

CONSERVATION EASEMENTS AND THE “TERM CREEP” PROBLEM

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INTRODUCTION

It has become apparent over the past several years that the decision to assign the label “easement” to conservation restrictions—designed to preserve and protect environmentally sensitive and productive agricultural lands, precious open space, and historically and architecturally significant lands and structures—has caused problems that most likely were not anticipated by those responsible for conceptualizing and popularizing this important and ubiquitous tool.¹ Judges and commentators have wrestled with important questions concerning the application of common law concepts such as merger and *cy pres* to the statutory creation we know as “conservation easements.”² There is also serious concern that other traditional principles and rules applicable to common law servitudes will make it more difficult for conservation easements to render their important service in perpetuity, given local and even global changes such as climate change and sea level rise.³ Conservation easements designed to protect critical habitat of protected

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¹ Wyoming was the last of the fifty states to enact conservation or preservation restriction legislation. *See infra* notes 42–43; *see* POWELL ON REAL PROPERTY ch. 34A (Michael Allan Wolf ed. 2013).

² *See* Piedmont Env'tl. Council v. Malawer, 80 Va. Cir. 116, 119 (Va. Cir. Ct. 2010) (merger); Carpenter v. Comm'r, 103 T.C.M. (CCH) 1001 (2012) (*cy pres*); Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 LAW & CONTEMP. PROBS. 279 (2011); Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 422 (2005) (*cy pres*); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 8.5 (2000) (*cy pres*); UNIF. CONSERVATION EASEMENT ACT § 3 cmt, 12 U.L.A. 165 (2008), available at http://www.uniformlaws.org/shared/docs/conservation_easement/ucea_final_81%20with%2007amends.pdf (*cy pres*).

³ *See, e.g.*, James L. Olmsted, *The Butterfly Effect: Conservation Easements, Climate Change, and Invasive Species*, 38 B.C. ENVTL. AFF. L. REV. 41, 59 (2011) (“One of the most complicated aspects of drafting perpetual conservation easements in the age of global warming is the tension between the need for flexible amendments to address potential future global warming scenarios, and amendment provisions that are so open-ended they can cause the termination of an easement by loss of perpetuity.”); Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 LAW & CONTEMP. PROB. 199, 200 (2011) (“Where climate change leads to conflicts between the written

species from development, to prevent the filling of wetlands, and to maintain longstanding agricultural use, for example, are vulnerable to such climate-related effects as shifts in habitat ranges, unprecedented coastal and inland flooding, dramatically altered growing patterns, saltwater intrusion, and supercharged tropical storms and hurricanes. Will there be any way to modify and thereby save these easements so that they can serve equally important (though technically different) public purposes?

It is true that some, even many, of the problems facing a wide range of conservation easements have little or nothing to do with the name by which they are identified in legal documents, statutes, and case law.⁴ Nevertheless, we can identify and anticipate enough instances in which a simple change in nomenclature would avoid unnecessary complications. Moreover, the nomenclature problem posed by these legislatively created hybrids of property, trust, and tax law might just be the canary in the coal mine that alerts the conservation and preservation community to the greater need to explore a new generation of conservation restrictions—one that will be suited to the legal, social, economic, ecological, and climatic realities of the twenty-first century and, it is hoped, beyond.⁵

This Essay is divided into four parts, the first of which discusses the “term creep” problem that has long plagued the Anglo-American common law of real property. By term creep I mean the tendency of common law courts (and in turn commentators and legislators) to use the same label to describe two or more conceptually discrete, though related, concepts. The confusion between easements of the “traditional” and “conservation” varieties—with its attendant negative externalities—is just one in a long line of situations in which the decision to allow often significantly dissimilar concepts to share the same name has led to unfortunate consequences. It would be most unwise to allow easements to suffer the same fate as trespass, nuisance, and adverse possession—three of the more prominent fields of law serving as cautionary tales for proponents of conservation restrictions.

In the second part, I explain the substantive nature of the hybrids known most familiarly as conservation easements. Statutory and uniform law drafters who piggy-backed on the early efforts of practitioners and government officials anxious

conservation easements and the landscapes they burden, it is not clear what the implications are for the continued viability of conservation easements.”).

⁴ For example, the names by which the restrictions are identified are irrelevant to questions raised in federal taxation cases. *See, e.g.*, Nancy A. McLaughlin, *Extinguishing and Amending Tax-Deductible Conservation Easements: Protecting the Federal Investment After Carpenter, Simmons, and Kaufman*, 13 FLA. TAX REV. 217 (2012).

⁵ There has been some movement of late to update statutory law in this area. *See, e.g.*, Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROB. 1 (2011). The Maine reforms were later adopted in substantial part in Rhode Island. R.I. GEN. LAWS § 34-39-3(f)(4) (2012).

to preserve view corridors⁶ and to provide other benefits for which traditional servitudes proved inadequate—chiefly and most importantly the drafters of the Uniform Conservation Easement Act (UCEA)—were straightforward in their efforts to cherry-pick the best attributes of traditional servitudes, while discarding troublesome disabilities, in order to achieve their admirable legislative goals. Fortunately, this is not an area in which the wheel needs to be reinvented, as the federal tax law already provides a clear, functional, descriptive term that carries none of the term-creep baggage—perpetual conservation restrictions. The fact that a significant percentage of conservation “easements” are created to meet federal tax eligibility criteria provides even further support for a smooth shift to a less problematic label.

The third part of this essay asks why proponents of conservation restrictions should care about term creep. The answer lies both in the serious substantive implications resulting from judicial and legislative confusion over easement terminology and in the potential for what I call the boomerang effect—that is, changes in traditional easement law caused by the failure of judges to perceive that there are meaningful, outcome-determinative differences between actual and “metaphorical” easements.

In the final section of this Essay, I explore three benefits that outweigh the burdens of removing “easement” or “servitude” from the name of conservation restrictions and adopting the terminology used in the federal tax arena. First, by a simple shift in usage—from conservation easement to perpetual conservation restriction (PCR) (or nonperpetual conservation restriction (NCR)), state legislators can avoid the term creep and boomerang phenomena along with their attendant negative effects. Second, by adopting a functional, descriptive label (such as that employed in federal tax regulations), state legislators will associate this important tool with its basic purpose—use restriction—rather than with an abstract real property interest in land with which laypersons may have only a passing familiarity. Third, and most importantly, by disassociating PCRs and NCRs from some aspects of traditional easement and servitude law, state legislators will disconnect their handiwork from any real property rules and principles that fail to take into account the public purpose and investment strategies of such instruments and that could lead to, for example, inappropriate interpretations, terminations, and remedies. Applying such rules to PCRs and NCRs could also have profound consequences for the traditional easement.

⁶ For an interesting history of the use of conservation restrictions, see Federico Cheever & Nancy A. McLaughlin, *Why Environmental Lawyers Should Know (and Care) About Land Trusts and Their Private Land Conservation Transactions*, 34 ENVTL. L. REP. 10223 (2004). Apparently, William H. Whyte is responsible for coining the troublesome, though extremely popular, term “conservation easement.” *See id.* at 10224 nn.11–12.

I. A ROSE IS NOT A ROSE: THE TERM CREEP PROBLEM THAT PLAGUES
THE COMMON LAW OF REAL PROPERTY

The common law system of real property that Americans inherited from the British was already burdened by the fact that in several important doctrinal areas the same word was used to label a related, though significantly distinguishable, legal principle. The discussion that follows identifies only some of the more prominent examples of this term creep phenomenon in American real property law.⁷ While considering these examples, the reader should consider how an ounce in terminology-shift prevention might have eliminated a pound of confusion.

