and §§ 7:7–7:8 (commenting on negative consequences of a floating easement for servient owner and recommending ways to limit scope and duration of a floating easement); *see also* Evans v. Bd. of Cnty. Comm’rs, 97 P.3d 697, 702–04 (Utah Ct. App. 2004) (recognizing a true “floating” or “roving” easement and explaining methods a court can use to fix its location).

<sup>303</sup> See UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM’N 2020).

<sup>304</sup> *See id.* § 4 cmt. 1.

<sup>305</sup> Compare *id.* § 4(1), with RESTATEMENT, *supra* note 16, at § 4.8(3)(a).

Section 4(2) of the U.E.R.A. departs marginally from Section 4.8(3)(b) of the Restatement in two respects. First, it specifies that the inquiry whether a relocation will “increase the burden on the easement holder in its reasonable use and enjoyment of the easement” should focus on the period “after the relocation” is achieved.<sup>306</sup> This clarification tightens the focus of Section 4(2) while complementing Section 4(5), which provides the court with an opportunity to focus on possible interference with the use and enjoyment of the easement while a relocation is occurring and on the servient estate owner’s ability to mitigate any such disruption.<sup>307</sup> Section 4(2) also includes the adjective “reasonable” to modify the easement holder’s “use and enjoyment” to preclude an easement holder from inventing a brand new use for the easement not reasonably contemplated at the easement’s creation.<sup>308</sup>

Section 4(3) also departs from Section 4.8(3)(c) of the Restatement to clarify the focus of judicial inquiry in an easement relocation proceeding—prevention of material impairment of “an *affirmative, easement-related purpose* for which the easement was created.”<sup>309</sup> This provision builds on the teaching of judicial decisions adopting the Restatement as well as insights of Restatement supporters by making clear that an easement holder cannot block a proposed easement relocation simply by asserting that an easement was actually, though silently, created to give the easement holder a veto over development on the servient estate.<sup>310</sup> However, if a proposed relocation would lead to material impairment of the affirmative entry, use, and enjoyment rights created by an easement eligible for relocation under the Act, then Section 4(3) of the U.E.R.A. would be grounds for a judicial determination that the proposed relocation cannot proceed.<sup>311</sup> If a property

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<sup>306</sup> UNIF. EASEMENT RELOCATION ACT § 4(2) (UNIF. L. COMM’N 2020).

<sup>307</sup> *Id.* § 4(5).

<sup>308</sup> *Id.* § 4(2).

<sup>309</sup> *Id.* § 4(3) (emphasis added).

<sup>310</sup> M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1058–59 (Mass. 2004); Susan F. French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 10, 15 (2003) (criticizing the mutual consent rule for allowing an easement holder to “demand and, in theory, expect to get almost all the surplus value created by any relocation” and warning that the traditional rule is “inefficient because it provides no exit from an impasse situation and represents bad social policy by rewarding a noncooperating easement holder”).

<sup>311</sup> See, e.g., Manning v. Campbell, 268 P.3d 1184, 1187–88 (Idaho 2012) (holding that a servient owner was not entitled to relocate a driveway access easement under Idaho Code Section 55-313 because the relocated easement would not have connected to any existing route and would have required dominant estate owners to construct a new driveway across their front lawn); MacKinnon v. Croyle, 899 N.Y.S.2d 422, 425 (N.Y. App. Div. 2010) (affirming trial court rejection



owner actually wants to prevent a neighbor from using land for a particular use or to prevent any development at all, the property owner can always achieve that goal, to the extent applicable state law provides, by negotiating for and obtaining a negative easement—precisely one of the property interests that are exempt from the Act’s scope.<sup>312</sup>

**Sections 4(4)–(6): Enhanced Protection for Easement Holder Interests:** Sections 4(4) through 4(6) of the Act establish new substantive conditions for relocation not found in the Restatement but consistent with the Restatement’s spirit. First, Section 4(4) guarantees that a proposed easement relocation will not materially “during or after the relocation, impair the safety of the easement holder or another entitled to use and enjoy the easement.”<sup>313</sup> Although the interest of easement holders and others in using and enjoying the easement safely once a relocation is complete would certainly be considered by a court under Sections 4(1)–(3), Section 4(4) makes this consideration an explicit focus to reflect repeated judicial emphasis on safety concerns in decisions that address proposed easement relocations under the Restatement or similar statutes.<sup>314</sup>

Next, Section 4(5) assures that a relocation will not materially “during the relocation, disrupt the use and enjoyment of the easement by the easement holder or another entitled to use and enjoy the easement, unless the servient estate owner substantially mitigates the duration and nature of the

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of proposed relocation of an undefined access easement because the new driveway would be more narrow, have sharp turns, and preclude access by delivery and garbage trucks); *City of Boulder v. Farmer’s Reservoir & Irrigation Co.*, 214 P.3d 563, 567–69 (Colo. App. 2009) (refusing to allow alteration of a ditch irrigation easement to facilitate a trail extension because the alteration of the easement would materially and adversely affect the maintenance rights that an irrigation company enjoyed by virtue of the easement).

<sup>312</sup>UNIF. EASEMENT RELOCATION ACT § 3(b)(1) (UNIF. L. COMM’N 2020). For a discussion of the limits on creating and enforcing negative easements or restrictive covenants generally, see RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

<sup>313</sup>UNIF. EASEMENT RELOCATION ACT § 4(4) (UNIF. L. COMM’N 2020).

<sup>314</sup>*Compare* *Belstler v. Sheler*, 264 P.3d 926, 933 (Idaho 2011) (affirming the trial court’s refusal to approve relocation of express ingress and egress easement under Idaho Code Section 55-313 because of steeper grades and hazard for dominant estate owners in using the easement), *with* *Carlin v. Cohen*, 895 N.E.2d 793, 798–99 (Mass. App. Ct. 2008) (affirming the trial court ruling approving relocation of pedestrian beach access easement because the entry point was not more difficult to reach than under the original easement and the lack of evidence that the original easement path was more level), *and* *R & S Invs. v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 877–78, 881 (Neb. Ct. App. 2006) (holding that a servient owner could relocate an easement for a sanitary sewer lagoon because, *inter alia*, the new lagoon would have greater wastewater capacity, new piping and connections, and would alleviate environmental concerns related to old lagoon).

disruption.”<sup>315</sup> This section will be important whenever an easement serves a dominant estate currently in active use as it would justify, for example, a court in ordering a servient estate owner to complete construction of a new road or driveway on the route of a relocated access easement before diverting traffic from the current route. Similarly, this section would justify a court in ordering a servient owner to complete construction of a new irrigation or drainage facility before diverting water from the former easement site. Importantly, Section 9 of the Act reinforces Section 4(5) by entitling the easement holder to enter, use, and enjoy the easement subject to relocation until the construction of all improvements necessary for use and enjoyment of the easement in the new location are complete and the servient estate owner files an affidavit certifying that the easement has been relocated in the relevant land records and sends that affidavit to the easement holder.<sup>316</sup> The final clause in Section 4(5) recognizes that there may be instances when a perfectly justifiable easement relocation cannot avoid all disruption of use and enjoyment of the easement during relocation.<sup>317</sup> In those cases, the servient estate owner should have the opportunity to show that it has substantially mitigated either the temporal duration or the nature of the disruption.<sup>318</sup> It thus leaves the court with a measure of discretion to determine whether those mitigation efforts are sufficient given the scope of the proposed relocation.

Section 4(6) prevents an easement relocation that would materially “impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate.”<sup>319</sup> In one sense, this provision simply makes explicit the results of application of Sections 4(1)–(3) of the Act, which are all designed to protect the functional utility of the easement to a dominant estate owner in the case of an appurtenant easement.<sup>320</sup> Thus, for example, if the relocation of an access easement would significantly alter the access points on the dominant estate and this change would impair the current use of the dominant estate or would require material changes to improvements already constructed on the dominant estate, Section 4(6) could justify rejection of the proposed relocation.<sup>321</sup> Similarly, if a change in

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<sup>315</sup> UNIF. EASEMENT RELOCATION ACT § 4(5) (UNIF. L. COMM’N 2020).

<sup>316</sup> *Id.* § 9.

<sup>317</sup> *See id.* § 4(5).

<sup>318</sup> *See id.*

<sup>319</sup> *Id.* § 4(6).

<sup>320</sup> *See id.*

<sup>321</sup> *See, e.g.,* Manning v. Campbell, 268 P.3d 1184, 1187–88 (Idaho 2012).

location of access points could be shown to have a material impact on the future development potential—and thus the value—of the dominant estate, Section 4(6) would also justify rejection of the proposed relocation.<sup>322</sup> Finally, if relocation of an easement would result in a material increase in the maintenance costs of the easement to the easement holder and thus materially impair the use of the easement, Section 4(6), would, in conjunction with Sections 4(1)–(3), also prevent the relocation from proceeding.<sup>323</sup>

**Other Parties' Interests:** Section 4(7) addresses a subject not covered under the Restatement by providing protection against impairment of the interest of a security-interest holder of record in the value of its collateral, a real-property interest of a lessee of record in the dominant estate, or a recorded real-property interest of any person in the servient or dominant estate.<sup>324</sup> If a security-interest holder of record having an interest in either the servient estate or dominant estate can show that the value of its collateral will be materially impaired by the proposed relocation of an easement, the relocation cannot proceed.<sup>325</sup> Similarly, if a lessee of record having a real-property interest in the dominant estate can show that this interest would be materially impaired by the proposed relocation, the relocation cannot proceed.<sup>326</sup>

Section 4(7)'s reference to “a recorded real-property interest of any other person in the servient estate or dominant estate” is intended to address persons such as the holder of another easement that burdens the servient

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<sup>322</sup>M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004) (observing that the Restatement approach “maximizes the over-all property utility by increasing the *value* of the servient estate without diminishing the *value* of the dominant estate”) (emphasis added).

<sup>323</sup>See City of Boulder v. Farmer's Reservoir & Irrigation Co., 214 P.3d 563, 567–69 (Colo. App. 2009) (refusing to allow alteration of a ditch irrigation easement to facilitate a trail extension because alteration of the easement would materially and adversely affect the maintenance rights that an irrigation company enjoyed by virtue of the easement).

<sup>324</sup>UNIF. EASEMENT RELOCATION ACT § 4(7) (UNIF. L. COMM'N 2020).

<sup>325</sup>In most cases, a security-interest holder of record with an interest in the *servient estate* will be unconcerned with a proposed easement relocation because, presumably, the relocation will result in an increase in the value of its collateral. In any event, a security-interest holder of record in either the servient or dominant estate, just like the other persons mentioned in Section 4(7), is entitled to notice of the judicial proceeding under Section 5(b)(1) of the Act. See *infra* Part II.E, notes 324–326 and accompanying text.

<sup>326</sup>A lessee of record with an interest in the servient estate is not addressed by Section 4(7) because, presumably, such a lessee can direct any concerns it has with loss of use or enjoyment of the servient estate to the servient estate owner under the terms of its lease. Of course, the servient estate owner will typically be seeking to enhance the use and enjoyment of the servient estate as a result of the proposed relocation.

estate or dominant estate,<sup>327</sup> a “unit” owner, that is, the owner of an interest in a common-interest community,<sup>328</sup> or the owner of a mineral interest in the servient or dominant estate.<sup>329</sup> Thus, if the proposed relocation of a vehicular ingress and egress easement on a servient estate would materially impair a separate irrigation or drainage easement also burdening the servient estate by reducing the volume of water conveyed through the easement, the irrigation or drainage easement holder could assert Section 4(7) and block the proposed relocation. Similarly, if the proposed relocation of an access easement would encroach on or interfere with a well site or an easement that facilitates oil, gas, or mineral development on the servient or dominant estate, Section 4(7) would prevent relocation from occurring.<sup>330</sup> In summary, the inclusion of Section 4(7) fills a gap in the Restatement by providing security interest holders, such as lenders or other secured parties, holders of significant recorded leasehold interests in the dominant estate, and holders of oil, gas, and mineral interests that could be negatively affected by a proposed relocation, with a specific statutory basis upon which to lodge an opposition to a proposed relocation.

