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ADVERSE POSSESSION, PRIVATE-ZONING WAIVER & DESUETUDE: ABANDONMENT & RECAPTURE OF PROPERTY AND LIBERTY INTERESTS

Scott Andrew Shepard*

Adverse-possession doctrine labors under a pair of disabilities: a hesitancy by theorists to embrace the abandonment-and-recapture principle that informs the doctrine, and a substantial unwillingness of governments to abandon an antiquated and outmoded maxim shielding them from the doctrine's important work. Removing these disabilities will allow a series of positive outcomes. First, it will demonstrate that all would-be adverse possessors, not just those acting "in good faith" or with possessory intent, should enjoy the fruits of the doctrine. Second, it will provide valuable additional means by which the public may monitor the performance of government employees, and additional discipline to governments tempted to allow their aspirational commitments to outstrip their fiscal capacities. As an added benefit, it can achieve these ends without posing any threat to emergent environmental values, while serving as a positive support for effective government conservation efforts. Moreover, once adverse possession is recognized as a process of abandonment and recapture, and is applied to government entities as well as to private, opportunities arise to employ the doctrine expansively for the protection of property and liberty interests against aggressive overregulation and overcriminalization. The doctrine can become a tool for tempering and restraining burgeoning zoning and other property- and liberty-curtailing regulations by declaring regulations that have gone long unenforced in the face of broad, open public violation to be abandoned and unenforceable. Perhaps most intriguingly, it can provide a secure foundation in the American legal system for the doctrine of desuetude, by which long-violated and long-unenforced criminal prohibitions lose their restrictive capacity.

INTRODUCTION

Adverse possession, alternatively described as "a strange and wonderful system"[1] and "legalized theft,"[2] might likeliest be

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1. WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 11.7, at 853 (3d ed. 2000).

2. *See, e.g.*, Todd Barnet, *The Uniform Registered State Land and Adverse Possession Reform Act, A Proposal for Reform of the United States Real Property Law*, 12 BUFF. ENVTL. L.J. 1, 3 (2004) (adversely possessed property "legally stolen"); Alexandra B. Klass, *Adverse Possession and*

thought, in this modern era, "a quiet backwater,"[3] the relevance of which is slowly—but surely and inevitably—drying up.

Adverse possession need not and should not fade from relevance this way, though. It and the principles underlying it still do much good in modern law, and could do much more. If properly understood and applied, the adverse-possession doctrine and the principles that inform it can serve as a basis upon which to curb wasteful government ownership of property, and can render unenforceable long-unenforced and long-violated regulations of property and liberty interests, such as zoning regulations and criminal prohibitions respectively. Unfortunately, however, the doctrine labors under a pair of unnecessary disabilities that are inconsistent with modern legal notions and needs, and that have consequently obscured the contemporary value and reach of adverse-possession doctrine and theory. These disabilities must be removed to allow the doctrine to reach fuller modern potential.

The first disability arises from the very way in which the doctrine has been described and justified. The standard explanations and justifications of adverse possession, offered haltingly and with vague embarrassment, fully account neither for why the doctrine does what it does nor for why its results are valid and appropriate. Yet a better—a complete—explanation and justification is in fact available. Adverse possession is best understood as a two-stage process: (1) constructive abandonment by the title owner, followed by (2) possession and ownership—essentially recapture—of the newly abandoned property by the adverse possessor. Hesitancy to embrace this model arises, in part, from an unwillingness to recognize either that land can be abandoned or that abandonment may and (as a practical matter) does occur constructively. There exists, however, no sound reason for this hesitancy. In Section I below I work through a complete theoretical account and justification of adverse possession, deploying and defending this abandonment-and-recapture model of the doctrine, and demonstrating the theoretical and practical advantages that arise from embracing the model.