A. *Trespassing “Trespass”*

While the origins of the common law trespass action (a discussion of which is beyond the bounds of this Essay) remain murky,⁸ the confusion regarding the meaning of the term “trespass” is clear and problematic. Over the past several hundred years, trespass has encompassed criminal prosecutions, as well as tort actions to protect persons, real property, personal property, and even property in cyberspace.⁹ While all forms of trespass have in common the idea of protecting persons and property from interference and invasion, the differences among the various criminal and civil variations on the term far outweigh the similarities.

Complicating matters even further is the fact that the terms “trespass” and “trespass on the case” were used to describe two distinct categories of tort. As William J. Prosser, the dean of late-twentieth century torts, explained,

Trespass was the remedy for all forcible, direct and immediate injuries, whether to person or to property—or in other words, for the kind of conduct likely to lead to a breach of the peace by provoking immediate retaliation. Trespass on the case, or the action on case, as it came to be called, developed somewhat later, as a supplement to the

⁷ Other nominees for term creep from real property law would include “merger” (found in future interests and servitudes law) and “privity” (found in adverse possession and servitudes law).

⁸ See WILLIAM L. PROSSER, HANDBOOK OF THE LAW OF TORTS 28 (4th ed. 1971) (“The origins of the law of torts are ‘secreted in the interstices of procedure.’” (quoting HENRY SUMNER MAINE, DISSERTATIONS ON EARLY LAW AND CUSTOM 389 (1883)); 9 POWELL ON REAL PROPERTY, *supra* note 1, § 64A.01[1] (“The specific origin of the action in trespass is unclear.”).

⁹ See, e.g., Shyamkrishna Balganes, *Common Law Property Metaphors on the Internet: The Real Problem with the Doctrine of Cybertrespass*, 12 MICH. TELECOMM. TECH. L. REV. 265 (2006); Richard A. Epstein, *Cybertrespass*, 70 U. CHI. L. REV. 73 (2003).

parent action of trespass, designed to afford a remedy for obviously wrongful conduct resulting in injuries which were not forcible or direct.¹⁰

Eventually, and luckily for future generations of law students and lawyers, the development of the modern law of negligence obviated the need to distinguish between trespass and trespass on the case.¹¹

The late twentieth century witnessed the development of a new usage: cybertrespass, a term that has proved to be a fertile source of judge-made and statutory law as well as heated academic debate.¹² This metaphorical use of trespass, a word traditionally associated with corporeal invasion, has created additional problems, as we shall see later in this Essay.

B. *Making a Nuisance Out of “Nuisance”*

Probably the most egregious example of term creep in the property realm involves the word “nuisance.” Dean Prosser memorably threw up his hands and proclaimed, “There is perhaps no more impenetrable jungle in the entire law than that which surrounds the word ‘nuisance.’ It has meant all things to all people, and has been applied indiscriminately to everything from an alarming advertisement to a cockroach baked in a pie.”¹³

As with “trespass,” the term “nuisance” encompasses criminal and civil wrongs—public nuisance and private nuisance, respectively.¹⁴ Adding insult to injury, modern nuisance law provides for the possibility of recovering damages (payable to the plaintiff, not to the state, in the form of a fine) as compensation for special injuries suffered by victims of a public nuisance.¹⁵

¹⁰ PROSSER, *supra* note 8, at 28–29.

¹¹ *See id.* at 29 (“Because of the greater convenience of the action [case], it came to be used quite generally in all cases of negligence, while trespass remained as the remedy for the greater number of intentional wrongs.”).

¹² *See, e.g.,* Epstein, *supra* note 9; Dan Hunter, *Cyberspace as Place and the Tragedy of the Digital Anticommons*, 91 CALIF. L. REV. 439 (2003); Mark A. Lemley, *Place and Cyberspace*, 91 CALIF. L. REV. 521 (2003); Dan L. Burk, *The Trouble with Trespass*, 4 J. SMALL & EMERGING BUS. L. 27 (2000).

¹³ PROSSER, *supra* note 8, at 571.

¹⁴ *See* RESTATEMENT (SECOND) OF TORTS § 821A (1977) (noting that the word “nuisance” is used to refer to “private and public nuisances”); 9 POWELL ON REAL PROPERTY, *supra* note 1, § 64.01[1] (discussing confusion caused by availability of private and public nuisance actions).

¹⁵ *See* RESTATEMENT (SECOND) OF TORTS § 821A (“In order to recover damages in an individual action for a public nuisance, one must have suffered harm of a kind different from that suffered by other members of the public exercising the right common to the general public that was the subject of interference.”); 9 POWELL ON REAL PROPERTY, *supra* note 1, § 64.07[4] (“[O]nly a plaintiff whose injuries or damages are special in kind, as distinguished from special in degree, may sue for his or her own injuries under the public nuisance doctrine.”).

The drafters of the Second Restatement of Torts addressed the difficulty posed by the use of the same word to denote two legal principles in this fashion:

In this Restatement, it is necessary to make use of the word nuisance, since there is no other word that will include both public and private nuisances and will avoid constant repetitions of cumbersome language defining both. . . . [A]s it is used in the Restatement, “nuisance” does not signify any particular kind of conduct on the part of the defendant. Instead, the word has reference to two particular kinds of harm—the invasion of two kinds of interests—by conduct that is tortious only if it falls into the usual categories of tort liability.¹⁶

Courts and commentators have long struggled with the confusion caused by the double duty rendered by this unfortunate legal homophone.

C. Exorcising “Adverse Possession”

The line separating real and personal property is easily crossed, often to the detriment of sound doctrine.¹⁷ That has certainly been the case with adverse possession. The American variation of the English theme of prescriptive title yielded a judicial/legislative blend that put the burden on the trespasser to establish ownership by making open and notorious, exclusive, hostile, and continuous use of the realty for a set statutory period.¹⁸ The inability to prove any of these elements would result in a failed claim to new title. By the nineteenth century, we find examples of American courts applying the same adverse possession principles and terminology to possessors of items of moveable personal property.¹⁹

Beginning in the second half of the twentieth century, a number of state courts attempted to put a stop to this form of term creep. Recognizing that the elements of adverse possession—particularly open and notorious use—operated much differently in the realm of personality, these courts explored alternative theories that

¹⁶ RESTATEMENT (SECOND) OF TORTS § 821A, cmt. c.

¹⁷ See, e.g., Michael Allan Wolf, *Taking Regulatory Takings Personally: The Perils of (Mis)reasoning by Analogy*, 51 ALA. L. REV. 1355 (2000) (discussing difficulties with applying real property doctrines to joint tenancy bank accounts and adverse possession of personal property).

¹⁸ See 16 POWELL ON REAL PROPERTY, *supra* note 1, § 91.02 (“To establish title by adverse possession, a claimant must demonstrate actual, open and notorious, exclusive, continuous and hostile possession of the premises for the prescribed statutory period often under a claim of right or color of title.”).

¹⁹ Some of those cases unfortunately and shamefully involved a certain kind of American personal property: human beings. See, e.g., *Lucas v. Daniels*, 34 Ala. 188 (Ala. 1859); *Pryor v. Rayburn*, 16 Ark. 671 (Ark. 1856); *Horn v. Gartman*, 1 Fla. 63 (Fla. 1846).

were more protective of the original owner, such as the discovery rule that derived from tort law.²⁰

There is a second area of confusion regarding the term “adverse possession” that crops up in court decisions, as some judges have used the label to describe the successful acquisition of a prescriptive easement. Despite the attempt by blackletter sources to make clear that a successful adverse possession results in actual, legal title for the claimant, while prescription results in a right in land (an easement), some judges use adverse possession terminology in the easement context.²¹

D. (P)restating “Servitudes”

American servitudes law is rife with confusion—some, but not all, of which is attributable to terminology. Courts and commentators have long wrestled with the distinctions between licenses and easements, real covenants and equitable servitudes, negative easements and restrictive covenants, and so on.²² Generations of American law students, for example, have struggled in vain to distinguish a negative easement from a restrictive covenant.²³ The American Law Institute’s flawed effort to unify this problematic area (the Third Restatement of Property, Servitudes) has so far failed to break down many of these barriers,²⁴ which is not surprising given the meaningful distinctions that gave rise to non-uniformity in the first place.