*E. Procedural Requirements and Safeguards: Complaint, Parties, Service, Order, Recordation*

Sections 5 and 6 are crucial provisions of the U.E.R.A., as they respond to critics who fault the Restatement for appearing to allow a servient estate owner to relocate an easement without prior judicial authorization,<sup>331</sup> and

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<sup>327</sup>For a discussion of the interaction between Section 4(7) and Section 10(a)(5) of the Act, which deals with the priority of another recorded easement that might be affected by a proposed relocation, see *infra* Part II.Limited Effect of Relocation and notes 386–87.

<sup>328</sup>See UNIF. EASEMENT RELOCATION ACT § 2(17) (UNIF. L. COMM’N 2020). (defining a “unit” to mean “a physical portion of a common interest community designated for separate ownership or occupancy with boundaries described in a declaration describing the common-interest community”). This definition is based on the UNIF. COMMON INT. OWNERSHIP ACT § 103(35) (UNIF. L. COMM’N 2008).

<sup>329</sup>See *infra* Part II.Procedural Requirements and Safeguards: Complaint, Parties, Service, Order, Recordation and notes 339–42 and accompanying text for a discussion of the kind of mineral interest holders entitled to service of a summons and complaint or petition under UNIF. EASEMENT RELOCATION ACT § 5(b)(2) (UNIF. L. COMM’N 2020).

<sup>330</sup>UNIF. EASEMENT RELOCATION ACT § 4(7) (UNIF. L. COMM’N 2020).

<sup>331</sup>See *infra* notes 212431–222 and accompanying text for discussion of criticism of the Restatement.

codify judicial decisions that embrace the Restatement but insist that a non-consensual easement relocation should only occur after judicial approval.<sup>332</sup>

**Commencement of Civil Action:** Section 5(a) begins by requiring a servient estate owner seeking to relocate an easement under Section 4 to file “a civil action.”<sup>333</sup> The precise form of the civil action will depend on the applicable rules of civil procedure in the relevant state.<sup>334</sup>

Section 5(b)(1) then establishes the necessary parties to an easement relocation proceeding under the Act and guarantees notice of the proceeding by requiring the servient estate owner to serve a summons and complaint or petition upon the easement holder whose easement is the actual subject of the relocation proceeding and other interested persons.<sup>335</sup> The other interested persons that must be served include: “(B) a security-interest holder of record of an interest in the servient estate or dominant estate; (C) a lessee of record of an interest in the dominant estate; and (D) . . . any other owner of a recorded real-property interest if the relocation would encroach on an area of the servient estate or dominant estate burdened by the interest.”<sup>336</sup> These persons are all necessary parties because each has a right to object to and potentially block a proposed easement relocation on the ground that the relocation would impair collateral or some other real-property interest under Section 4(7) of the Act.<sup>337</sup>

Section 5(b)(2), however, narrows the category of persons who must receive service under Section 5(b)(1)(D) because of a potential encroachment on an area of the servient or dominant estate burdened by that interest in the particular context of mineral interest holders.<sup>338</sup> Thus, only a mineral interest holder whose “interest includes an easement to facilitate oil, gas, or mineral development” is entitled to service.<sup>339</sup> Holders of other mineral interests, particularly fractional mineral interest holders whose interest is only in *severed, sub-surface* minerals in either the servient or dominant estate, are

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<sup>332</sup> See *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229, 1237–38 (Colo. 2001); *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1059 (Mass. 2004).

<sup>333</sup> UNIF. EASEMENT RELOCATION ACT § 5(a) (UNIF. L. COMM’N 2020).

<sup>334</sup> In most states, a servient estate owner would bring a declaratory judgment action. See, e.g., La. Code Civ. Proc. Ann. arts. 1871–83 (2021) (providing for declaratory judgment actions); Cal. Civ. Proc. Code §§ 1060–1062.5 (West 2021) (same).

<sup>335</sup> UNIF. EASEMENT RELOCATION ACT § 5(b)(1) (UNIF. L. COMM’N 2020).

<sup>336</sup> See *id.*

<sup>337</sup> *Id.* § 4(7).

<sup>338</sup> *Id.* § 5(b)(2).

<sup>339</sup> See *id.*

exempt from service.<sup>340</sup> These kinds of mineral interest holders typically have no possessory interest in the surface of the relevant land and thus would be unaffected by the relocation of a surface easement (and most other easements as well).<sup>341</sup> Requiring the servient estate owner to serve all such mineral interest holders would be unwieldy and unproductive. In effect, this section exempts from service most severed mineral interest holders, including holders of a royalty interest, overriding royalty interest, net-profits interest, or working interest, unless, once again, that interest “includes an easement to facilitate oil, gas, or mineral development.”<sup>342</sup> When a mineral interest does include an easement to facilitate development, such as an easement created for the purpose of providing vehicular access to a drill site or an easement established to construct, operate, or maintain a gathering line or a pipeline, then the easement holder must be served.<sup>343</sup>

Sections 5(c)(1)–(6) specify the information that the servient estate owner must include in its complaint or petition, such as the servient estate owner’s intent to seek relocation, the nature, extent, and anticipated dates of the relocation project, the current and proposed locations of the easement, and reasons the proposed relocation is eligible for and satisfies the Act.<sup>344</sup> This information will give the easement holder and other necessary parties an opportunity to decide whether to consent or object to the proposed relocation.<sup>345</sup> Nothing in the Act, of course, prevents the servient estate owner from providing all of this information to the easement holder and other interested parties in advance of filing a civil action.<sup>346</sup>

Section 5(c)(6) is slightly different in focus. It requires the servient estate owner to state that it “has made a reasonable attempt to notify the holders of any public-utility easement, conservation easement, or negative easement on the servient estate or dominant estate of the proposed relocation.”<sup>347</sup> In effect, this provision alerts the court to the possibility that certain kinds of easements are not eligible for relocation under Section 3(b)(1) and whose interests are

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<sup>340</sup> *Id.* § 5(b)(2), cmt. n.3.

<sup>341</sup> *See id.*

<sup>342</sup> *Id.* § 5(b)(2).

<sup>343</sup> *See id.*

<sup>344</sup> *Id.* § 5(c)(1)–(5).

<sup>345</sup> *See id.*

<sup>346</sup> In many cases, a prudent servient estate owner will do just that and attempt to obtain all necessary consents before undertaking the costly step of filing an easement relocation lawsuit under the act.

<sup>347</sup> UNIF. EASEMENT RELOCATION ACT § 5(c)(6) (UNIF. L. COMM’N 2020).

also protected under Section 3(b)(2) might burden either the servient or dominant estate.<sup>348</sup> This is crucial because Section 6(a)(1) of the Act requires a court to make a threshold determination that the easement subject to relocation is, in fact, eligible for relocation under Section 3.<sup>349</sup> The U.E.R.A. Drafting Committee intentionally chose not to make holders of the excluded easement categories (public-utility easements, conservation easements, and negative easements) necessary parties out of concern that they might be served with process but then, due to lack of resources or access to legal counsel (particularly in the context of a conservation easement or perhaps a small utility cooperative), might not appear and defend their interests in court.<sup>350</sup> A failure to appear and contest a judicial relocation action after receiving service could then result in the easement holder being barred on the basis of *res judicata* from attacking a judgment against its interest.<sup>351</sup> Section 5(c)(6) nevertheless provides additional protection for the holders of the excluded easement categories by bringing their existence to the attention of the court so that the court can verify that an excluded easement is not being relocated or otherwise harmed as discussed below.

Section 5(d) is also designed to speed resolution of a judicial easement relocation proceeding by providing a mechanism for all other necessary parties (other than the easement holder whose easement is subject to relocation) to file a document with the court “that waives its rights to contest or obtain relief in connection with the relocation or subordinates its interests to the relocation.”<sup>352</sup> Once such a document is filed, the court may excuse that party from answering or participating in the proceeding and thus eliminate any further expense for that party.<sup>353</sup>

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<sup>348</sup> *See id.*

<sup>349</sup> *Id.* § 6(a)(1).

<sup>350</sup> *See id.* § 5, cmt. n.7.

<sup>351</sup> RESTATEMENT OF THE LAW (SECOND): JUDGMENTS § 34(1)–(3) (1980) (stating that the general principle of *res judicata* applies to a person “who is named as a party to an action and subjected to the jurisdiction of the court” and that a person “who is not a party to an action is not bound by . . . the rules of *res judicata*”). *See also* MOORE’S FED. PRACTICE §§ 130.40–130.41 (3d ed. 2017) (addressing scope of doctrine of claim preclusion, parties bound, and requirement that for parties to be bound by claim preclusion they must have full and fair opportunity to litigate), and § 131.40[2][a] (“A person . . . may be involuntarily subjected to the court’s jurisdiction by proper service of process.”).

<sup>352</sup> UNIF. EASEMENT RELOCATION ACT § 5(d) (UNIF. L. COMM’N 2020) (referring to persons listed under subsections 5(b)(1)(B)(C) or (D) who must receive a summons and complaint or petition).

<sup>353</sup> *Id.*

**Required Findings; Order:** Section 6 focuses on a court's obligations when confronted with an easement relocation proceeding under the Act. First, Section 6(a)(1) mandates that the court determine that "the easement is eligible for relocation under Section 3."<sup>354</sup> This requirement protects the holder of any of the easements specifically excluded from the scope of the Act—a public-utility easement, a conservation easement, or a negative easement—from having its easement improperly relocated in violation of Section 3(b) and also assures that the new location of an easement eligible for relocation will not "encroach on an area burdened by a conservation easement" and will not "interfere with the use and enjoyment of a public-utility easement or an easement appurtenant to a conservation easement."<sup>355</sup> This provision thus provides an important check on a servient estate owner and protection for public-utility and conservation easement holders by preventing an ineligible easement from actually being moved and preventing an eligible easement from landing in an area burdened by a conservation easement or interfering with one of the other exempt easements, all without requiring the holder of an exempt easement to be a party to the judicial easement proceeding.<sup>356</sup>

Section 6(a)(2) requires the court to determine that the proposed relocation "satisfies the conditions for relocation under Section 4."<sup>357</sup> This simply makes clear that Section 4 is the heart of the Act and directs the court to apply all of its substantive conditions in making its ultimate determination as to whether a relocation is permitted.

Once a court determines that a relocation is appropriate, Sections 6(b)–(d) require the court to issue an order authorizing the relocation and the servient estate owner to record a certified copy of that order, along with an explanatory statement, in the appropriate land records of the state.<sup>358</sup> Sections 6(b)(1)–(7) specify the contents of that order, with the most important

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<sup>354</sup>*Id.* § 6(a)(1).

<sup>355</sup>*Id.* § 3(b)(1)–(2).