Section II discusses the second disability under which adverse possession labors: the continuing assertion, by courts and legislatures alike, of the maxim *nullum tempus occurrit regi*—the claim

Conservation: Expanding Traditional Notions of Use and Possession, 77 U. COLO. L. REV. 283, 288–89 (2006) (citing William G. Ackerman & Shane T. Johnson, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 94 n.117 (1996)) ("title by theft").

3. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1122 (1984).

that "time does not run against the king"—as a justification for exempting government-held property from the ambit of adverse-possession doctrine. Modern governments have abandoned this manifestly outdated maxim and its first cousin, sovereign immunity, in myriad other contexts, ranging from tort and contract suits against government to statutes of limitations for the prosecution of criminal and tax violations. Some scholars have already argued that the time has long-since passed to abandon it in the adverse-possession context as well. Building on that scholarship, in Section II I review and respond to scholars who argue for maintaining or even expanding the *nullum tempus* bar to adverse possession against government-held property. I demonstrate that applying adverse possession to government-held property will advance the interests of good and competent government and coherent resource allocation: first by better aligning government's expressed goals with its actual investments; and second, by providing additional means by which the public can effectively monitor government functions and take direct action against government neglect that threatens its communities. Finally, I will demonstrate that applying adverse possession to government-held property will not damage, and will in fact *enhance*, the real-world prospects of conservation and environmental protection.

Recognizing the abandonment-and-recapture basis of adverse possession and applying the doctrine to government permits additional, novel protections of the public's property and liberty interests to arise as well. In particular, adverse possession need not apply only to government ownership of fee-simple property, nor even to the traditional categories of physical and intangible property interests alone. Unlike private and non-profit entities, and unlike the public in its communal-ownership capacity, government has the power to limit, by statute and regulation, the property and liberty interests of the public at large or of various segments of the public. In doing so, it effectively acquires these liberty and property interests—or the negative, reciprocal interest in denying the regulated public the use of these interests—for itself. Sometimes, as in the context of zoning regulation, this acquisition is quite plain. For instance, when government enacts a maximum building-height restriction, it effectively acquires for itself a negative easement in the airspace estate of the regulated property owners, denying them the opportunity to build above the height of the restriction. In other contexts the acquisition is no less real, though perhaps somewhat less obvious. When government enacts a criminal statute, it withdraws from the

restricted public the liberty interest that those persons previously enjoyed to undertake the now-proscribed activity, and acquires for itself a negative liberty interest—as expressed in its new authority to patrol against and punish behavior consistent with the now-denied liberty interest.

Applying adverse-possession doctrine to government allows a mechanism by which the public can recapture for itself some of the liberty and property interests withdrawn by these government restrictions. The public prescriptive easement doctrine (effectively an aspect of adverse-possession doctrine) already teaches that the public can, acting in concert, acquire on its behalf easement rights initially held by other parties. Subjecting government to adverse-possession doctrine generally would presumptively subject it to public-prescriptive doctrine as well. If, as suggested above, the doctrine were understood to apply broadly to all negative easements (or analogous liberty or property interests) acquired by government through the regulatory and statutory processes, it would allow the public to recapture such property and liberty interests. Abandonment should be found when government, having enacted restrictions on the enjoyment of certain liberty and property interests, then systematically fails to enforce—i.e., constructively abandons—the restrictions in the face of ongoing, regular, and widespread violations of which the relevant enforcement authorities are actually or constructively aware, for the length of the relevant statute-of-limitations period. Recapture, which is in this process the obverse of abandonment, should therefore be found when the public has regularly, broadly, and for the length of the statutory period, violated the relevant restrictions in a manner that provides actual or constructive notice to enforcement authorities of the ongoing and widespread violations. This application of public-prescriptive doctrine to regulatory and statutory limitations on the interests of the public would track, and effectively import into the public-regulation context, the waiver doctrine that has long applied to systematically violated-and-unenforced restrictions in the private-zoning context (i.e., the context of private communities and covenant restrictions). The details of this proposal, and consideration of its ramifications, appear in Section III.A. below.