There are sui generis puzzles as well, particularly the aberration known as the “railroad easement” or “railroad right-of-way,” which has attributes of a present estate, a servitude, and a future interest all rolled into one bewildering ball. As

²⁰ The leading example is *O’Keeffe v. Snyder*, 416 A.2d 862, 876 (N.J. 1980) (“The discovery rule permits an equitable accommodation of the rights of the parties without establishing a rule of law fraught with uncertainty.”).

²¹ See, e.g., *Matoush v. Lovingood*, 177 P.3d 1262, 1270 (Colo. 2008) (“Hence, the elements of a claim to terminate an easement by adverse possession mirror the elements of a claim to create an easement by adverse possession.”).

²² The clarion call in the revolt designed to end servitudes complexity was Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982).

²³ See, e.g., RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2, cmt. h (“Negative easements are restrictive covenants.”).

²⁴ See, e.g., Andrew Russell, Comment, *The Tenth Anniversary of the Restatement (Third) of Property, Servitudes: A Progress Report*, 42 U. TOL. L. REV. 753, 755 (2011) (“The Third Restatement purports to restate rather than revise the law. Still, courts and commentators have not embraced it, suggesting that it does not truly reflect the law. Courts generally have not cited to the Third Restatement’s more revisionist sections. Critical commentators range from those who think it does not go far enough in adopting a contract approach to those who find merit in the old approach.” (footnotes omitted)); see also Note, *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 938 (2009) (“This Note argues that courts are correct in not embracing the Restatement’s new approach . . .”).

Professor Danaya Wright has explained in her authoritative treatment of the law regarding rails-to-trails conversion,

As a practical matter, railroads needed a property interest that was more substantial than a mere common-law easement. They needed exclusive control over the land, particularly the ability to fence it in order to keep landowners and their livestock off the road. They needed the right to dig tunnels and drainage ditches, alter the elevation, and pour creosote and herbicides on the land. They needed to limit grade crossings, and they obviously needed enough control to limit others from using the roadbed. The reality of railroad usage is that it was an extremely intensive use, a use that for the vast majority of nineteenth-century grantors and railroad land agents implicitly necessitated a fee simple grant.²⁵

As we have seen before, the use of familiar terminology in an unfamiliar setting has led to needless confusion—in courts, legislatures, and law offices. Again, we can turn to Professor Wright for guidance through this thicket:

Although the modern trend seems to be to interpret “right-of-way” simply to mean an easement, courts have agreed that the railroad easement is a unique and difficult-to-define property right that does not clearly fit into the easement or fee categories. As the Supreme Court has noted: “A railroad right-of-way is a very substantial thing. It is more than a mere right of passage. It is more than an easement.” But it is not a fee. It has been called a “limited fee,” a “perpetual easement,” a “right-of-way easement,” and an “exclusive easement,” but no court has clearly indicated the differences, if any, between these terms. Initially the courts seemed more likely to interpret ambiguous deeds for “railroad right-of-way” to be some form of defeasible fee. But by the early twentieth century, both federal and state courts had turned toward labeling the interest as an exclusive easement rather than a defeasible fee.²⁶

Unfortunately, the ramifications of term creep in this area can be serious, for they can spell the difference between the survival of a rail banking scheme for the benefit of the public or a successful takings claim for a distant successor-in-interest of a remote grantor.²⁷

²⁵ 11 POWELL ON REAL PROPERTY, *supra* note 1, § 78A.06[3][b] (footnotes omitted) (Chapter 78 was written by Professor Wright).

²⁶ *Id.* § 78A.07[1][a] (quoting *W. Union Tel. Co. v. Pennsylvania R.R. Co.*, 195 U.S. 540, 570 (1904)) (footnotes omitted).

²⁷ *See id.* § 78A.13 (discussing rails-to-trails takings cases).

II. THE CONSERVATION HYBRID

Properly understood, conservation easements (even those that do not carry the specific name) are in fact hybrids that contain elements of servitude, future interest, taxation, and charitable trust law. While these kinds of restrictions existed in pre-statutory regimes, today conservation easements are very much creatures of state (and to some extent federal) legislation and regulation. Legislative drafters, particularly the framers of the UCEA (a project of the National Conference of Commissions of Uniform State Laws (NCCUSL)), strove to adopt some of the strengths of traditional servitude law and at the same time eliminate some of the weakest elements that often enervate traditional common-law servitudes.

According to the institutional history of the uniform act, the decision to use common-law terminology to label this hybrid was a conscious one. In a meeting on August 10, 1979, to consider what was then called the Uniform Conservation and Historic Preservations Agreements Act, Russell L. Brenneman—who served as one of the Reporters along with then New York University law professor John Costonis—reported to the Committee of the Whole that “some new nomenclature is in the Draft Acts. We have called this thing a conservation or historic preservation agreement, for want of a better term.”²⁸ In response, Rupert Bullivant, who presented the act to the assembled experts, observed that “[w]ith respect to the nomenclature, the Committee is badly at sea, and I think our Advisors are as well.”²⁹ He also noted that “there has been another suggestion for a title known as ‘resources conservation covenant,’”³⁰ a suggestion that, should it have been accepted, would have presented its own term creep challenges. It is apparent from this document that, even among those with experience in this emerging field, terminology was quite fluid and non-uniform.³¹

By the end of 1979, a new draft was prepared, carrying a new title: Uniform Conservation and Historic Preservation Easement Act. The first comment on Section 1 (the section that defined “conservation easement” and “preservation easement”) provided this explanation for the shift:

The issue of terminology is not free of difficulty, and the states have adopted various approaches, including the terms “easement,” “restriction,” and “agreement.” The Act elects “easement” in order to

²⁸ Nat’l Conference of Comm’rs on Unif. State Laws, Proceedings in Committee of the Whole Uniform Conservation and Historic Preservation Agreements Act 13 (Aug. 10, 1979) (on file with author).

²⁹ *Id.* at 19.

³⁰ *Id.*

³¹ *See, e.g., id.* at 42 (statement of K. King Burnett) (“I think that it’s very hard, when you aren’t familiar with what these *easements* are for and how they work, for people to grasp, sometimes, the problem that really exists. Actually, this is a very conservative notion—this statute—in allowing the creation of these *covenants*. It is completely in keeping with our traditional notions in this country.” (emphasis added)).

make clear that the intention is not to create an entirely new interest in land but rather to eliminate certain common law defenses under a defined set of circumstances. The critical questions are the enforceability of the interest if it is held in gross, its assignability if it is so held, whether the burden of a negative interest “runs,” and whether interest of a “novel” type will be recognized. The term “easement” is satisfactory if the Act specifically addresses the particular problems arising out of that concept in this context, as the Act does. It should further be noted that “easement” is a prevailing nomenclature in existing statutes and in the Internal Revenue Code.³²

In this way, the drafters acknowledged the problem and offered two rationales for the shift to easement terminology. First, it was their intent to present traditional easements that would be strengthened by statutory modifications regarding their enforceability. Second, state laws and the federal tax code were already using the term “easement.”