<sup>356</sup>If a court erroneously allows an easement to be relocated in violation of the scope provisions of Section 3(b), then the easement holder could always challenge that ruling in a subsequent proceeding as long as the easement holder was not a party to the earlier proceeding.

<sup>357</sup>UNIF. EASEMENT RELOCATION ACT § 6(a)(2) (UNIF. L. COMM'N 2020).

<sup>358</sup>*Id.* at § 6(b)–(d). These requirements are generally consistent with the approach taken by courts that have adopted the Restatement approach to easement relocation. *See, e.g., R & S Invs. v. Auto Auctions, Ltd.*, 725 N.W.2d 871, 878 (Neb. Ct. App. 2006) (requiring servient estate owner that satisfies Restatement criteria to execute a new document setting forth the new location and other relevant terms of the relocated easement).



information being the immediately preceding and new location of the relocated easement,<sup>359</sup> the kinds of mitigation that the servient estate owner must provide to the easement holder during the process of relocating the easement,<sup>360</sup> the plans and specifications of any improvements that must be constructed so that the easement holder can use and enjoy the easement in its new location,<sup>361</sup> and any other conditions that must be satisfied to complete the relocation.<sup>362</sup>

Sections 6(b)(8)–(9) require the court to include provisions for the payment of expenses under Section 7 and for compliance with the obligation of good faith under Section 8, both of which are discussed below.<sup>363</sup> Section 6(b)(10) requires the court to “instruct the servient estate owner to record an affidavit, if required under Section 9(a), when the servient estate owner substantially completes relocation.”<sup>364</sup> Section 6(c) widens a court’s discretion in fashioning an order authorizing relocation by allowing it to “include any other provision consistent with this [Act] for the fair and equitable relocation of an easement.”<sup>365</sup>

Finally, Section 6(d) requires a servient estate owner that obtains judicial approval for relocation to record, “in the land records of each jurisdiction where the servient estate is located, a certified copy of the order under subsection (b).”<sup>366</sup> In most cases, the Section 6(b) order will be the first of two documents that must be recorded to complete an easement relocation.<sup>367</sup> The second document will be the relocation affidavit specified in Section 9(a)(1), which certifies that the easement has been relocated.<sup>368</sup> When no improvements need to be constructed or altered for use of the relocated

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<sup>359</sup> UNIF. EASEMENT RELOCATION ACT § 6(b)(3)–(4) (UNIF. L. COMM’N 2020).

<sup>360</sup> *Id.* § 6(b)(5).

<sup>361</sup> *Id.* § 6(b)(6).

<sup>362</sup> *Id.* § 6(b)(7).

<sup>363</sup> *Id.* § 6(b)(8)–(9). For discussions of Sections 7 and 8 of the Act, see *infra* Parts II. Expenses–G.

<sup>364</sup> UNIF. EASEMENT RELOCATION ACT § 6(b)(10) (UNIF. L. COMM’N 2020). Section 9 is a safeguard added for the benefit of an easement holder to assure that the easement holder enjoys uninterrupted use of the easement subject to relocation in its old location until all of the work necessary for relocation is complete. UNIF. EASEMENT RELOCATION ACT § 9 (UNIF. L. COMM’N 2020), discussed *infra* Part II. Affidavit of Relocation

<sup>365</sup> UNIF. EASEMENT RELOCATION ACT § 6(c) (UNIF. L. COMM’N 2020).

<sup>366</sup> *Id.* § 6(d).

<sup>367</sup> *See id.* § 6(b).

<sup>368</sup> *See id.* § 9(a)(1).

easement, the recordation of the order approving relocation under Section 6(d) will constitute completion of the relocation.<sup>369</sup>

### *F. Expenses*

Section 7 follows the Restatement by declaring that a “servient estate owner is responsible for reasonable expenses of relocation of an easement under this [Act].”<sup>370</sup> It breaks new ground, however, by specifying what some of those expenses might be, including constructing necessary improvements on either the servient or dominant estate, mitigation disruption measures, obtaining governmental approvals or permits, preparing and recording any necessary documents, any title work required to complete the relocation, title insurance premiums, the fees of experts necessary to review plans and specifications of necessary improvements, maintenance costs associated with the relocated easement that exceed those in the former location, and obtaining any necessary third party consents.<sup>371</sup>

Notably, Section 7 does not address litigation-related attorney fees. Thus, the U.E.R.A. does not displace the general American rule for attorney fees, and each party to a contested easement relocation proceeding will still be responsible for paying its own litigation-related attorney fees, in the absence of some other applicable state law.<sup>372</sup>

### *G. Duty of Good Faith*

Once a court issues an order under Section 6 authorizing an easement relocation, Section 8 requires that all parties in the civil action must act in good faith to facilitate the relocation.<sup>373</sup> This duty to act in good faith is grounded in an understanding of an easement as a long-term, concurrent property relationship that imposes mutual duties of accommodation.<sup>374</sup> As noted earlier, a number of U.S. courts adopting the Restatement approach to

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<sup>369</sup> *Id.* § 9(c).

<sup>370</sup> *Id.* § 7.

<sup>371</sup> *Id.* § 7(1)–(9). The Supreme Court of Appeal of South Africa also insisted that a servient estate owner that obtains approval to relocate a predial servitude pay the costs involved in amending and registering the title deeds of the servient estate, and if applicable, the dominant estate. *Linvestment CC v. Hammersley*, 3 S.A. L. Rep. 283, 294 (Sup. Ct. App. 2008).

<sup>372</sup> UNIF. EASEMENT RELOCATION ACT § 7(c), cmt n.2 (UNIF. L. COMM’N 2020).

<sup>373</sup> *Id.* § 8.

<sup>374</sup> See Lovett, *supra* note 98, at 36–47 (discussing the principle of mutual accommodation in the law of easements and servitudes at common and civil law).

easement relocation have specifically endorsed this principle of mutual accommodation in an easement relationship.<sup>375</sup> A number of other uniform acts promulgated by the Uniform Law Commission also require parties bound together in a long-term property relationship to act in good faith.<sup>376</sup>

#### *H. Affidavit of Relocation*

Section 9 of the U.E.R.A. addresses another potential concern about the Restatement approach to easement relocation—the possibility that a servient estate owner will commence a relocation and destroy improvements in the existing location but never complete the improvements needed to make the relocated easement usable in its new location. This section responds to that concern in two ways.

First, Section 9(a) provides that “[i]f an order under **Section 6 requires the construction of an improvement as a condition for relocation of an easement, relocation is substantially complete, and the easement holder is able to enter, use, and enjoy the easement in the new location,**” the servient estate owner must record an affidavit attesting to these facts in the local land records and then send, by certified mail, a copy of the affidavit to the easement holder and other parties.<sup>377</sup> In essence, this section constitutes a means of providing formal notice to the easement holder that all of the work necessary for its use and enjoyment of the relocated easement is complete.<sup>378</sup>

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<sup>375</sup>Roaring Fork Club L.P. v. St. Jude’s Co., 36 P.3d 1229, 1234–35 (Colo. 2001) (explaining that Colorado law increasingly recognizes that when there are two competing interests in the same land, those interests “should be accommodated, if possible” and endorsing the Restatement approach to easement relocation as consistent with that “accommodation doctrine”); M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1058–59 (Mass. 2004) (quoting *Roaring Fork Club L.P.*, 36 P.3d at 1237 for the proposition that “[c]learly, the best course is for the owners to agree to alterations that would accommodate both parties’ use of their respective properties to the fullest extent possible”); R & S Invs. v. Auto Auctions Ltd., 725 N.W.2d 871, 880 (Neb. Ct. App. 2006) (stating that “Nebraska case law provides that the owner of a servient estate and the owner of a dominant estate enjoy correlative rights . . . and the owners must have due regard for each other and should exercise that degree of care and use which a just consideration of the rights of the other demands”).

<sup>376</sup>*See, e.g.*, UNIF. COMMON INTEREST OWNERSHIP ACT § 1-113 (UNIF. L. COMM’N 2008) (“Every contract or duty governed by this [act] imposes an obligation of good faith in its performance or enforcement.”); UNIF. HOME FORECLOSURE PROCS, ACT § 105 (UNIF. L. COMM’N 2015); UNIF. SIMPLIFICATION OF LAND TRANSFERS ACT § 1-301 (Unif. L. Comm’n 1976).

<sup>377</sup>UNIF. EASEMENT RELOCATION ACT § 9(a) (UNIF. L. COMM’N 2020).

<sup>378</sup>*See id.*

Perhaps even more important, though, Section 9(b) assures that the easement holder and others will have the right to enter, use, and enjoy the easement in the current location until the relocation affidavit described in Section 9(a) is recorded and sent to the parties.<sup>379</sup> In effect, this requires the servient estate owner to continue to provide access to all of the improvements necessary for use of the easement in its original or current location until all improvements necessary for its use in the new location are complete and until any other conditions of the court's section 6(b) order are satisfied.<sup>380</sup>

In what is likely to be the relatively rare case of an easement that can be used and enjoyed without any improvements on the servient estate—for example, a pedestrian access or recreational access easement unmarked by a path or trail or some other kind of easement for which necessary improvements have yet to be constructed by the easement holder—Section 9(c) simply provides that the recording of the court's Section 6(d) order authorizing a relocation will actually constitute the relocation.<sup>381</sup>

### *I. Limited Effect of Relocation*

Section 10, which addresses the limited legal effect of an easement relocation under the Act, is based on the premise that a relocation under the Act does not create a new easement; rather, it merely changes where the easement may be utilized by the easement holder to satisfy the affirmative, easement-related purposes for which the easement was created.<sup>382</sup> Accordingly, Section 10(a)(1) clarifies that a relocation under the Act does not constitute a new transfer or grant of an interest in either a servient estate burdened by the easement or a dominant estate benefited by the easement.<sup>383</sup>

Furthermore, Sections 10(a)(2) through (4) clarify that an easement relocation under the Act is not a breach or default of, and will not trigger, a due-on-sale clause, or other transfer-restriction clause, under an applicable recorded document, such as a mortgage, a lease, or any other recorded document that might be affected by the relocation.<sup>384</sup> The potential interaction, if any, between Section 10 of the U.E.R.A. and federal legislation designed to preempt state laws that restrict the enforcement of due-on-sale

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<sup>379</sup> *Id.* § 9(b).

<sup>380</sup> *See id.*

<sup>381</sup> *Id.* § 9(c).

<sup>382</sup> *Id.* § 10, 4(3).

<sup>383</sup> *Id.* § 10(a)(1).

<sup>384</sup> *Id.* § 10(a)(2)–(4).

clauses in the context of residential real estate is discussed in the comments to Section 10.<sup>385</sup>

Section 10(a)(5) addresses what is likely to be a rare conflict. This section provides that a relocation under the Act “does not affect the priority of the easement with respect to other recorded real-property interests burdening the area of the servient estate where the easement was located before the relocation.”<sup>386</sup> Relying on the underlying premise of the entirety of Section 10 (that a relocation under the Act does not create a new easement), Section 10(a)(5) establishes that a relocated easement retains the same temporal priority in the public records as the original easement. Section 10(a)(5) limits this principle of retained priority, however, by confining its geographic reach to “the area of the servient estate where the easement was located before the relocation.”<sup>387</sup> Thus, if an easement is relocated to some other portion of the original servient estate not burdened by the easement subject to relocation but burdened by another real property interest that was recorded on the servient estate *after* the establishment of the easement subject to relocation (or if it was relocated to another estate entirely), the relocated easement will not necessarily have priority over the other recorded real-property interest.<sup>388</sup> However, because the holder of such a recorded real property interest in the servient estate would be served and received notice under Section 5(b)(1)(D)

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<sup>385</sup> See *id.* § 10, cmt. n.2 (noting that “as standard residential loan documents do not specifically characterize an easement relocation as an event triggering a default or due-on-sale clause, Section 10(a)(2) clarifies that, in such a case, an easement relocation will not have the effect of triggering a breach or default or application of a due-on-sale clause or other transfer restriction clause”). For a thorough discussion of the history, purpose, and application of Section 341 of the Garn-St. Germain Depository Institutions Act of 1982 (Garn-St Germain Depository Institutions Act of 1982, 12 U.S.C.A. § 1701j-3), see Grant S. Nelson, et al., REAL ESTATE FINANCE LAW § 5.24, at 519–43 (6th ed. 2015).