This expansive use of adverse-possession doctrine—especially with regard to liberty rather than property interests acquired by government legislation—may initially seem uncomfortably novel. Such discomfort proves unwarranted. The basic principle animat-

ing this expanded application of adverse possession is the principle at the heart of the ancient civil-law doctrine of desuetude, a doctrine long admired by scholars precisely as a means of retiring long-violated and long-unenforced criminal prohibitions. Academic supporters of the desuetude doctrine have usually attempted to import it into American law by finding a constitutional situs for it, but courts have consistently rejected these efforts on the bases both that desuetude lacks a constitutional foundation and that the doctrine itself proves hopelessly indeterminate, and so would present a nightmare of application. Seating desuetude in the adverse-possession doctrine responds to both of these considerations by providing desuetude an organic American home in the common law of property rather than in the Constitution, and by providing it definite, regular, and familiar mechanisms for implementation. The history and theory of desuetude doctrine, and the potential power of an adverse-possession-based desuetude, are explored below at Section III.B.

I. ADVERSE POSSESSION AS A PROCESS OF ABANDONMENT & RECAPTURE

A. Adverse Possession: The Basics

The formal, core elements of adverse possession are well known. They require that the trespasser's possession of property be (1) actual; (2) open and notorious to the owner (i.e., actually known to or reasonably capable of discovery by the owner); (3) hostile to the owner's interests (i.e., without the owner's permission); (4) exclusive of the owner's concurrent possession; and (5) continuous for the length of the statutory period of limitations on the owner's action to recover possession from the trespasser.[4]

Courts and legislatures in some states, however, have with some scholarly support added additional elements to this core. Chief among these are the requirements that the trespasser's possession be made under "claim of right,"[5] in "good

4. *See* STOEBUCK & WHITMAN, *supra* note 1, § 11.7, at 853–86; *id.*, § 11.7, at 859 (citing Alaska Nat'l Bank v. Linck, 559 P.2d 1049 (Alaska 1977)).

5. The standard interpretation of "claim of right" in the United States for nearly two centuries has been that the trespasser act toward the property in the same way an owner would—but, so interpreted, it adds nothing to the core elements of adverse possession. *Id.* § 11.7, at 858 (citing Carpenter v. Coles, 77 N.W. 424 (Minn. 1898)); *see, e.g.*, Roger A. Cunningham, *Adverse Possession and Subjective Intent: A Reply to Professor Helmholz*, 64 WASH. U. L.Q. 1, 23 n.75, 59 n.234 (1986). It is, however, too often taken to suggest instead that the

faith,"[6] or with "intent."[7] Though often confused, these additional elements—to the extent that they mean anything—do not all mean the same thing, and are to some extent mutually exclusive.

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trespasser's adverse-possession claim will be recognized as valid only if the trespasser acts with *colorable* claim of title. *See, e.g.*, STOEBUCK & WHITMAN, *supra* note 1, § 11.7, at 855–58; Merrill, *supra* note 3, at 1142–44. When thus employed, the element bars adverse possession completely (or extends the adverse possession period) or adds additional use requirements. *See, e.g.*, ALASKA STAT. § 09.45.052(a) (2008) (longer statutory period when adverse possession occurs without color of title); ARK. CODE ANN. § 18-11-106 (2003) (special adverse-possession period where color of title present); ARK. CODE ANN. § 18-11-103 (2003) (longer period for wild lands when color of title must eventually be presumed); COLO. REV. STAT. § 38-41-101, -108 (2010) (shorter period if color of title and payment of taxes); FLA. STAT. § 95.18 (heightened requirements); TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024-.025 (Vernon 2002) (longer statutory period when adverse possession occurs without color of title); *see also* STOEBUCK & WHITMAN, *supra* note 1, § 11.7, at 854 n.7 (listing cases); Barnet, *supra* note 2, at 7 (discussing New York's additional requirements where color of title not demonstrated) (citing N.Y. REAL PROP. ACTS LAW § 522 (2009)). Alternatively, this element can add an obligation that the adverse possessor pay the title owner compensation for her adverse possession. *See* Merrill, *supra* note 3, at 1124 (describing Warsaw v. Chi. Metallic Ceilings, Inc., 676 P.2d 584 (Cal. 1984), and advocating for similar payments by "bad-faith" adverse possessors generally); *id.* at 1126 (describing those trespassers who cannot make some plausible claim to ownership independent of the eventual adverse-possession claim itself); *see also* John L. McCormack, *Title to Property, Title to Marriage: The Social Foundation of Adverse Possession and Common Law Marriage*, 42 VAL. U. L. REV. 461, 465 (2008) (arguing that adverse possession not initiated under color of title "is an anachronism no longer adequately justified by any contemporary interest or policy").