Subsequent developments cause us to question both of these rationales. First, it has become apparent, as noted in the discussion below, that the UCEA as promulgated did not “specifically address[] the particular problems arising out of that concept.”³³ Indeed, the Prefatory Note and certain comments of the UCEA have been amended to clarify issues regarding the use of the *cy pres* doctrine to preserve restrictions despite changes in circumstances.³⁴ Second, there is a much greater variety in the nomenclature found in state statutes today, while federal tax regulations now employ different terminology as well.³⁵

When the Committee of the Whole met again in July of 1980, Professor Costonis offered an historical excursion through the thicket of English and American servitudes law. He then explained that the Reporters and Committee considered three alternatives:

The first was, we could try to cure the defects of all three common law interests [covenants, easements, equitable servitudes]; that is, write an Act which removed disabilities to equitable servitudes and to real covenants We thought it added complexity, and we doubted we would be successful in the effort, in any event.³⁶

³² UNIF. CONSERVATION AND HISTORIC PRESERVATION EASEMENT ACT 3 (Draft, Dec. 21, 1979) (on file with author).

³³ *Id.* at 3.

³⁴ See Nat’l Conference of Comm’rs on Unif. State Laws, Amendments to Unif. Conservation Easement Act 3, 4, 5–6 (Feb. 3, 2007) (on file with author).

³⁵ For a discussion of the history of tax code and regulatory changes, see *infra* notes 47–52 and accompanying text.

³⁶ Nat’l Conference of Comm’rs on Unif. State Laws, Proceedings in Committee of the Whole Uniform Conservation and Preservation Easements Act 9 (July 27 and 29, 1980) (on file with author).

Given the daunting task of “purifying” traditional servitudes doctrines, the drafters appear to have made a wise choice.

The second alternative, rejected by the reporters and drafting committee,

was to sweep away the three common law interests and create a statutory hybrid—you might call it a restriction—but in any event, it would be an amalgam of the three interests, but in some unstated way it would be an independent interest of its own. We thought, given the confusion in the field, that, rather than multiplying additional concepts, we would reject that.³⁷

With all due respect to Professor Costonis and his distinguished colleagues, their effort not to “create a statutory hybrid” was successful in name only, as their final work product does indeed select characteristics of various servitudes, mixed with related areas of real property law such as present estates and future interests and charitable trusts. Moreover, the growing number of cases and commentary questioning the applicability of common-law concepts to these “easements” suggests strongly that their quest to avoid confusion, while ambitious, proved to be quixotic.

Professor Costonis then described the third—and adopted—alternative as a return

to the source—namely, to go back to the easement itself, which really is the residual less-than-fee interest at common law—and to do what the English common law did not do; namely, to open up the easement, so that the disabilities that prevented it from being used for purposes such as those considered in the Act would be removed.³⁸

There were two chief improvements on age-old doctrines—(1) “recognizing that new kinds of interests, other than the five mentioned in common law, could be the subject matter of an easement;”³⁹ and (2) “recogniz[ing] that an easement could impose affirmative duties on the holder.”⁴⁰ Of course, if the drafters had chosen different terminology they could still have imbued their hybrid with these important attributes.

One year later, the final version of what was then renamed the Uniform Conservation Easement Act featured a “Commissioner’s Prefatory Note” with language that tracked closely with Professor Costonis’s explanation, with a few relatively minor additions:

³⁷ *Id.* at 9–10.

³⁸ *Id.* at 10.

³⁹ *Id.* It appears from earlier in his talk that Professor Costonis is referring to restrictions on the types of negative easements under traditional English law. *See id.* at 7.

⁴⁰ *Id.* at 10.

The easement alternative is favored in the Act for three reasons. First, lawyers and courts are most comfortable with easements and easement doctrine, less so with restrictive covenants and equitable servitudes, and can be expected to experience severe confusion if the Act opts for a hybrid fourth interest. Second, the easement is the basic less-than-fee interest at common law; the restrictive covenant and the equitable servitude appeared only because of then-current, but now outdated, limitations of easement doctrine. Finally, non-possessory interests satisfying the requirements of covenant real or equitable servitude doctrine will invariably meet the Act's less demanding requirements as "easements." Hence, the Act's easement orientation should not prove prejudicial to instruments drafted as real covenants or equitable servitudes although the converse would not be true.⁴¹

The attention that this Essay pays to the framing of the UCEA is warranted for two important reasons. First, it is an invaluable source of information regarding the thought process that important figures in the field went through during this crucial period in the development of the conservation restriction concept. Second, the UCEA has been a successful project, as evidenced by its adoption (along with its easement terminology) by lawmakers in twenty-one states, the District of Columbia, and the Virgin Islands.⁴² Of the twenty-nine remaining states that have legislation pertaining to conservation and preservation restrictions, all but nine use easement or servitude nomenclature.⁴³

⁴¹ UNIF. CONSERVATION EASEMENT ACT, at prefatory note, 12 U.L.A. 165 (2008).

⁴² *Legislative Fact Sheet—Conservation Easement Act*, UNIF. LAW COMM'N, <http://www.uniformlaws.org/LegislativeFactSheet.aspx?title=Conservation%20Easement%20Act> (last visited Nov. 4, 2013). The states that have adopted the UCEA are Alabama, Alaska, Arizona, Arkansas, Delaware, Georgia, Idaho, Indiana, Kansas, Kentucky, Maine, Minnesota, Mississippi, Nevada, New Mexico, Oklahoma, South Carolina, Texas, Virginia, Wisconsin, and Wyoming. *Id.* With the exception of New Mexico, which uses the term "land use easement," all of the jurisdictions adopting the UCEA employ the term "conservation easement." See N.M. STAT. ANN. § 47-12-1 (2012) ("This act may be cited as the 'Land Use Easement Act.'").

⁴³ Other states using the word "easement" among non-UCEA states include California, Colorado, Florida, Hawaii, Iowa, Maryland, Michigan, Missouri, Montana, Nebraska, New York, North Dakota, Ohio, Oregon, Pennsylvania, South Dakota, Tennessee, Utah, Vermont, and West Virginia. CAL. CIV. CODE § 815.1 (West 2012) ("conservation easement"); COLO. REV. STAT. § 38-30.5-101 (2012) ("conservation easements in gross"); FLA. STAT. § 704.06 (2012) ("conservation easements"); HAW. REV. STAT. § 198-1 (2012) ("conservation easement"); IOWA CODE § 457A.1 (2012) ("conservation easements"); MD. CODE ANN., REAL PROP. § 2-118 (West 2012) ("conservation easements"); MICH. COMP. LAWS § 324.2140 (2012) ("conservation easement" and "historic preservation easement"); MO. REV. STAT. § 67.880 (2012) ("development right or restrictive covenant, conservation easement, covenant or other contractual right"); MONT. CODE ANN. § 76-6-201 (2012) ("conservation easements");

A. UCEA as Cherry picking

The UCEA framers, like their counterparts in several state legislatures, sought to bolster conservation easements by imparting to this legislative hybrid the best of what servitudes law had to offer. Conservation easements would be as strong as appurtenant easements without the need for a dominant tenement. Unlike noncommercial easements in gross and licenses, conservation easements are assignable. While negative easements were traditionally limited to a few varieties, this legislative hybrid is not; nor do the traditional limitations on affirmative covenants have effect. While real covenants and equitable servitudes need to touch and concern land, the same is not true of their hybrid cousin. And privity, the bugbear of the first year property student struggling with the black letter law of real covenants, is not required for conservation easements.⁴⁴