<sup>386</sup> UNIF. EASEMENT RELOCATION ACT § 10(a)(5) (UNIF. L. COMM’N 2020).

<sup>387</sup> *Id.* § 10(a)(5).

<sup>388</sup> Comment 3 to Section 10 illustrates the effect of this provision with an example:

Suppose the easement subject to relocation originally burdens parcels A and B. After relocation the easement will burden parcels A, B, and C. Mortgage 1 was recorded on parcels A, B, and C subsequent to the recording of the easement on parcels A and B. Mortgage 2 is recorded only against parcel C. Under Section 10(a)(5), the relocated easement, which is now located on parcels A, B, and C, will have priority over Mortgage 1 but will be subordinate to Mortgage 2.

*Id.* § 10, cmt. n.3.

of the Act, any potential temporal priority conflict could be addressed by the court.<sup>389</sup>

### J. *Non-waiver*

Section 11 of the U.E.R.A. departs from the Restatement by making the Act's core relocation right immune from waiver.<sup>390</sup> As readers will recall, Section 4.8(3) of the Restatement states that “[u]nless expressly denied by the terms of an easement, as defined in Section 1(2), the owner of the servient estate is entitled to make reasonable changes in the location and dimensions of an easement . . . .”<sup>391</sup> A few courts latched on to this portion of the Restatement, and to introductory language in Section 4.8 relevant to determining the initial location of “a servitude,”<sup>392</sup> to hold that a servient estate owner could only change the location of an easement if the easement

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<sup>389</sup>*Id.* § 5(b)(1), discussed *supra* note 335335 and accompanying text. The court order under Section 6(b) could include any provisions necessary to address temporal priority vis-à-vis such a recorded real property interest under the authority of UNIF. EASEMENT RELOCATION ACT § 6(c) (UNIF. L. COMM’N 2020).

<sup>390</sup>Section 11 provides:

The right of a servient estate owner to relocate an easement under this [act] may not be waived, excluded, or restricted by agreement even if:

- (1) the instrument creating the easement prohibits relocation or contains a waiver, exclusion, or restriction of this [act];
- (2) the instrument creating the easement requires consent of the easement holder to amend the terms of the easement; or
- (3) the location of the easement is fixed by the instrument creating the easement, another agreement, previous conduct, acquiescence, estoppel, or implication.

*Id.* § 11.

<sup>391</sup>RESTATEMENT, *supra* note 16, at § 4.8(3).

<sup>392</sup>*Id.* § 4.8(1)–(2):

Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows:

- (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude.
- (2) The dimensions are those reasonably necessary for enjoyment of the servitude.

*Id.* (emphasis added). The Restatement drafters, however, likely intended the italicized language simply to indicate that the parties to a “servitude” agreement are always “free to determine the location and dimensions of a servitude” in the initial agreement. *Id.* at cmt. a.

was undefined, that is, if its location was not expressly defined by a metes and bounds description or some other indication of its location in the instrument that established the easement.<sup>393</sup> The Restatement comments also indicate that parties to an easement agreement can expressly agree to negate the Restatement's own terms, and they even advise that "[i]f the purchaser of an easement wishes to retain control over any change in location, the instrument should be drafted to accomplish that result."<sup>394</sup>

Section 11 of the U.E.R.A. unequivocally rejects not only the judicial holdings mentioned above but also the Restatement position that unilateral relocation by a servient estate owner subject to the Restatement's criteria is merely a default rule that can be altered or waived by contractual agreement. Section 11(1), which strictly prohibits the "waiver, exclusion, or restriction" of relocation rights established under the Act, and Section 11(2), which expressly prohibits parties from drafting around the rights established in Section 4 by requiring easement holder "consent . . . to amend the terms of an easement," both make clear that the relocation right established in Section 4 is not subject to waiver or exclusion in any manner and thus departs from the Restatement's lenient default rule position.<sup>395</sup> In effect, these two subsections adopt the German position on waiver and contractual limitation.<sup>396</sup> Furthermore, Section 11(3) expressly rejects the narrow approach to easement relocation followed by the courts that limited application of the Restatement to undefined easements.<sup>397</sup> The strong, anti-waiver provisions of Section 11 assure that the U.E.R.A. will remain useful for years to come instead of being easily negated by boilerplate provisions inserted in easement agreements that would otherwise restrict application of the Act. Section 11 also protects an unsophisticated servient estate owner who might unwarily sign an easement agreement that prevents resort to the

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<sup>393</sup>Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998); St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 193–94 (Nev. 2009); *but see* Town of Ellettsville v. Despirito, 111 N.E.3d 987, 992–94 (Ind. 2018) (explaining that Section 4.8(3) of the Restatement was most likely not intended to be restricted to undefined easements).

<sup>394</sup>RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

<sup>395</sup>UNIF. EASEMENT RELOCATION ACT § 11(1)–(2) (UNIF. L. COMM'N 2020), cmts. n.1–3. Sections 11(1) and (2) also reject dicta in *M.P.M. Builders* suggesting that parties to an easement agreement could always opt-out of the Restatement approach by express contractual provision. *M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1058 (Mass. 2004).

<sup>396</sup>BGB § 1023(1)–(2) (S. Forrester et al., Rothman & Co. trans., 1975), discussed *supra* note 151 and accompanying text.

<sup>397</sup>Lewis, 705 N.E.2d at 653–54; *St. James Vill.*, 210 P.3d at 193–94.

Act and will prevent courts from giving a cramped, narrow interpretation of the Act that would limit its application to undefined easements.

The Act's mandatory nature is justified for several reasons. First, the numerous additional substantive and procedural safeguards that have been built into the Act provide greater protection for the easement holder (and other interested parties) than the Restatement and thus assure that the Act cannot impose any material harm on the easement holder.<sup>398</sup> The Act's mandatory nature is also justified because the Act provides a form of consumer protection for grantors of easements. American contract law and property law already feature many mandatory rules designed to protect vulnerable parties from unintended, harmful, long-term consequences of a naïve contractual choice.<sup>399</sup>

Relatedly, Section 11 prevents a servient estate burdened with a poorly located easement from becoming practically inalienable or unsusceptible of reasonable future development just because at some point in the past a landowner granted an easement appurtenant or in gross but failed to reserve a right to relocate the easement or a landowner allowed a prescriptive easement to ripen under the laws of prescription. American property law has always been suspicious of direct and indirect restraints on alienation of land because they have the effect of taking property out of commerce or making it unfit for adaptation to new circumstances.<sup>400</sup> While the U.E.R.A.'s exacting substantive criteria and robust procedural safeguards preserve the functional utility of an easement to a dominant estate or easement holder, the non-waiver

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<sup>398</sup> See UNIF. EASEMENT RELOCATION ACT § 4 (UNIF. L. COMM'N 2020).

<sup>399</sup> SINGER, *supra* note 300, at 36–54.

<sup>400</sup> JOSEPH WILLIAM SINGER, PROPERTY 281–85, 329 (4th ed. 2014); see also RESTATEMENT, *supra* note 16, at § 3.4 (“A servitude that imposes a direct restraint on alienation of the burdened estate is invalid if the restraint is unreasonable. Reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint.”), and § 3.5 (“(1) An otherwise valid servitude is valid if even it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of the property, or by otherwise reducing the value of the property. (2) A servitude that lacks a rational justification is invalid.”). In a sense, Section 11 of the U.E.R.A. can be understood as fulfilling the Restatement's general promise to subject all questions about a servitude's validity to a practical and policy-oriented discussion of whether the servitude is illegal, unconstitutional, or violates public policy. *Id.* at ch. 3, intro. note, § 3.1. Section 11 also prevents, consistent with Section 3.4 of the Restatement, any easement, other than those specifically excluded under Section 3(b) of the Act, from becoming perpetually fixed in place based on a contractual waiver of the right to relocate and thus becoming, in effect, a kind of direct restraint on alienation that does not serve a reasonable purpose. *Id.* § 3.4, cmt. c (detailing “harmful effects” that flow from unreasonable direct restraints on alienation).



provision of the U.E.R.A. preserves the alienability, functional flexibility, and long-term development value of a servient estate.<sup>401</sup> Meanwhile, the Act's scope exemptions for conservation easements and negative easements, which can be used to create perpetual restraints on development and which, of course, do limit the alienability of burdened land, will preserve the value of those easements.<sup>402</sup>

### *K. Standard Provisions*

Sections 12, 13, and 15 are standard provisions found in most uniform acts promulgated by the Uniform Law Commission.<sup>403</sup> Section 12 provides that in applying and construing this Act courts should pay heed to “the need to promote uniformity of the law” with respect to the subject matter of the Act among the states that enact it.<sup>404</sup> Section 13 addresses the relation of the Act to the Electronic Signatures in Global and National Commerce Act.<sup>405</sup> Section 15 contains the Uniform Law Commission's standard severability clause.<sup>406</sup> None of these provisions should be controversial in any legislature considering adoption of the Act.

### *L. Legal Transition – Retroactivity*

Finally, Section 14 provides the transitional rule for the U.E.R.A. by specifying that the Act “applies to an easement created before, on, or after [the effective date of this [Act]].”<sup>407</sup> Put simply, the Act applies both prospectively and retroactively. As should be clear by now, an easement relocation can only proceed under the Act if the relocated easement will provide the easement holder with the same “affirmative, easement-related benefits” that the easement's original location delivered to the easement

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<sup>401</sup> SINGER, *supra* note 400,400 at 281–85.

<sup>402</sup> UNIF. EASEMENT RELOCATION ACT § 3(b) (UNIF. L. COMM'N 2020), discussed *supra* Part II.Scope

<sup>403</sup> See, e.g., UNIF. COMMON INT. OWNERSHIP ACT § 1-113 (UNIF. L. COMM'N 2008) (providing an example of the standard provisions in another uniform act).

<sup>404</sup> UNIF. EASEMENT RELOCATION ACT § 12 (UNIF. L. COMM'N 2020).

<sup>405</sup> *Id.* § 13.

<sup>406</sup> *Id.* § 15. Section 15, however, will only be included in a version of the Act if that state lacks a general severability statute or a judicial ruling of the highest court stating a general rule of severability. *Id.* (legislative note).

<sup>407</sup> *Id.* § 14.

holder.<sup>408</sup> In light of the seven substantive conditions that a servient estate owner must satisfy under Section 4, including the condition that the relocation will not materially “impair the physical condition, use, or *value* of the dominant estate or improvements on the dominant estate,”<sup>409</sup> the extensive procedural safeguards in the Act,<sup>410</sup> the obligation of the servient estate owner to pay all reasonable expenses of the relocation,<sup>411</sup> and the protections of the easement holder’s continuing right to use and enjoy the easement during the process of relocation,<sup>412</sup> application of the Act will not deprive the easement holder of any functional benefits of the easement and will not cause the easement holder to suffer any material harm, even during the relocation process, regardless of whether the Act applies to an easement created before, on, or after the effective date of the Act.