6. The "good faith" requirement runs parallel to, yet is broader than, the claim-of-right/color-of-title requirement. It delays or bars claims by would-be adverse possessors who know themselves to be trespassing. *See, e.g.*, R.H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983) (arguing that good-faith belief in ownership of the occupied property plays an important practical role in judicial awards). *But see* Cunningham, *supra* note 5, at 58, *passim* (contesting Helmholz's claim); Per C. Olson, Comment, *Adverse Possession in Oregon: The Belief-in-Ownership Requirement*, 23 ENVTL. L. 1297 (1993) (considering Oregon's then-recent enactment of stringent good-faith requirements and the practical effects of such requirements). A colorable claim of right would allow a trespasser to assert good faith, but so, generally, would unintentional trespass arising from an erroneous but genuine—even if unexamined—belief that the trespasser owns the relevant property. *See, e.g.*, Merrill, *supra* note 3, at 1123. Numerous authors endorse restricting adverse possession to good-faith trespassers or, even when recognizing the need to employ adverse possession without reference to good faith, deplore the bad-faith adverse possessor. *See, e.g.*, Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 685–89 (1986) (proposing a two-tier statute in which bad-faith claimants would suffer longer statutory periods before title vests in them); R.H. Helmholz, *More on Subjective Intent: A Response to Professor Cunningham*, 64 WASH. U. L.Q. 65, 75 (1986) (arguing that adverse possession should be restricted to good-faith trespassers); Thomas J. Miceli & C.F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. & ECON. 161, 162 (1995) (same). *But see* Olson, *supra*, at 1298 ("[A]n inquiry into a claimant's belief in ownership is immaterial."). Professor Merrill's conclusion that bad-faith claimants should have to pay compensation for lands taken by adverse possession is considered *infra* note 21.

7. *Cf.* STOEBUCK & WHITMAN, *supra* note 1, § 11.7, at 854. The "intent" requirement, which works to nearly opposite purposes as the good-faith requirement, would limit adverse-possession claims to trespassers who always intended to possess adversely. The intent requirement is therefore essentially a "bad faith" requirement. In fact, Professor Fennell argues explicitly that "only the knowing trespasser should be able to prevail in adverse possession." Lee Ann Fennell, *Efficient Trespass: The Case for "Bad Faith" Adverse Possession*, 100 NW. U. L. REV. 1037, 1049 (2006). This position is sometimes referred to as the "Maine Rule." *See, e.g.*, Preble v. Maine R.R. Co., 27 A. 149 (Me. 1893) (establishing the Maine

Each of these additional elements, if and where adopted, radically reduces the universe of valid adverse-possession claims. A trespasser who knows that she has no plausible claim to title of the land she occupies—except upon adverse possession—would fail both the color of title and good-faith standards, but would possess the intent to adversely possess. A second trespasser who makes continual use of a parcel of land over another claimant-owner's objections because he believes himself the rightful owner has a colorable claim of title, assuming that his claim is plausible. He should also therefore be a good-faith possessor, though perhaps his assertion of good faith is undermined by his refusal to countenance the competing claim, and to test the claims before the law. This second trespasser will, though, lack intent to achieve ownership of the property by adverse possession, at least as a primary matter. A third trespasser, who has no idea that the fence she has built actually cuts off a corner of her neighbor's property, acts in good faith both in erecting the fence and in occupying her neighbor's land. She does not, however—as a logical matter, she cannot—have any real intent at all with regard to possession in the face of an ownership claim by her neighbor. Nor is she likely to be acting under color of title; she thinks the land she has enclosed is hers, but her belief is unexamined and likely unsupported.