NEB. REV. STAT. § 76-2,111 (2012) (“conservation easement” and “preservation easement”); N.Y. ENVTL. CONSERV. LAW § 49-0303 (McKinney 2012) (“conservation easement”); N.D. CENT. CODE § 55-10-08 (2012) (“historic easements”); OHIO REV. CODE ANN. § 5301.67 (“conservation easement” and “agricultural easement”); OR. REV. STAT. § 271.715 (2012) (“conservation easement” and “highway scenic preservation easement”); 32 PA. CONS. STAT. § 5053 (2012) (“conservation easement” and “preservation easement”); S.D. CODIFIED LAWS § 1-19B-56 (2012) (“conservation easement”); TENN. CODE ANN. § 66-9-303 (2012) (“conservation easement”); UTAH CODE ANN. § 57-18-1 (West 2012) (“conservation easement”); VT. STAT. ANN. tit. 10, § 325a (2012) (“conservation easement”); W. VA. CODE § 20-12-3 (2012) (“conservation easement” and “preservation easement”). The nine states that, with the endorsement of the author of this Essay, do not use easement nomenclature are Connecticut, Illinois, Louisiana, Massachusetts, New Hampshire, New Jersey, North Carolina, Rhode Island, and Washington. CONN. GEN. STAT. § 47-42a (2012) (“conservation restriction” and “preservation restriction”); 765 ILL. COMP. STAT. 120/1 (2012), (“conservation right”); LA. REV. STAT. ANN. § 9:1272 (2012) (“conservation servitude”); MASS. GEN. LAWS ch. 184, § 31 (2012) (“conservation restriction,” “preservation restriction,” “agricultural preservation restriction,” “watershed preservation restriction,” and “affordable housing restriction”); N.H. REV. STAT. ANN. § 477:45 (2012) (“conservation restriction,” “preservation restriction,” and “agricultural preservation restriction”); N.J. STAT. ANN. § 13:8B-2 (West 2012) (“conservation restriction” and “historic preservation restriction”); N.C. GEN. STAT. § 121-35 (2012) (“conservation agreement” and “preservation agreement”); R.I. GEN. LAWS § 34-39-2 (2012) (“conservation restriction” and “preservation restriction”); WASH. REV. CODE § 64.04.130 (2012) (“development right, easement, covenant, restriction, or other right, or any interest less than the fee simple, to protect, preserve, maintain, improve, restore, limit the future use of, or conserve for open space purposes”).

⁴⁴ See, e.g., UNIF. CONSERVATION EASEMENT ACT § 4 (“A conservation easement is valid even though: (1) it is not appurtenant to an interest in real property; (2) it can be or has been assigned to another holder; (3) it is not of a character that has been recognized traditionally at common law; (4) it imposes a negative burden; (5) it imposes affirmative obligations upon the owner of an interest in the burdened property or upon the holder; (6) the benefit does not touch or concern real property; or (7) there is no privity of estate or of

Any lawyer or judge who is familiar with the servitudes concepts addressed in a traditional American real property class will be able to perceive that the “conservation easement” is, for many purposes, an easement in name only. And that is the problem; the name “easement” is misleading, despite any caveats or explanations to the contrary in the legislative text, comments, or history. Litigators seeking to prevail in a dispute regarding the creation, legitimacy, survival, or termination of a conservation restriction will not (and, in the name of zealous advocacy, perhaps should not) hesitate to take advantage of a favorable easement doctrine that is not directly addressed in a relevant “conservation easement” statute in an attempt to prevail in their disputes. Given the regrettable record of term creep in real property law, it is probably asking too much of the members of our overburdened judiciary (many of whom are decades away from their initial introduction to servitudes law) to perceive the outcome-determinative difference between a “real” easement and the statutory hybrid bearing the same name.

B. *The Tax Tail and the Conservation Dog*

A significant number of conservation restrictions in effect in the United States today were eligible for favorable federal or state tax treatment.⁴⁵ This is by no means coincidental, as evidenced by the overabundance of federal tax and circuit court decisions in which the Internal Revenue Service has challenged taxpayers’ use of this strategy to reduce their tax bottom line. I will leave it to others to analyze the holdings and rationales of this expanding line of cases.⁴⁶ The most relevant aspect of the tax treatment of conservation easements for purposes of this Essay lies in the terminology featured in federal tax law.

The Uniform Commissioners were not the only lawyers charged with drafting responsibility in the conservation restriction area. Since the 1970s, those responsible for crafting provisions of the Internal Revenue Code (IRC) and Treasury regulations have experimented with various formulations to describe the kind of partial property interests that qualify for favorable tax treatment. In 1976, IRC § 170(f)(3), regarding “income tax deductions for charitable contributions of partial interests in property for conservation purposes,” provided the following list of eligible less-than-fee interests: “(iii) a lease on, option to purchase, or easement

contract.”). While there are some variations, this language appears in most UCEA states. See statutes cited *supra* note 43 for variations in adopting jurisdictions.

⁴⁵ See Nancy A. McLaughlin, *Perpetual Conservation Easements in the 21st Century: What Have We Learned and Where Should We Go From Here?*, 2013 UTAH L. REV., 687, tbl.2, 33 UTAH ENVTL. L. REV. 1 (2013) (showing the number of conservation and façade easements for which taxpayers claimed federal tax benefits from 2003 through 2009).

⁴⁶ See, e.g., 4 POWELL ON REAL PROPERTY, *supra* note 1, § 34A.04 (2013 revision by Professor McLaughlin); McLaughlin, *supra* note 4; Martin J. McMahon, Ira B. Shepard & Daniel L. Simmons, *Recent Developments in Federal Income Taxation: The Year 2012*, 13 FLA. TAX REV. 503, 652–68 (2013) (discussing the tax perspective of several conservation easement cases).

with respect to real property of not less than 30 years’ duration . . . and (iv) a remainder interest in real property”⁴⁷ The following year, congressional drafters eliminated the deduction with regard to term interests, but kept “easements” in the mix: “(iii) a lease on, option to purchase, or easement with respect to real property granted in perpetuity.”⁴⁸

In December 1980, only a few months after Professor Costonis presented his defense of the decision to use the term “easement,” federal lawmakers moved in a different direction. They settled on the current version of the key language in what is now § 170(h), defining what § 170(f) now refers to as a “qualified conservation contribution.” The subject matter of the contribution is now referred to as “a qualified real property interest,” a term that in turn is defined as

any of the following interests in real property:

- (A) the entire interest of the donor other than a qualified mineral interest,
- (B) a remainder interest, and
- (C) a *restriction (granted in perpetuity)* on the use which may be made of the real property.⁴⁹

While the language “conservation easement” has by no means been deleted from the tax code,⁵⁰ a significant precedent had been set as early as 1980 for the notion that a workable description of conservation and historic preservation restrictions could be devised without using common law servitudes terms.

In 1983, the Treasury Department proposed regulations to accompany IRC § 170(f), introducing the descriptor “perpetual conservation restriction.”⁵¹ The final regulations that appeared three years later featured the same nomenclature:

Perpetual conservation restriction. A perpetual conservation restriction is a qualified real property interest. A “perpetual conservation restriction” is a restriction granted in perpetuity on the use which may be made of real property—including, an easement or other interest in real

⁴⁷ An Act to Reform the Tax Laws of the United States, Pub. L. No. 94-455, § 280 B., 90 Stat. 1520 (Oct. 4, 1976).

⁴⁸ An Act to Reduce Individual and Business Income Taxes and to Provide Tax Simplification and Reform, Pub. L. No. 95-30, § 309, 91 Stat. 154 (May 23, 1977).