Despite these substantive and procedural protections, some readers may still wonder whether retroactive application of the Act would constitute an uncompensated taking of private property under state or federal constitutional principles. Fortunately, one state supreme court has already answered this question in the context of a state statute that provides for relocation of an easement on terms similar to, but actually less exacting than, the U.E.R.A. In *Statewide Construction, Inc. v. Petri*, a servient estate owner that sought to develop a fifteen-acre parcel filed a declaratory judgment action to obtain judicial approval to relocate an express vehicular access easement that served seven adjacent parcels.<sup>413</sup> The servient estate owner brought the lawsuit after obtaining a conditional use permit requiring construction of a new road to serve the dominant estates,<sup>414</sup> and it sought judicial authorization for the relocation of the easement under Idaho’s private access road relocation statute that grants a private landowner whose land is burdened by an undedicated vehicular access road a “right at their own expense to change such access to any other part of the private lands,” as long as the change is made in “a manner as not to obstruct motor vehicle travel, or

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<sup>408</sup> *Id.* § 14, cmt.1.

<sup>409</sup> *Id.* § 4(6) (emphasis added).

<sup>410</sup> *Id.* §§ 5–6, discussed *supra* Section II.Procedural Requirements and Safeguards: Complaint, Parties, Service, Order, Recordation

<sup>411</sup> *Id.* § 7, discussed *supra* section II.Affidavit of Relocation

<sup>412</sup> *Id.* §§ 6(5)–(7), 9(b).

<sup>413</sup> 247 P.3d 650, 652 (Idaho 2011).

<sup>414</sup> *Id.*

to otherwise injure any person or persons using or interested in such access.”<sup>415</sup>

In affirming the district court order allowing the proposed relocation, the Idaho Supreme Court first ruled that allowing unilateral relocation of an access road under the statute did not amount to a per se injury merely because the result deviated from the traditional common law rule.<sup>416</sup> Moreover, the court also held that relocation of the access road easement was not an unconstitutional taking of private property without just compensation under either the Fifth Amendment to the U.S. Constitution or the Idaho Constitution because the statute expressly required the change be made in a manner that does not obstruct vehicular travel over the road or injure any interested person’s access over the road.<sup>417</sup> As the court put it, any relocation authorized by the statute will thus “provide the dominant estate holders with the same benefi[cial] [interest] they were entitled to under the easement by its original location.”<sup>418</sup> Therefore, the court reasoned, the easement holders would not suffer any specific constitutional injuries that would impair their ability to access their properties if relocation was permitted.<sup>419</sup> Interestingly, the court noted that the dominant estate owners did not cite any authority for their argument that relocation of an easement under the statute constituted a taking.<sup>420</sup> Just as the Idaho Supreme Court ruled in *Statewide Construction*, retroactive application of the U.E.R.A. will not be a taking because the easement holder still has the right to use and enjoy a perfectly functional easement, and the easement holder will not suffer any material harm.

### III. JUSTIFICATIONS FOR THE U.E.R.A.

As Part I of this article has demonstrated through its review of the case law preceding and following the Restatement, judicial views concerning

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<sup>415</sup>IDAHO CODE § 55–313 (2021).

<sup>416</sup>*Statewide Constr.*, 247 P.3d at 654–56 (finding that legislature intended to modify common law no-unilateral relocation rule as expressed in *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950), because it left intact two other statutes requiring easement holder consent for relocation of other kinds of easements while allowing non-consensual relocation of motor vehicle access easements under IDAHO CODE § 55–313).

<sup>417</sup>*Id.* at 656 (quoting IDAHO CODE § 55–313).

<sup>418</sup>*Id.* at 657.

<sup>419</sup>*Id.* at 657–58.

<sup>420</sup>*Id.* at 656. The court’s observation is not surprising as the author of this article has not located any decision holding that retroactive application of the Restatement, or any state statute allowing unilateral easement relocation for that matter, would constitute a taking.

unilateral easement relocation have ebbed and flowed over the years. Further, as Part II has demonstrated, the U.E.R.A. builds on the Restatement's doctrinal breakthrough (and the Civil Law approach followed in Louisiana and elsewhere) but refines the Restatement approach in numerous ways. This final part expands to address policy arguments, both those made by judges and scholars opposed to any kind of unilateral easement relocation right,<sup>421</sup> and those in favor of such an approach,<sup>422</sup> and sets the debate about easement relocation in a broader theoretical framework.

In general, the version of unilateral relocation offered in the U.E.R.A. represents an economically desirable, welfare-enhancing, socially constructive, and fair doctrinal advance in American property law. It is based on an understanding of an easement, not as an absolute, unconditional property right that an easement holder can wield like a Blackstonian stick against a helpless servient estate owner, but rather as a long-term property relationship in which both the easement holder and the servient estate owner owe each other duties of mutual accommodation and respect.<sup>423</sup>

Moreover, the U.E.R.A. recognizes that an easement is not really like a mythical fee simple absolute, entitling its owner to exercise complete dominion with respect to all non-owners, subject only to the limitations of the law of nuisance. Instead, the U.E.R.A. acknowledges that an easement is, in fact, a limited, non-possessory property interest that entails a complex relational matrix of mutual obligations that, from time to time, requires judicial control if the parties cannot reach mutually acceptable compromises on how to respond to changed circumstances.<sup>424</sup>

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<sup>421</sup>BRUCE & ELY, *supra* note 26, §§ 7:13, 7:16 (Spring 2020) (criticizing Restatement); Orth, *supra* note 298 (same); Note, *The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 HARV. L. REV. 1693 (1996) (analyzing tentative draft of section 4.8(3) and favoring traditional mutual consent rule); Joseph Kakesh, *Recent Decisions of the United States Court of Appeals for the District of Columbia, Property Law*, 73 GEO. WASH. L. REV. 918, 927–28 (2005) (criticizing Restatement).

<sup>422</sup>GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, COVENANTS AND EQUITABLE SERVITUDES § 4.13(c), at 196–99 (3rd ed. 2016) (adopting neutral position on Restatement); V. William Scarpato, “Is” v. “Ought,” or How I Learned to Love to Stop Worrying and Love the Restatement, 85 TEMP. L. REV. 413, 442–46 (2016); Korngold, *supra* 264264, at 1568–69; Lovett, *supra* note 98 (arguing in favor of modified version of section 4.8(3) of the Restatement); French, *supra* note 310; Douglas B. Harris, *Balancing the Equities: Is Missouri Adopting a Progressive Rule for Relocation of Easements?*, 61 MO. L. REV. 1039, 1060 (1996) (supporting tentative draft of section 4.8(3) over the traditional approach).

<sup>423</sup>Lovett, *supra* note 98, at 34–43.

<sup>424</sup>*Id.* at 36–43.

Finally, the U.E.R.A. recognizes that an easement is not a static property *commodity* subject to modification solely through market transactions. Rather the U.E.R.A. appreciates that property law often creates complex, reciprocal duties among the persons affected by an easement. In short, the U.E.R.A. recognizes that an easement is a prime example of “governance property” or property as *propriety*.<sup>425</sup> It will thus help the American legal community appreciate something that many other legal systems around the world have long realized—that an easement or servitude represents an important model for resource sharing and provides opportunities for mutual benefit and just social relations.<sup>426</sup>

This part of the article considers four fulcrums of debate over the desirability of recognizing a unilateral easement relocation right. The first debate fulcrum turns primarily on utilitarian claims about the costs and benefits of the mutual consent rule or the unilateral easement relocation alternative in terms of short-term certainty and long-term flexibility. The second fulcrum addresses similar concerns but stages them in terms of economic fairness and the risk of windfall gains and losses. The third and fourth axes of debate turn on more formalistic claims about symmetry in easement relocation rules and appeals to the ideal nature of an easement as a prototypical property form in the architecture of property law.

#### A. *Short-Term Certainty versus Long-Term Flexibility*

The first fulcrum of debate over easement relocation typically begins with the argument that recognition of any kind of judicially sanctioned unilateral easement relocation right will lead to uncertainty, erode trust between the parties to an easement, and provoke unnecessary litigation and potentially even harassment of easement holders.<sup>427</sup> Although judges initially made this

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<sup>425</sup> See generally Gregory S. Alexander, *Governance Property*, 160 U. PENN. L. REV. 1853, 1862 (2012); GREGORY S. ALEXANDER, *COMMODITY AND PROPRIETY: COMPETING VISIONS OF PROPERTY IN AMERICAN LEGAL THOUGHT 1776–1970* (1997).

<sup>426</sup> See generally Rashmi Dyal-Chand, *Sharing the Cathedral*, 46 CONN. L. REV. 647, 677–79 (2013) (describing the broad impulse toward sharing in American property law decision making and arguing for greater recognition and formalization of an interest-outcome and sharing-based approach to property disputes); *id.* at 697–99 (detailing this approach in the context of implied easements).

<sup>427</sup> Note, *The Right of Owners of Servient Estates to Relocate Easements Unilaterally*, 109 HARV. L. REV. 1693, 1694–95, 1700–01 (1996); BRUCE & ELY, *supra* note 26, §§ 7:13, 7:16; *Stamatis v. Johnson*, 224 P.2d 201, 202–03 (Ariz. 1950), *modified on reh'g*, 231 P.2d 956 (Ariz.

claim without any empirical or theoretical support,<sup>428</sup> some commentators have advanced more sophisticated versions of the argument based on Coasian accounts of the presence or absence of transaction cost friction,<sup>429</sup> or speculations as to whether parties to an easement relocation dispute would be members of an effective norm-producing community with thick or intimate relational bonds that could easily resolve intra-community disputes without resort to the formal legal system.<sup>430</sup>

One common feature of all versions of the argument that the Restatement approach to easement relocation will increase controversy and litigation is the observation that the Restatement itself does not require a servient estate owner to seek judicial approval of a proposed relocation before actually moving the easement.<sup>431</sup> This failure, the critics suggest, could produce a cascade of interlocking problems: (1) the servient estate might rush to relocate a burdensome easement without seeking easement holder consent; (2) the servient estate owner's improvements resulting from the unilateral relocation would then turn into sunk costs discouraging the servient estate owner from engaging in fruitful negotiation; and (3) the resulting destabilization of the easement relationship will force the easement holder to litigate to protect its interests in the original easement location.<sup>432</sup>

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1951); *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980); *Herren v. Pettengil*, 538 S.E.2d 735, 736–37 (Ga. 2000); *MacMeekin v. Low Income Hous. Inst. Inc.* 45 P.3d 570, 576 (Wash. Ct. App. 2002).

<sup>428</sup>*Stamatis*, 224 P.2d at 202–03.

<sup>429</sup>Note, *supra* note 421, at 1699–1702 (first acknowledging that because of the small number of parties, their proximity to each another, and the ease of initiating bargaining, that transaction costs might initially appear to be low for easement relocation disputes and thus a default rule setting could be inconsequential in Coasian terms, but then noting that the inherent bilateral monopoly situation created by an easement may increase bargaining costs and thus make the choice of a default rule more significant).

<sup>430</sup>Note, *supra* note 421, at 1702–05 (citing and discussing ROBERT C. ELLICKSON, ORDER WITHOUT LAW: HOW NEIGHBORS SETTLE DISPUTES (1991), and observing that even if the parties to an easement relocation dispute are members of an effective norm-producing community, these kinds of disputes probably do not occur frequently enough for the community to generate applicable norms).