As these examples demonstrate, no jurisdiction could coherently adopt color-of-title, good-faith, *and* intent requirements; taken together, these requirements eliminate essentially or absolutely all potential adverse-possession claims.[8] However, as will be demonstrated in Section I.C. below, a deeper evaluation of the purpose and effects of adverse possession reveals that no jurisdiction should adopt any of them.

Rule); Helmholz, *supra* note 6, at 339–41. In contrast, under the "Connecticut Rule" the intent of the trespasser is irrelevant. *See* French v. Pearce, 8 Conn. 439 (1831) (establishing the Connecticut Rule).

8. As the examples above illustrate, a jurisdiction that had adopted all three of these requirements might theoretically still recognize the adverse-possession claim of a claimant who occupies with color of title, but with a secondary intention of gaining title by adverse possession if the color-of-title claim were defeated. The logic of the good-faith requirement militates against even this narrow exception, however; if a possessor's colorable claim fails, his residual intent to possess adversely evinces the exact sort of "bad faith" in the face of a stronger claim to title that the good-faith requirement is designed to exclude. But even if this narrow and oddly formalistic category of claims were still permitted, the effect would be effectively to eliminate adverse possession entirely.

B. The Traditional Justifications of Adverse Possession

The standard explanation for the doctrine of adverse possession has significant surface appeal: it reunites ownership and possession of property in the trespasser after the running of the statute of limitations eliminates the title owner's opportunity to regain possession by ejectment (or similar) action.[9] This explanation, however, proves essentially question begging. By justifying the doctrine by reference to the statute of limitations, it simply demands an explanation of why a statute of limitations applies to actions for recovery of property by dispossessed owners. One can surely imagine a legal structure in which an owner faces no time constraints on his opportunities to eject a trespasser to regain possession of what he continues to hold title to. Yet no jurisdiction has established such a rule.[10]

The standard moral and philosophical justifications for the universality of limitations on recovery actions—and thus for adverse possession—are essentially *ad hoc.*[11] They include the assertion (made in defense of statutes of limitations generally) that adverse possession serves to mitigate the problem of proving stale claims,[12]

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9. Tim owns five acres of rural land. Sarah occupies that land, perhaps pays taxes, and generally acts—in accordance with the core elements of adverse possession—as title owner. Years pass without Tim either noticing Sarah's occupation or acting in response to it—enough years so that the time during which he may bring action to recover possession has passed. Now Tim is without recourse and cannot challenge Sarah's continued occupation and use of land to which he—but for the doctrine of adverse possession—technically still holds title. Who, though, "owns" the land? Can Sarah sell it? Even if Sarah can sell—as neither Tim nor anyone else would now have standing to object—who would buy land for which no title can be produced? If for nothing but administrative ease, then, adverse possession steps in to grant new title to Sarah and to eliminate the awkwardness inherent in a division between formal title ownership and permanent possessory rights.

10. Professor Stake has offered model statutory text to achieve just such a resolution. *See* Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2422–23 (2001).

11. Merrill, *supra* note 3, at 1127 n.22 ("Casebooks often try to compensate for the lack of systemic scholarly discussion [of adverse possession] by offering a collection of chestnuts from various legal sources that suggest different rationales for adverse possession."); *see* STOEBUCK & WHITMAN, *supra* note 1, § 11.7, at 860 (briefly listing just such chestnuts).