⁴⁹ An Act to Extend Certain Temporary Tax Provisions, and for Other Purposes, Pub. L. No. 96-541, § 6, 94 Stat. 3206 (Dec. 17, 1980) (codified at I.R.C. § 170(h)(2) (2012)) (emphasis added).

⁵⁰ See I.R.C. § 2031(c) (discussing estate tax implications of a “qualified conservation easement,” whose meaning is equated with “a qualified conservation contribution (as defined in section 170(h)(1) of a qualified real property interest (as defined in section 170(h)(2)(C)))”).

⁵¹ Qualified Conservation Contribution; Proposed Rulemaking, 48 Fed. Reg. 22,940 (May 23, 1983) (to be codified at 26 C.F.R. pts. 1, 20, 25).

property that under state law has attributes similar to an easement (e.g., a restrictive covenant or equitable servitude). For purposes of this section, the terms “easement”, “conservation restriction”, and “perpetual conservation restriction” have the same meaning.⁵²

The terminology currently used in the regulations—“perpetual conservation restriction”—has three major advantages over “conservation easement.” This phrase (like the alternative “nonperpetual conservation restriction”) comprises a (1) descriptively accurate, (2) functional definition that (3) carries none of the potentially confusing and problematic common-law baggage of terms such as “conservation easements,” “conservation servitudes,” and the like.

III. WHY WE SHOULD CARE: THE POWER OF WORDS IN A COMMON-LAW SYSTEM

At its essence, law is verbal, developing word-by-word and phrase-by-phrase, as courts add patinas onto the original brass. Lawyers and judges devote inestimable amounts of time, effort, and brainpower to the interpretation and manipulation of words and phrases. In the realms of statutory and constitutional law, the search for the framers’ intent and original understanding often play a significant interpretative role that supplement exegesis of important texts. In the realm of the common law, whose foggy origins are associated with the convenient myth of unchanging truths from the too distant past, the words embodying the concepts (such as nuisance, trespass, and easement) take on even more significance, and there is perhaps an even greater need for vigilance regarding term creep.

A. Problem Areas Resulting from Treatment as an Easement: An Illustrative List

It is beyond the intent and scope of this Essay to provide an exhaustive catalogue of current and potential problems posed by judicial treatment of “conservation easements” as real, traditional easements. Instead, it will be helpful to review three illustrative examples of the hazards of term creep in this highly sensitive and important area. The first two problems have already been raised in reported cases and discussed in the growing conservation easement literature. The third is a serious, potential problem that could easily appear in future court challenges.

The first problem area involves the termination of conservation easements under the doctrine of merger, which is a traditional mode for terminating common law servitudes.⁵³ While most conservation-restriction statutes do not specifically

⁵² See Income Taxes: Qualified Conservation Contributions, 51 Fed. Reg. 1,496 (Jan. 14, 1986) (to be codified at 26 C.F.R. 1.170A-14(2)).

⁵³ See, e.g., 4 POWELL ON REAL PROPERTY, *supra* note 1, § 34.22[1] (“An easement, by definition, is an interest in land that is in the possession of another This prerequisite

address the topic of merger,⁵⁴ a few do.⁵⁵ Most courts are thus left on their own to solve this puzzle.⁵⁶ There seems to be little logic and a lot of bad public policy behind application of this traditional rule to easements that are designed to be perpetual and in the public interest.⁵⁷ The identity of the owner of the property subject to a conservation restriction is irrelevant to the purpose of the restriction. It would be unfortunate if the grantor’s intent were frustrated by a government or nonprofit holder that had the good fortune of being the beneficiary of a partial

situation ceases to exist when the owner of an easement in gross becomes the owner of the servient tenement or when the dominant and servient tenements of an appurtenant easement come into the same ownership. In each instance, the owner of the easement, having become the owner of the servient tenement, has, as such owner of the servient tenement, rights of user greater than those comprised in the easement itself. The lesser is swallowed by the greater and the easement is, under the majority view, permanently terminated by this merger.” (footnote and citation omitted)). Merger will terminate covenants enforceable at law and equity as well. *See id.* § 60.10[1].

⁵⁴ Section 2 of the UCEA provides, “Except as otherwise provided in this Act, a conservation easement may be created, conveyed, recorded, assigned, released, modified, terminated, or otherwise altered or affected in the same manner as other easements.” UNIF. CONSERVATION EASEMENT ACT § 2(a), 12 U.L.A. 165 (2008).

⁵⁵ Colorado and Utah statutes specify that merger is a valid method of termination. *See* COLO. REV. STAT. § 38-30.5-107 (2003); UTAH CODE ANN. § 57-18-5 (2012). Maine’s statute provides otherwise. *See* ME. REV. STAT. 33, § 479 (2012). In Maine, the conservation easement will be valid even if

[t]he title to the real property subject to the conservation easement has been acquired by the holder, unless the holder, with the consent of any 3rd party with rights of enforcement, replaces the conservation easement with legally binding restrictions under a conservation easement or declaration of trust at least as protective of the conservation values of the protected property as provided by the replaced easement.

Id.

⁵⁶ *See, e.g.,* Piedmont Env’tl. Council v. Malawer, 80 Va. Cir. 116, 119 (Va. Cir. Ct. 2010) (“[S]uch easements are not subject to the typical common law analysis of merger as would be appropriate to rights of way between two adjoining tracts.”).

⁵⁷ *See also* Op. Va. Att’y Gen. 11-140 (Aug. 31, 2012) (“[A] conservation easement . . . is not extinguished by application of the common law doctrine of merger”); Nancy A. McLaughlin, *Conservation Easements and the Doctrine of Merger*, 74 LAW & CONTEMP. PROBS. 279, 279 (2011) (“This article explains that merger generally should not occur in such cases because the unity of ownership that is required for the doctrine to apply typically will not be present. For merger to occur, ‘the two estates must be in the same person at the same time and in the same right.’ If the government or nonprofit holder of a conservation easement subsequently acquires title to the encumbered land, the two estates will be ‘in the same person at the same time,’ but they generally will not be held ‘in the same right.’”). While I commend the Virginia Attorney General and Professor McLaughlin on their analyses, I am not confident that courts, without clear guidance from state lawmakers, will rule consistently in the public interest.

interest in year one, and in year twenty of the underlying fee, particularly if that entity, which would now own the property free of restrictions, sought to sell it for development, trade it for another parcel, or otherwise use the property for non-conservation purposes.

The second area of concern involves the fact that charitable trust principles do not generally apply to servitudes. While the NCCUSL has addressed this issue both in the original comments to the UCEA and in the recent amendments to the Prefatory Note and comments,⁵⁸ and while Professor Nancy McLaughlin's scholarship has taken the lead in this area,⁵⁹ asking courts in a case involving an interest identified as an easement to overlook changed conditions as profound as the effect of climate change on the critical habitat of an endangered species,⁶⁰ may well be asking too much. Courts distracted by the common-law rules normally applicable to servitudes might also fail to recognize the fiduciary obligations requiring government and nonprofit holders to administer these "easements" consistent with their stated terms and charitable conservation purposes on behalf of donors, funders, and the public, as well as the authority of certain state attorneys general to bring suit against a holder who fails to meet these obligations.

The third troublesome issue involves the set of remedies available when conservation restrictions are breached. The public interest, which is inextricably connected with these special legislative hybrids, demands a much more flexible set of legal and equitable remedies than is normally available under the traditional easement regime. The involvement of state attorneys general in the enforcement of conservation restrictions is a strong indication that this is not a good old-fashioned servitude.⁶¹ Also, courts and commentators need to consider seriously whether it

⁵⁸ See Nat'l Conference of Comm'rs on Unif. State Laws, *supra* note 34.