<sup>431</sup>Note, *supra* note 421, at 1700–01; Orth, *supra* note 298, at 647.

<sup>432</sup>Note, *supra* note 421, at 1700–01; Orth, *supra* note 298, at 647; *Town of Ellettsville v. Despirito*, 111 N.E.3d 987, 996–97 (Ind. 2010) (citing and quoting Note, *supra* note 421, at 1701 for proposition that adoption of Restatement would lead a servient estate owner to “take initial steps to relocate the easement unilaterally because he does not need the dominant estate-holder’s prior consent,” resulting investment of recourses would produce “sunk costs,” and servient estate owner would become “reluctant to accept an offer from the owner of the dominant estate to cease the relocation, even if doing so would be the most efficient outcome”).

Legislatures contemplating adoption of the U.E.R.A. should consider several counter-arguments to this uncertainty critique. First, as supporters of the Restatement have noted, most servient estate owners are, in fact, likely to be risk-averse property owners themselves and will be reluctant to move an easement without easement holder consent or judicial approval precisely because of their fear of being stuck with improvements that might have to be torn down or removed at considerable expense *ex post*.<sup>433</sup> In other words, the fear of significant sunk costs may actually discourage hasty relocation by servient estate owners even more in states with the U.E.R.A. than in states without it. Indeed, the possibility that a court might eventually approve a proposed relocation under a substantive reasonableness test like that found in the Restatement or the U.E.R.A. might actually encourage both the servient estate owner and the easement holder to engage in more negotiation, cooperation, and other-regarding accommodation *ex ante*.<sup>434</sup> This is certainly the view taken by the Massachusetts Supreme Judicial Court when it adopted the Restatement rule and appears to have been the practice in Massachusetts after the Restatement became the universal standard there.<sup>435</sup>

Next, as Professor French once noted, it is quite possible that the easement holder faced with a reasonable relocation request under either the Restatement or the U.E.R.A. might want to consent (assuming, of course the proposed relocation does not materially impair the easement's utility) because the easement holder will understand that in the future she may want to adjust the manner, frequency, and intensity of the easement's use due to technological developments or changes in the neighborhood and would prefer to have the servient estate owner's cooperation rather than risk litigating that question.<sup>436</sup> Finally, legislatures should remember that even if the establishment of a unilateral relocation right does produce some increased

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<sup>433</sup>Harris, *supra* note 421, at 1059–61; French, *supra* note 310, at 5.

<sup>434</sup>French, *supra* note 310, at 11–13.

<sup>435</sup>*M.P.M. Builders, LLC v. Dwyer*, 809 N.E.2d 1053, 1059 (Mass. 2004) (commentating that amicable settlements are still likely to predominate after adoption of the Restatement because a servient owner will be reluctant to seek judicial approval unless it is confident relocation will not harm the easement holder and a dominant estate owner would be unwise to resist a well-considered relocation proposal). For the relatively few Massachusetts decisions after *M.P.M. Builders*, see *supra* notes 201–02 and accompanying text.

<sup>436</sup>French, *supra* note 310, at 11. Of course, the incentives to cooperate can break down when a proposed location really does impair the easement holder's use of the easement, or the easement holder simply tries to take advantage of the servient owner's need for a relocation opportunistically. *Id.* However, it is just these kinds of factors that the U.E.R.A.'s substantive criteria are designed to expose.

litigation initially, the aggregate gains in welfare that will result from breaking the easement holder's bilateral monopoly veto power under the mutual consent rule could, in the long run, still far outweigh the short term friction that might result during the transition to the U.E.R.A.<sup>437</sup>

Taking an even broader, systemic view of this particular debate, legislatures considering adoption of the U.E.R.A. should remain focused on the fact that the Act will provide much more flexibility for the proximate and remote successors of servient estate owners in future generations and this will, in the long run, lead to more efficient land allocation generally, without any additional increase in transaction costs or litigation than the mutual consent rule, and likely lead to more efficient land use planning.<sup>438</sup> Indeed, it was precisely this promise of long-term flexibility that proved most persuasive to the Supreme Court of Appeal of South Africa when it adopted the civil law approach to servitude relocation for a post-Apartheid South African property law.<sup>439</sup>

Finally, and quite significantly, legislatures should not overlook the fundamental fact that the U.E.R.A. has responded to the Restatement critics who pointed out the absence of a judicial approval mandate under its regime. As shown in Part II, the U.E.R.A. requires a servient estate owner to bring a civil action to relocate an easement without the easement holder's consent.<sup>440</sup> This requirement and the Act's detailed, carefully modulated rules for an easement relocation proceeding,<sup>441</sup> along with its other protections for easement holder interests during and after the relocation,<sup>442</sup> should alleviate one of the primary concerns that underscored the uncertainty arguments often made by Restatement critics.<sup>443</sup>

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<sup>437</sup>Harris, *supra* note 422, at 1059–61; French, *supra* note 310, at 8.

<sup>438</sup>Korngold, *supra* note 264264, at 1568–69.

<sup>439</sup>Linvestment CC v. Hammersley, 3 S.A.L. Rep. 283, 292–93 (Sup. Ct. App. 2008).

<sup>440</sup>UNIF. EASEMENT RELOCATION ACT § 5(a) (UNIF. L. COMM'N 2020).

<sup>441</sup>*Id.* §§ 5–6.

<sup>442</sup>*Id.* §§ 7–10.

<sup>443</sup>Legislatures considering the U.E.R.A. might also consider an empirical study that gathered evidence on the effectiveness of a similar regime for the judicial modification and termination of servitudes and title conditions more generally. See SCOTTISH LAW COMMISSION, REPORT ON REAL BURDENS (Scot Law Com No 106, 1998) §§ 6.1–6.7 (finding that many applications for variation or discharge of old title conditions were not challenged, the Lands Tribunal dispatched most applications at low cost, frivolous applications and oppositions were discouraged by flexible attorney fee award customs, accumulated case law in time provided a basis for predictability and certainty, and the “very availability of the Tribunal served as a spur to negotiation and consensual discharge”). See also Lovett, *supra* note 128, at 61–62 (discussing Scottish Law Commission study).



*B. Economic Fairness and Aggregate Utility—Of Windfalls, Pareto and Kalder-Hicks Efficiency, Bilateral Monopoly Safety Valves, and the Cost of Easements*

The certainty versus flexibility debate has frequently been restaged in somewhat different economic terms—namely the relationship between economic fairness and aggregate utility. Judicial and academic critics of unilateral easement relocation have long contended that any kind of retroactive adoption of a unilateral relocation right could produce a windfall gain for the servient estate owner and a windfall loss for the easement holder based on initial bargaining and subsequent market transactions that factored in the immutability of the mutual consent rule.<sup>444</sup> Consequently, these critics argue, any adjustment of an easement's location should only occur through a market transaction.<sup>445</sup> Legislatures concerned about this economic fairness argument should pause, however, and at least question the critics' assumptions about parties' knowledge of the mutual consent rule at the time of easement creation or in subsequent transactions. They should also not lose sight of other fairness considerations—particularly the problem of hold-outs—and should not forget the potential systemic gains for the entire private land use system that could result from adoption of the U.E.R.A.

First, as Professor French suggested at the beginning of the debate over the Restatement, the parties to an easement often have given very little, if any, attention to the question of easement relocation either at the time of easement creation or in subsequent conveyances of the servient or dominant estate.<sup>446</sup> Expectations about which party might be advantaged years down the road, she argues, may thus have had little, if any, effect on the amount of consideration given or received in any of these transactions.<sup>447</sup> Only in rare

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<sup>444</sup>*Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950); *Herren v. Pettengil*, 538 S.E.2d 735, 736 (Ga. 2000); *Davis v. Bruk*, 411 A.2d 660, 665 (Me. 1980); BRUCE & ELY, *supra* note 26, § 7.13; Orth, *supra* note 298, at 646–50; Note, *supra* note 421, at 1695.

<sup>445</sup>*Herren*, 538 S.E.2d at 736; *Town of Ellettsville v. Despirito*, 111 N.E.3d 987, 992–95 (Ind. 2010).

<sup>446</sup>French, *supra* note 310, at 12–14 (examining cases and noting the unlikelihood that when a servient and dominant estate owner agree to something as practical and utilitarian as a common, shared driveway, as in *Lewis v. Young*, 705 N.E.2d 649 (N.Y. 1998), or irrigation ditch easements, as in *Roaring Fork Club, L.P. v. St. Jude's Co.*, 36 P.3d 1229 (Colo. 2001), that the owners were actually bargaining over the right to prevent future development of the servient estates).

<sup>447</sup>French, *supra* note 310, at 12.

cases, when some special feature of an easement's utility related to its precise location or when particularly sophisticated developers or real estate attorneys are involved, she argues, would parties tend to focus on easement relocation rights at the time of easement creation or in subsequent transactions.<sup>448</sup> Indeed, many of the cases reviewed in Part I of this article reveal that easement agreements are often drafted by parties who were at least inattentive to the immediate or future location of an easement.<sup>449</sup>

Because the debate about the extent of any set of understandings of the complexities of easement relocation law at the time of contracting is impossible to resolve without a detailed empirical study, legislatures considering the wisdom of adopting the U.E.R.A. in light of critics' claims about windfall gains and losses should not lose sight of the strong likelihood that a properly constructed easement relocation rule will produce more economic efficiency overall and greater aggregate utility. As French first argued at the time the Restatement rule emerged and as the Colorado Supreme Court eventually concluded in *Roaring Fork Club*, when an easement is relocated under terms similar to the Restatement or, for that matter, under the even more rigorous conditions offered in the U.E.R.A.—when the relocated easement will not materially reduce the easement's utility to the easement holder, impair the affirmative purpose for which the easement was created, or impair the physical condition, use, or value of the dominant estate or improvements on the dominant estate—a relocation will be *Pareto efficient or Pareto superior*—that is, the servient estate owner will be better off, but the easement holder will not actually be any worse off.<sup>450</sup>

Critics of unilateral relocation, however, might object to this Pareto superiority claim with another objection. That objection would likely rest on the notion that, putting aside all of the calculations that a court will make in determining whether a proposed relocation meets the substantive criteria of Section 4 of the U.E.R.A., the mere fact that the relocation will occur non-consensually (or *coercively* as the critics would say), without a market

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<sup>448</sup>French, *supra* note 310, at 9.

<sup>449</sup>That was certainly the conclusion of the South African Supreme Court of Appeal in *Linvestment CC v. Hammersley*, 3 S.A. L. Rep. 292–93 (Sup. Ct. App. 2008).

<sup>450</sup>French, *supra* note 310, at 5 (arguing that a relocation under Section 4.8(3) “makes one party better off without making the other party worse off”); *Roaring Fork Club*, 36 P.3d. at 1236 (observing that the Restatement rule “maximizes the overall utility of the land” because the “burdened estate profits from an increase in value while the benefitted estate suffers no decrease”). As noted earlier, these claims amount to a classic statement of the theory of Pareto efficiency. MALLOY, *supra* note 167, at 189.

transaction, implies that there must be some loss of value to the easement holder or otherwise the easement holder would have consented to the proposed relocation in the first place.<sup>451</sup> In other words, any non-consensual transfer is, by definition, not Pareto optimal.