12. Merrill, *supra* note 3, at 1128 ("As the quality and quantity of evidentiary material deteriorates over time, the process of fact-gathering and proof becomes more difficult. . . . A rule requiring prompt resolution of claims is thus efficient in that it helps to minimize the costs of litigation and trial." (citing 21 Jac., c. 16 (1623) (Eng.) (the first English adverse-possession statute, which declared its purpose to be "quieting of men's estates and avoiding of suits"))); *see* Robert C. Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U. L.Q. 723, 725–34 (1986) (attempting to establish a most-efficient range of limitations periods in adverse-possession cases); Klass, *supra* note 2, at 289 (another typology); Paula R. Latovick, *Adverse Possession Against the States: The Hornbooks Have It Wrong*, 29 U. MICH. J.L. REFORM 939, 941–43 (1996). Not all authors, of course, find all of these justifications persuasive. *See, e.g.*, Stake, *supra* note 10, at 2435–55

that it advances the interest of quieting title to property,[13] that it serves to punish owners who "sleep on their property rights,"[14] and that it recognizes and accounts for reliance interests developed by the trespasser and by third parties as a result of the trespasser's long possession.[15]

Each of these *ad hoc* justifications, taken alone, proves substantially incomplete. Concerns about the deterioration of evidence are of course less pressing today than they were four centuries ago,[16] but even taken at face value the "stale claims" justification only obliquely explains adverse-possession doctrine. Current possessors, third parties and courts could all be protected from costly and inconclusive claims (rendered so by stale evidence) merely by a presumption of ownership in the long-term possessor, which presumption could be defeated by clear and substantial proof of title ownership. No arbitrary time limit need be established. If the owner has maintained pristine records, then he will not have created an evidentiary problem, and his clear, unstale title should, under this justification, defeat the trespasser's entire lack of title documents and record ownership whenever she might elect to assert it.[17]

(dividing the justifications for adverse possession into fifteen categories and finding only a psychological theory of loss aversion persuasive).

13. Merrill, *supra* note 3, at 1129 ("[I]f th[e] state has no mechanism for eliminating old claims to property, the information costs, transaction costs, and hold out problems involved in discovering and securing the releases of these claims would very likely impose a significant impediment to the marketability of property.").

14. *Id.* at 1130 ("[T]he shift in [ownership] acts as a penalty to deter [true owners] from ignoring their property or otherwise engaging in poor custodial practices.").

15. Oliver Wendell Holmes, *The Path of the Law*, 10 HARV. L. REV. 457, 477 (1897) ("A thing which you have enjoyed and used as your own for a long time, whether property or an opinion, takes root in your being and cannot be torn away without your resenting the act and trying to defend yourself, however you came by it. The law can ask no better justification than the deepest instincts of man."); Merrill, *supra* note 3, at 1131–32 ("A fourth . . . explanation . . . focuses on the possessor, and in particular on the reliance interests that the possessor may have developed through longstanding possession of the property.").

16. *See, e.g.*, Brian Gardiner, *Squatter's Rights and Adverse Possession: A Search for Equitable Applications of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 125–27 (1997) (reviewing development of adverse-possession doctrine in Britain).

17. If the would-be adverse possessor claims under color of title, then that claim, along with whatever evidence may support it, may be tried against the claim and evidence of the (other) asserted title owner. The passage of time may not have caused equal deterioration in both claimants' evidence of ownership, but because the claimant in possession could as easily have brought a quiet-title action during his period of possession as the non-possessing claimant could bring an action to recover possession, it is difficult to see why the possessing claimant should unilaterally benefit from a rule (solely) designed to discourage stale claims. Some additional justification is required to explain that preference. *See* Holmes, *supra* note 15, at 476 ("The end of [a statute of limitations] is obvious, but what is the justification for depriving a man of his rights, a pure evil as far as it goes, in consequence of the lapse of time? Sometimes the loss of evidence is referred to, but that is a secondary matter. Sometimes the desirability of peace, but why is peace more desirable after twenty years than before? It is increasingly likely to come without the aid of legislation."); *see also* Stake, *supra*