⁵⁹ Nancy A. McLaughlin, *Rethinking the Perpetual Nature of Conservation Easements*, 29 HARV. ENVTL. L. REV. 422 (2005); Nancy A. McLaughlin, *Amending Perpetual Conservation Easements: A Case Study of the Myrtle Grove Controversy*, 40 U. RICH. L. REV. 1031 (2006) [hereinafter McLaughlin, *Myrtle Grove Controversy*]; Nancy A. McLaughlin & W. William Weeks, *Conservation Easements and the Charitable Trust Doctrine: Setting the Record Straight*, 10 WYO. L. REV. 73 (2010).

⁶⁰ See Olmsted, *supra* note 3, at 46 ("Isotherm maps become important when one understands that one of the effects of global climate change will be the wholesale migrations of entire species—and indeed entire biomes—as increases in average temperatures in their native climes send them northward, in search of climates similar to those in which they evolved."); Owley, *supra* note 3, at 202 ("As the climate changes, ranges for ecosystems and viable species habitats will shift.").

⁶¹ See, e.g., *Wooster v. Dept. of Fish & Game*, 211 Cal. App. 4th 1020 (Cal. Ct. App. 2012) (involving California Attorney General defending validity of conservation easement); *N.J. v. Quaker Valley Farms*, No. HNT-C-14007-08 (N.J. Super. Ct., Aug. 9, 2012) (involving New Jersey Attorney General suing to enforce conservation easement); *Windham Land Trust v. Jeffords*, 967 A.2d 690, 695–96 (Me. 2009) ("The plain language of [33 M.R.S.] section 478(1)(D) authorizes the State to intervene in an action that was initiated by another party, as the State did in this case, and that affects a conservation easement"); McLaughlin & Weeks, *supra* note 59 (involving a suit in which

makes sense and would be beneficial public policy to allow conservation restrictions to be terminated by adverse possession or prescription, in the event the owner of the underlying (servient) parcel should make continuous use of the property to the adverse interests of the restriction holder,⁶² or if a trespasser gains title by fulfilling the elements of adverse possession.⁶³ The modern trend is to allow the statute of limitations to run in certain circumstances against public and charitable owners, although there are exceptions.⁶⁴ While public entities that own

Wyoming Attorney General objected to county’s agreement to terminate conservation easement at request of new owners of land was settled, leaving easement intact with minor court-approved modifications); McLaughlin, *Myrtle Grove Controversy*, *supra* note 59 (involving a suit in which Maryland Attorney General objected to land trust’s agreement to “amend” conservation easement to allow upscale subdivision on property at request of new owners of land settled leaving easement intact); *see also* UNIF. CONSERVATION EASEMENT ACT § 3 cmt., 12 U.L.A. 165 (2008) (“[I]ndependently of the Act, the Attorney General could have standing in his capacity as supervisor of charitable trusts, either by statute or at common law.”); Jeff Pidot, *Conservation Easement Reform: As Maine Goes Should the Nation Follow?*, 74 LAW & CONTEMP. PROB. 1, 20–21 (2011).

⁶² *See, e.g.*, 4 POWELL ON REAL PROPERTY, *supra* note 1, § 34.21 (footnote and citation omitted) (“The servient owner can extinguish an easement in whole or in part by adverse uses continued for the prescriptive period. As in the case of the creation of an easement by prescription, the uses must be adverse, continuous, uninterrupted, and for the prescriptive period.”)

⁶³ *See, e.g.*, Alexandra B. Kass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 308 (2006) (“Are wild lands encumbered by conservation easements at risk of adverse possession? Although the source of many potential easement violations comes from the owner of the underlying fee property, interference with easement values can arise from neighbors or other third parties engaging in development, fencing, harvesting or other prohibited activities on the property. In theory, such activities could result in acquisition of some or all of the property by adverse possession as that doctrine is applied to wild lands. However, because the conservation organization has taken on the obligation of monitoring what might be remote and relatively inaccessible property, the conservation organization is in a position to prevent adverse possession of the property and thus minimize the risk of this common law doctrine to lands enrolled in conservation easements.”). One can safely speculate that the more successful organizations become in obtaining even more conservation restrictions, the greater the likelihood that they will be unable to monitor inconsistent activities by innocent and purposeful intruders.

⁶⁴ *See, e.g.*, 16 POWELL ON REAL PROPERTY, *supra* note 1, § 91.11[2] (“In several American jurisdictions, the rigor of the common-law barrier has been relaxed by statute. In some states, this relaxation takes the form of allowing adverse possession against a governmental entity, but the required time period is doubled or otherwise extended. In still other states, statutes eliminate the common-law barrier completely, making governmental entities and individuals subject to the same rules.” (footnotes omitted)).

State statutory protection for charitable owners is rare. *See* MO. REV. STAT. § 516.090 (2013) (“Nothing contained in any statute of limitation shall extend to any lands given, granted, sequestered, or appropriated to any public, pious, or charitable use, or to any lands belonging to this state.”); S.D. CODIFIED LAWS § 15-3-17 (2013) (“The provisions of

the restrictions are in a stronger position than individual or charitable organization owners, the risk of loss still remains, which suggests to this Author that state lawmakers should at least debate the wisdom of providing statutory protections from adverse possession and prescription.

B. The Boomerang Phenomenon: A Lesson from Cyberlaw

While the primary drawback of term creep lies in the needless confusion resulting from using the same word to describe distinct concepts, there is a secondary problem as well—the boomerang phenomenon. As the general editor of a multi-volume, real property treatise, the Author feels protective (admittedly, perhaps unreasonably so) about the discipline, and he is ever on the lookout for reported decisions in which state and federal courts misapply precedents or confuse basic concepts.

Imagine that Legal Concept *A* and Legal Concept *B* are known by the identical term (such as “trespass” to land and “trespass” to personal property, respectively). Now imagine that the law in Legal Concept *B* cases begins to take on some of the doctrinal attributes of the law regarding Legal Concept *A*, for no apparent reason other than the fact that the two concepts have the same name in common. That is a classic risk posed by term creep. Now imagine that a court in a Legal Concept *B* case makes an unprecedented (and perhaps unwise) leap and then the same or another court subsequently cites this new Legal Concept *B* case with approval in a Legal Concept *A* case, which has the effect of moving Legal Concept *A* law in an unanticipated (and perhaps unwise) direction. When the second case moves the law in a different direction, that is the boomerang phenomenon. The court’s misstep in the Legal Concept *B* case has come back to cause harm to the logical and efficient doctrinal development in the law of Legal Concept *A*. An example follows from the realm of trespass law.

On June 28, 1996, the Court of Appeal of California issued its ruling in *Thrifty-Tel, Inc. v. Bezenek*,⁶⁵ a computer-hacking case growing out of the activities of two teenagers. After Thrifty-Tel discovered that the Bezenek teens had run a computer “program between six and seven hours, generating over one thousand three hundred calls,”⁶⁶ the company filed an action “seeking damages for conversion, fraud, and reasonable value of services.”⁶⁷ Thrifty-Tel was successful in the state trial court, receiving more than \$33,000 in damages and \$14,000 in

§§ 15-3-15 and 15-3-16 [on adverse possession] shall not extend to school lands or to lands belonging to the United States or this state, or to religious or charitable societies, or to lands held for a public purpose.”); VT. STAT. ANN. tit. 12 § 462 (2012) (“Nothing contained in this chapter shall extend to lands given, granted, sequestered or appropriated to a public, pious or charitable use, or to lands belonging to the state.”).