Supporters of the U.E.R.A. can respond to this objection with two rejoinders of their own. First, as Richard Posner once observed, the requirement of unanimity for Pareto superiority is, “a very austere conception of efficiency, with rather few exceptions in the real world,” for the simple reason that most transactions “have effects on third parties.”<sup>452</sup> In the context of easement relocation, the unreasonable and unrealistic demands of Pareto superiority are clear. Many third parties, principally all the persons who would likely benefit from the enhanced development of a servient estate resulting from reasonable easement relocation—future homeowners, future residential and commercial tenants, and business consumers and customers to name a few—are left out of the efficiency calculus demanded by a strict rule of unanimity. Second, even if some loss in value resulting from a lack of unanimity in an easement relocation does materialize, a judicial relocation occurring under the strict conditions of Section 4 of the U.E.R.A. will still be Kaldor-Hicks efficient; it will lead to a net or aggregate gain in overall utility because the gain in utility to the servient estate owner will be higher than the loss in utility suffered by the easement holder resulting from the mere involuntary nature of the relocation.<sup>453</sup> When third persons’ gains are considered as well—the gains of people who could benefit from the enhanced development of the servient estate resulting from a productive easement relocation—the aggregate gain in utility is likely to be even greater.

Legislatures considering adoption of the U.E.R.A. should not lose sight of one more fundamental economic efficiency problem presented by the mutual consent rule. Whatever the parties’ original understandings were, when surrounding circumstances do change substantially, the mutual consent rule can easily produce a bilateral monopoly benefiting the easement holder and allowing the easement holder to demand a ransom payment and “extract

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<sup>451</sup>MALLOY, *supra* note 167, at 189–90 (observing that the “classic example of a *Pareto efficient* exchange is a voluntary market exchange where, by definition (in the absence of fraud, duress, or the like), both parties are made better off, in their own estimation, by virtue of the exchange”).

<sup>452</sup>RICHARD POSNER, *ECONOMIC ANALYSIS OF THE LAW* 12 (3d ed. 1986).

<sup>453</sup>MALLOY, *supra* note 167, at 190 (explaining that under “the Kaldor-Hicks theory, a reallocation of resources is efficient . . . as long as the increased benefit to one party (the winner) more than offsets the decrease in utility (or cost) to the other party (the loser)”).

nearly all of the surplus value created by relocation of the easement.”<sup>454</sup> Just like the Restatement, the U.E.R.A. will provide a useful bypass around the mutual consent rule roadblock by allowing a servient estate owner to relocate an easement, subject to meaningful judicial oversight, and thus avoid substantial economic waste of the servient estate.

One other long-term economic consideration is also relevant to the critics’ claims about windfall gains and losses. By making it possible for a servient estate owner to relocate an easement in the face of adamant easement holder opposition, the U.E.R.A., just like the Restatement rule, promises to “encourage the use of easements and lower their price by decreasing the risk [that] easements will unduly restrict future development of the servient estate.”<sup>455</sup> The property law system in general and the system for allocating use rights in neighboring parcels of land, in particular, may thus benefit from greater precision because the risks inherent in granting an easement will be lower. Landowners should be more willing to grant an easement knowing it can be relocated later under the U.E.R.A. Consequently, the cost for dominant estate owners and others to acquire easements may come down, thus facilitating their use.

In a similar way, the property law system may also benefit in an adjacent area of easement law—the law concerning prescriptive easements and other kinds of non-express easements. Prescriptive easement disputes are particularly ubiquitous in American law. Every year dozens of prescriptive easement disputes are resolved by reported judicial decisions.<sup>456</sup> As any practicing real estate attorney will likely attest, unreported prescriptive easement disputes are even more common. The U.E.R.A. offers a promising

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<sup>454</sup>French, *supra* note 310, at 15. *See also* Harris, *supra* note 422, at 1059–61 (praising the Restatement for offering an escape from the bilateral monopoly power of the easement holder under the mutual consent rule).

<sup>455</sup>RESTATEMENT, *supra* note 16, at § 4.8 cmt. f.

<sup>456</sup>*See* John A. Lovett, *Restating the Law of Prescriptive Easements*, 104 MARQUETTE L. REV. 939 (2021) (presenting a fifty-state study focused on one constant controversy in prescriptive easement law—the question of whether alleged prescriptive use is subject to a presumption of adversity or permissive use). A Westlaw search for prescriptive easement decisions in the West reporter system, using the West Key Number “141Key5 (Easements: Prescription. In General),” produces 189 headnotes for the three-year period from June 30, 2018 to June 30, 2021. A similar search for West Key Number “141Key8(2) (Easements: Prescription. Use by permission or agreement),” a frequently contested issue in prescriptive easement disputes, produces fifty-nine headnotes over the same three-year period. A search for West Key Number “141Key36(1) (Easements: Evidence. Presumptions and Burden of Proof),” another related and frequent headnote in prescriptive easement disputes, produces 100 headnotes over the same three-year period.

way to lower the temperature of these disputes and make them easier to settle. Because the U.E.R.A. applies to all kinds of non-express easements, such as easements created by estoppel, implication, necessity, or prescription, as well as express easements,<sup>457</sup> an alleged servient estate owner may be more likely to reach an accommodation with a neighbor claiming the existence of a non-express easement because the servient estate owner can be assured that even if the disputed easement is recognized, it will still be subject to relocation under the U.E.R.A. in the event the initial location imperils future development of the servient estate.

*C. Micro-Level Doctrinal Symmetry versus Broader Functional Reciprocity in Response to Changed Conditions*

The third major focus of debate over unilateral easement relocation concerns the supposedly advantageous symmetry of the mutual consent rule. As Restatement critics frequently note, one reason to maintain the mutual consent rule is simply that it applies with equal force to both the easement holder and the servient estate owner; thus, absent some express contractual reservation, neither party to an easement can relocate an easement without the other's consent.<sup>458</sup> This justification, seemingly grounded in a notion of correlative rights and an appeal to aesthetic doctrinal symmetry, has also been mentioned in a number of judicial decisions.<sup>459</sup> This justification, however, is subject to a significant doctrinal counterargument.

In states that chose to follow the robust Restatement approach to easement relocation or chose to adopt the U.E.R.A. or some other statutory relocation right, the law actually achieves a more profound functional reciprocity between the servient estate owner and the easement holder. It does this by providing the servient estate owner with a judicially controlled opportunity to respond productively to changing social and economic conditions in a way that matches the easement holder's ability to adjust the manner, frequency, and intensity of an easement's use as long as that adjustment does not unreasonably interfere with the servient estate owner's use of the servient estate.<sup>460</sup> As noted earlier in this article, under a well-

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<sup>457</sup> UNIF. EASEMENT RELOCATION ACT § 3(a) (UNIF. L. COMM'N 2020).

<sup>458</sup> Orth, *supra* note 298, at 652–53; BRUCE & ELY, *supra* note 26, § 7.13; Note, *supra* note 421, at 1695.

<sup>459</sup> *Stamatis v. Johnson*, 224 P.2d 201, 203 (Ariz. 1950); *Fla. Power Corp. v. Hicks*, 156 So.2d 408, 410 (Fla. Dist. Ct. App. 1963); *Sakansky v. Wien*, 169 A. 1, 3 (N.H. 1933).

<sup>460</sup> French, *supra* note 310, at 10–11.

established but muddy common law rule, an easement holder can “use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the [easement]” and can change the “manner, frequency and intensity” of that use over time “to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefitted by [the easement].”<sup>461</sup>

Although one of the Restatement’s most stern critics contends that Professor French misunderstands or misrepresents the meaning of the common law rule formulated in Section 4.10 of the Restatement,<sup>462</sup> another prominent scholar in the field of private land use arrangements, Gerald Korngold, summarizes a wide range of cases falling under this heading and lends support to French’s view.<sup>463</sup> Professor Korngold emphasizes that the reasonableness standards used by courts to deal with changes in the use of an easement are vague, judicial application of the standards is unpredictable, and courts do their best to balance three competing interests: (1) honoring the intent of the parties; (2) allowing new uses of the easement to permit efficient use of the dominant estate; and (3) minimizing interference with the productive use of the servient estate.<sup>464</sup> In fact, despite the variety of formulations of this rule, Korngold notices a bias in favor of allowing new productive uses of an easement as long as the new use “seems in the least way related to the prior use.”<sup>465</sup>

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<sup>461</sup> RESTATEMENT, *supra* note 16, at § 4.10 cmt. f; *see also* BRUCE & ELY, JR., *supra* note 26, § 8.3 (“Reasonable use [of an easement] is not fixed at a particular point, but may vary from time to time . . . Absent specific provision to the contrary, the concept of reasonableness includes a consideration of changes in the surrounding area and technological developments. These factors provide a degree of elasticity in the scope of express easements.”); French, *supra* note 310310, at 15.

<sup>462</sup> Orth, *supra* note 298, at 652 (arguing that what the common law meant by its rule allowing reasonable changes in the use of an easement was simply more frequent use—for example of a right of way—but that it would not permit an “overburden” or “use of an easement beyond its scope”).

<sup>463</sup> KORNGOLD, *supra* note 422, § 4.08, at 178–79.

<sup>464</sup> *Id.*

<sup>465</sup> *Id.* at 180. Professor Korngold’s examples of judicial bias in favor of new uses include *Downing House Realty v. Hampe*, 497 A.2d 862, 865 (N.H. 1988) (permitting intensified use a right of way easement, even though dominant estate was originally used as residence and began to be used as a seventeen car parking lot, since both properties and surrounding areas had been converted to commercial use), and *Logan v. Brodrick*, 631 P.2d 429 (Wash. 1981) (permitting intensified use of a roadway easement after a small lakefront resort on the dominant estate was expanded causing road traffic to increase to eighty vehicles a day and noting “[c]hanges in surrounding conditions and modernization of recreational vehicles are to be reasonably contemplated”). KORNGOLD, *supra* note 422, § 4.08, at 181–82.

Like the Restatement, the U.E.R.A. promises to produce true functional reciprocity in the easement relationship by responding to the common law's grant of flexibility to the easement holder and by embedding flexibility and elasticity on both sides of an easement relationship. It allows the servient estate owner as well as the dominant estate owner to respond to changed conditions that make either parcel ripe for new development.<sup>466</sup> Legislatures should take note that several leading state court decisions have found this particular justification for recognizing unilateral easement relocation rights to be especially persuasive.<sup>467</sup> They should also take note that two of the most prominent critics of the Restatement expressly acknowledge that the traditional common law rule allowing an easement holder to alter the manner, frequency, or intensity of an easement's use is subject to an open-textured reasonableness standard,<sup>468</sup> one that is actually more open-textured than the quite detailed and relatively stringent material impairment standard now offered in Section 4 of the U.E.R.A.

#### *D. Easement as Inviolable Property Right or Long-Term, Concurrent Property Relationship*

Another way that some judges and scholars have framed the debate over unilateral easement relocation focuses on the nature of an easement itself and what role, if any, courts should play in adjusting the relationship between a servient estate owner and an easement holder. How should an easement be conceptualized? As a fundamentally unalterable property right—unchangeable without the consent of the easement holder, just like the mythical Blackstonian fee simple absolute—or as a limited non-possessory use right embedded in a mutually reciprocal property relationship?

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<sup>466</sup>M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004).

<sup>467</sup>Roaring Fork Club, L.P., v. St. Jude's Co., 36 P.3d 1229, 1237 (Colo. 2001); *Dwyer*, 809 N.E.2d at 1057.