⁶⁵ *Thrifty-Tel Inc. v. Bezenek*, 46 Cal. App. 4th 1559 (Cal. Ct. App. 1996).

⁶⁶ *Id.* at 1564.

⁶⁷ *Id.*

attorney’s fees and costs.⁶⁸ The appellate court affirmed the substantive ruling on tort law, but reversed and remanded on the question of damages.⁶⁹

The appellate court’s discussion of the applicable tort theory is what started the boomerang process. When the Bezeneks asserted that “the unauthorized use of confidential codes to gain computer access did not give rise to a cause of action for conversion,”⁷⁰ arguing that in order to prevail the plaintiff would have to show that the hackers took something tangible, the court of appeal found it “unnecessary to resolve the question because the evidence supports the verdict on a trespass theory.”⁷¹

It is at this point that the plot thickens. Notice how, in a footnote, the court makes an outcome-determinative leap from established and emerging law (on trespass to land and personal property) to an intimation and then to an unsupported proposition (regarding trespass in cyberspace):

At early common law, trespass required a physical touching of another’s chattel or entry onto another’s land. The modern rule recognizes an indirect touching or entry; e.g., dust particles from a cement plant that migrate onto another’s real and personal property may give rise to trespass. But the requirement of a tangible has been relaxed almost to the point of being discarded. Thus, some courts [in 1985 and 1992] have held that microscopic particles or smoke may give rise to trespass. And the California Supreme Court has *intimated* migrating intangibles (e.g., sound waves) *may result in a trespass*, provided they do not simply impede an owner’s use or enjoyment of property, but cause damage. In our view, the electronic signals generated by the Bezenek boys’ activities were sufficiently tangible to support a trespass cause of action.⁷²

The court was persuaded that a trespass to personal property had occurred and quoted Dean Prosser’s observation that “[t]respass to chattels survives today, in other words, largely as a little brother of conversion.”⁷³ In the following footnote, the court acknowledged that “[a]pparently no California decision has applied a trespass theory to computer hacking,” but apparently found some support in dicta from an Indiana case and a criminal “computer trespass” statute from the state of Washington.⁷⁴

⁶⁸ *Id.*

⁶⁹ *Id.* at 1572.

⁷⁰ *Id.* at 1565.

⁷¹ *Id.* at 1566.

⁷² *Id.* at 1566 n.6 (citations omitted) (emphasis added).

⁷³ *Id.* at 1566–67 (quoting PROSSER & KEETON ON TORTS 85–86 (5th ed. 1984) (internal quotation marks omitted)).

⁷⁴ *Id.* at 1567 n.7.

The analysis of the *Thrifty-Tel* court is problematic in and of itself. Later that same year, however, on November 19, 1996, three other judges serving on the same court (Fourth Appellate District of the Court of Appeal of California) cited the computer-hacking trespass to personal property decision as precedent in a case involving trespass to land. *Elton v. Anheuser-Busch Beverage Group*,⁷⁵ concerned damage to Elton's property caused by Anheuser-Busch's negligent failure to prevent a fire that the company had set on the adjoining property. Unable to find a "reason why a fire cannot constitute the agent by which a trespass is committed,"⁷⁶ the appellate court affirmed the trial court's conclusion that a trespass to land had occurred, despite the fact that "no California case has previously decided that a fire can constitute a trespassory invasion."⁷⁷

One of the building blocks underlying the court's move away from the traditional distinction between direct and indirect invasions in trespass to land cases⁷⁸ was none other than the same court's precedent-deficient decision several months before: "Even damaging electronic signals sent by a computer 'hacker' can constitute a trespass to personalty."⁷⁹ A questionable development in trespass to *personal property* law has thus contributed to a questionable development in trespass to *land* law, and for no other apparent reason than the name they have in common—boomerang!

This Author's fear is that problematic, emerging case law interpreting the judicial hybrid known as a conservation "easement" will one day come back to haunt and infect "real" easement law, in part because of the label that has been attached to conservation restrictions. The attempt to unify servitudes law is problematic enough. An even greater error than ignoring the meaningful differences between easements, covenants, and licenses would be to apply the attributes of legislatively reinforced PCRs or NCRs, created for conservation and preservation purposes, to run-of-the mill easements that further purposes unrelated to the public good.

IV. THE BENEFITS (NOT BURDENS) OF RENAMING

Abandoning the name "conservation easements" for a more functional and descriptive alternative—perpetual and non-perpetual conservation restrictions—is by no means a magic bullet that, without causing any harm, will cure the many existing and potential problems faced by advocates of this legislative tool for protecting environmentally, historically, and architecturally significant properties

⁷⁵ *Elton v. Anheuser-Busch Beverage Grp., Inc.*, 50 Cal. App. 4th 1301 (Cal. Ct. App. 1996).

⁷⁶ *Id.* at 1306.

⁷⁷ *Id.* at 1307.

⁷⁸ See 9 POWELL ON REAL PROPERTY, *supra* note 1, § 64A.04[1] ("Other courts held that small or invisible air pollutants were not a direct invasion of a possessory interest, and thus denied a recovery in trespass for damage resulting from such pollutants.").

⁷⁹ *Elton*, 50 Cal. App. 4th at 1397 (citing *Thrifty-Tel*, 46 Cal. App. 4th at 1566 n.6).

and structures. Nevertheless, a simple nomenclature change may very well yield three meaningful benefits with no measurable burden other than the energy lawmakers and their staffs will expend making ever-so-slight statutory emendations.

A. Avoiding Term Creep and Boomerangs

The first advantage of the name change—specifically substituting the word “restrictions” for “easements” or “servitudes”—is that lawmakers will be sending courts an even clearer message that their work product is unique and a thing apart, despite its consanguinity with traditional easements, covenants, and equitable servitudes. This alone should go a long way toward slowing down term creep (though probably not stopping it dead in its tracks)⁸⁰ and helping to prevent future instances of the boomerang phenomenon. Moreover, lawyers and laypersons alike will understand from the nomenclature itself that owners of lands affected by perpetual conservation *restrictions* have yielded some rights to use and develop their property that they would otherwise possess.

B. Associating Legislative Provenance with the Public Interest

The second benefit of the name change, specifically identifying the restrictions as “perpetual” in duration and for “conservation” (and related) purposes only, is that lawyers, judges, and, perhaps more importantly, the general public will be informed or reminded that in authorizing this new real property instrument the state legislature’s overriding goal was the protection of society’s interest in preserving for as long as possible sensitive lands and important, vulnerable structures from harmful exploitation and destruction.

C. Disconnecting Hybrids from Traditional Rules that Inhibit Adaptation to Profound, Unanticipated Changes

Finally, it is hoped that distancing PCRs from easement terminology will disentangle them from common law rules that pose a threat to the PCR’s ability to adapt to profound alterations, such as shifting critical habitat attributable to climate change. Unlike traditional easements, covenants, and equitable servitudes, whose termination would only in rare instances result in significant negative externalities for the general public, the vast majority of PCRs are specifically designed chiefly to avoid those results. Therefore, to allow for the termination of this protection

⁸⁰ There still could be a problem with the use of the term “restrictions.” *See, e.g.,* Kepple v. Dohrmann, 60 A.3d 1031 (Conn. App. Ct. 2013) (misapplying easement law to what the court called “conservation easements” even when they were actually named “restrictions”).

solely because the label it carries “sounds in” traditional servitudes law would, with excuses to the Bard, be a termination devoutly not to be wished.⁸¹

⁸¹ See WILLIAM SHAKESPEARE, *HAMLET* act III, sc. 1 (“’Tis a consummation. Devoutly to be wish’d.”).