<sup>468</sup>BRUCE & ELY, *supra* note 26, at § 8:13 (observing that the “[s]cope of an easement may be expanded beyond the terms of the grant or the original usage, but the dominant owner may not unreasonably increase the burden on the servient estate,” noting that “courts balance the dominant owner’s right to enjoy the easement and take advantage of technological innovations with the servient owner’s right to make all use of the servient land that does not interfere with the servitude,” and advising that “[s]ince these rights are relative, courts must strive to protect the interests of both parties”).

Following the lead of several early nineteenth and twentieth century judicial decisions discussed in Part I.A,<sup>469</sup> and even some post-Restatement judicial decisions discussed in Part I.G,<sup>470</sup> supporters of the traditional common law mutual consent rule argue that an easement should be maintained without any modification because an easement is no less dignified and significant a property right as a fee simple absolute.<sup>471</sup> Consequently, the rights of the easement holder should not be subject to any non-consensual alteration by a duty holder (the servient estate owner) even if this alteration does not impose any material economic, social, or aesthetic harm on the right holder. In short, property rights in easements are permanent, unalterable, and static, and any judicial interference with them would demote an easement from a robust, inviolable, fully possessory interest in land, on a par with the fee simple, into an inferior, malleable, mere use right.<sup>472</sup>

The flaw in this traditionalist claim about the inviolable nature of an easement, however, is that generally speaking, or at least outside the narrow debate over easement relocation, an easement has never been understood to be a property interest of equal rank and dignity as a fee simple estate or unencumbered ownership of land. Quite to the contrary, the common law has generally understood an easement to be not only more malleable and limited in nature than a fee simple, but also more dynamic and flexible. Consider just some of the ways that property law regards an easement quite differently than a fee simple interest in land.

First, and most obviously, the common law conceives of an easement as a *non-possessory* interest in land.<sup>473</sup> This does not mean, of course, that an easement holder is precluded from physically using the portion of the servient estate burdened by an easement, but rather that the easement holder cannot possess the rest of the servient estate and cannot possess the land subject to

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<sup>469</sup>Gore v. Fitch, 54 Me. 41, 45–46 (1866); White Bros. & Crum Co. v. Watson, 117 P. 497, 499 (Wash. 1911); Smith v. Jackson, 104 S.E. 169, 170 (N.C. 1920); Sakansky v. Wein, 169 A. 1, 1–2 (N.H. 1933).

<sup>470</sup>Stamatis v. Johnson, 224 P.2d 201, 203 (Ariz. 1950); Davis v. Bruk, 411 A.2d 660, 665 (Me. 1980); MacMeekin v. Low Income Hous. Inst. Inc., 45 P.3d 570, 576 (Wash. Ct. App. 2002).

<sup>471</sup>Orth, *supra* note 298, at 649 (quoting 2 WILLIAM BLACKSTONE, COMMENTARIES ON THE LAWS OF ENGLAND 2 (1765)).

<sup>472</sup>Orth, *supra* note 298, at 648–49, 653–54.

<sup>473</sup>BRUCE & ELY, *supra* note 26, § 1:1; RESTATEMENT, *supra* note 16, at § 1.2(1) (“An easement creates a non-possessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the used authorized by the easement.”).



the easement for purposes unrelated to the easement.<sup>474</sup> As the Restatement itself explains, an easement only “authorizes limited uses of the burdened property for a particular purpose.”<sup>475</sup> According to two prominent critics of the Restatement, the easement holder’s primary right is simply to insist that the servient estate owner and third parties not interfere with the easement holder’s *specific use and enjoyment rights* under the easement.<sup>476</sup>

Another unmistakable sign of an easement’s more modest systemic status in property law is the well-established common law principle that an easement holder’s rights of use and enjoyment in the easement must be exercised in a manner that imposes the least possible interference with the servient estate owner’s residual rights to use and develop the rest of the servient estate not burdened by the easement.<sup>477</sup> This *civiliter* principle, a foundation of the civil law of servitudes under both Roman law and later French law,<sup>478</sup> reveals quite clearly that an easement does not provide its holder with anything like absolute dominion over the servient estate. Note that the *civiliter* principle goes much further than a fee simple estate owner’s duty not to cause a nuisance to a neighbor; it means literally a duty to cause the least possible interference with the servient estate owner’s ability to use and enjoy the servient estate.<sup>479</sup>

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<sup>474</sup>BRUCE & ELY, *supra* note 26, § 1:1 (observing that the “non-possessory feature of an easement differentiates from an estate in land” because the easement holder may “only use the land burdened by the easement” and “may not occupy and possess the realty as does an estate owner”).

<sup>475</sup>RESTATEMENT, *supra* note 16, at § 1.2 cmt. d.

<sup>476</sup>BRUCE & ELY, *supra* note 26, §§ 8:18–8:29 (detailing the ways a servient estate owner may be held to interfere with enjoyment of the easement and the easement holder’s remedies), § 8:33 (same with respect to third parties).

<sup>477</sup>See RESTATEMENT, *supra* note 16, at § 4.10. (“Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.”); BRUCE & ELY, *supra* note 26, § 8:13 (same); Minnkota Power Coop, Inc. v. Lake Shure Props., 295 N.W.2d 122, 127–28 (N.D. 1980) (“The most comprehensive restriction that is imposed upon the use a general right of way by the dominant owner is that he may not use the way as to unduly increase the burden upon the servient tenement.”); Delaney v. Pond, 86 N.W.2d 816, 817 (Mich. 1957) (“A principle which underlies the use of all easements is that the owner of an easement cannot materially increase the burden of it upon the servient estate or impose thereon a new and additional burden.”).

<sup>478</sup>Lovett, *supra* note 98, at 38–43.

<sup>479</sup>*Id.*

Finally, consider the various ways that an easement can be terminated, even when it is expressly denominated as perpetual.<sup>480</sup> An easement can be lost by abandonment or by non-use.<sup>481</sup> An easement can end when the specific purpose for which it was created no longer exists,<sup>482</sup> when a building that serves as a dominant or servient estate is destroyed,<sup>483</sup> when an easement holder of a non-commercial easement in gross dies,<sup>484</sup> when an easement holder engages in misuse or overburdens the servient estate,<sup>485</sup> when a servient estate is sold to a bona fide purchaser without notice,<sup>486</sup> or when an easement is created after a mortgage attaches to the servient estate and then a judicial or non-judicial foreclosure occurs and the easement holder is joined or otherwise given notice.<sup>487</sup> And the list goes on.<sup>488</sup> The inference is obvious: an easement is simply not as durable or temporally indefinite as a fee simple estate.<sup>489</sup>

Easements are important property rights to be sure. They can provide long-term value to a dominant estate owner or the holder of an easement in gross. But they are not, and never have been, equivalent to a fee simple interest in land. They are malleable, relational, and contingent at their core.<sup>490</sup> Moreover, the legitimacy of an easement as a staple form of property depends crucially on its capacity to protect the easement holder's interest in the

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<sup>480</sup>BRUCE & ELY, *supra* note 26, § 10:1 (observing “numerous other ways,” other than when an easement is subject to an express term or is defeasible upon the happening of a certain event, “that easements, both perpetual and non-perpetual, may be terminated”).

<sup>481</sup>*Id.* §§ 10:18–10:19; RESTATEMENT, *supra* note 16, at § 7.4; KORNGOLD, *supra* note 422, § 6.09, at 289–93.

<sup>482</sup>BRUCE & ELY, *supra* note 26, § 10:8 (explaining that the “cessation of purpose doctrine is designed to eliminate meaningless burdens on land and is based on the notion that parties that create an easement for a specific purpose intend the servitude to expire upon cessation of that purpose”).

<sup>483</sup>*Id.* § 10:10–10:13.

<sup>484</sup>*Id.* § 10:16.

<sup>485</sup>*Id.* § 10:26.

<sup>486</sup>*Id.* § 10:31–37.

<sup>487</sup>*Id.* § 10:41.

<sup>488</sup>*Id.* § 10:21–24 (termination by estoppel), § 10:25 (termination by prescription), § 10:27–30 (termination by merger). *See also* KORNGOLD, *supra* note 422, § 6.01–6.16 (reviewing various termination doctrines).

<sup>489</sup>*See* KORNGOLD, *supra* note 422, § 6.02, at 272 (commenting that the multiplicity of easement termination doctrines are “based on public policy considerations” as “the law seeks to terminate obsolete, useless ties that would impair the productivity of the servient land without bringing a corresponding increase in the benefits to the dominant parcel”).

<sup>490</sup>*See generally* JENNIFER NEDLESKY, *A RELATIONAL THEORY OF SELF, AUTONOMY, AND THE LAW* (2013).

productive use of the easement and the correlative and long-recognized limitation that the easement holder's use must not interfere with the servient estate owner's ability to put the rest of the servient estate to productive use as well.<sup>491</sup> In this sense, the U.E.R.A. recognizes and protects both parties' interest in the productive use of their respective properties.

All of these debates over the efficiency and fairness of unilateral easement relocation reflect another broad theme—the extent to which any property right can or should be subject to modification because of exogenous change. Despite the day-to-day incentives for cooperation entailed in an easement relationship, the mutual consent rule can, in moments of transition or disequilibrium, tempt the easement holder to treat an easement as a pure *commodity*. The U.E.R.A., however, limits or counters this tendency because it allows the parties to an easement to reestablish a property relationship based on *propriety*, that is, long-term, other-regarding behavior focused on maintaining norms of community and sharing.<sup>492</sup> In other words, the U.E.R.A. might encourage the parties to an easement to see their relationship as something more than an opportunity for short-term economic exploitation of their easement partner but instead as an unfolding series of opportunities to compromise and reach outcomes that serve both parties' long-term interests.<sup>493</sup>

#### IV. CONCLUSION

This article has demonstrated that the evolution of easement relocation law in the United States is more complex than the orthodox view of easement law has long acknowledged. Many other countries have long employed versions of the civil law servitude relocation rule first adopted in France and used in Louisiana for two centuries or have allowed for judicial modification of easements under statutory changed conditions doctrines. Promulgation of Section 4.8(3) of the Restatement prompted leading courts in a number of states to adopt robust versions of the Restatement approach, even though other state courts rejected the Restatement relying on rationales provided by early judicial decisions. Some states have adopted narrowly tailored relocation statutes.

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<sup>491</sup>Eric R. Claeys, *Labor, Exclusion, and Flourishing in Property Law*, 95 N.C.L. REV. 413, 439–40 (2017) (making a natural rights or Lockean argument for productive use as a core justification for and limitation on property rights).

<sup>492</sup>See generally ALEXANDER, *supra* note 425425.

<sup>493</sup>French, *supra* note 310, at 15; Dyal-Chand *supra* note 426426, *passim*.

The U.E.R.A. offers legislatures across the United States a chance to unify American easement relocation law. It builds upon the doctrinal innovation of the Restatement but refines and strengthens the Restatement approach to easement relocation in many ways. The U.E.R.A. establishes a significant but nuanced easement relocation right and, crucially, embeds it within a carefully constructed easement relocation procedural regime that requires advance judicial approval for a non-consensual relocation. The U.E.R.A. will provide greater flexibility for servient estate owners and allow useful development of servient estates, but will not impose any material easement-related harm on an easement holder. The U.E.R.A. promises to produce more mutual accommodation between servient estate owners and easement holders while more accurately situating easements in the architecture of American property law. Finally, the U.E.R.A. protects the interests of both the servient estate owner and the easement holder in the productive use of their property in the face of changing circumstances.