Similarly, the claim that the statute of limitations on property recovery serves to quiet title is both incomplete and somewhat odd. In the absence of a statute of limitations on property recovery, and thus of adverse possession, title and ownership would remain quietly in the record owner, at least so long as the record owner could prove such title (after which time, again, a narrow rule favoring a possessor in the absence of any competent evidence of title ownership would suffice). The statute of limitations and the resulting adverse-possession doctrine *itself* disquiets title—and is systemically unlikely to result in easily discoverable, reliably recorded title.[18]

The reliance justification is also significantly incomplete. This justification springs from a variety of sources, including the personhood theory of property, concerns about violence that might erupt upon recommitment of property to the title owner, and the loss to the trespassing possessor of costs sunk into the use and development of the property trespassed upon.[19] These concerns, however, do not explain why the law should favor the reliance interests and potential losses of the trespasser over the (presumably usually much larger) reliance interests and potential losses of the

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note 10, at 2439, 2455 (noting that the indeterminacy of adverse-possession elements, and thus of potential adverse-possession determinations, create their own problems of potentially stale evidence and costly trial, while the adverse-possession rule bars some true owners with good title from recovery).

18. *See, e.g.*, Ellickson, *supra* note 12, at 730 (noting that while adverse possession will sometimes lower search costs, it "bestows valid claims upon persons not identified in the land records," thus disquieting title and raising potential title-search costs). Professor Merrill explains and supports the quiet-title justification of adverse possession by noting that but for statutes of limitations on property-recovery claims,

> [t]itle examiners would have to trace every deed back to its source; ancient easements, unextinguished spousal rights, grants of future interests, unreleased mortgages or liens could well be discovered; these interests would have to be traced to present-day successors; and releases of these interests would have to be secured. . . . The 'nuisance' value of these claims could easily lead to holding out or other rent-seeking behavior that would make the process of obtaining clear title even more burdensome.

Merrill, *supra* note 3, at 1129. This is arguably true for properties held in the normal course of transfer (though it should be noted that the investigation and quieting should only have to be done once). But it does nothing to explain why statutes of limitations should work on behalf of the titleless adverse possessor, whether possessing in good faith or bad. Without additional justification, it remains unclear why it would be valuable to create a new and potentially unrecorded and untested title chain, following a period of legal indeterminacy, for a trespasser. Perhaps, then, this justification, standing alone, would provide support for (only) the "strong" color-of-title theory of adverse possession.

19. *See, e.g.*, Merrill, *supra* note 3, at 1131–32; Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 741–42, 745 (1986) (discussing the personhood theory of property).

title owner.[20] Nor does it explain why adverse possession results in a transfer of the title to the property, rather than a requirement that the title owner compensate the trespasser for some or all of the value added to the property by the trespasser's improvements.[21] With regard to third-party reliance interests, meanwhile, it is not clear why these concerns would result in a transfer of ownership of the property to the trespasser, rather than simple satisfaction of any *bona fide* obligations running from the trespasser to third parties out of the ownership interest that nevertheless always remained in the title owner.

Professor Stake has argued that the reliance justification is properly based in the "endowment effect," the apparent psychological fact that "the loss of an asset has more impact on utility than does the gain of the same asset."[22] Moreover, "people become more attached to tangible physical assets than to financial assets and feel a greater sense of loss when deprived of tangible physical objects."[23] As a result, he argues, if both the adverse possessor and the record owner claim a property, then the possessor would feel the transfer of the property back to the record owner more keenly than would the record owner feel the reverse transfer.[24] Internal difficulties with this explanation arise. The data do not seem to address, for instance, the question of whether a claimant's total-loss calculation will be affected by the amount of the claimant's investment in the property prior to the loss. If that variable matters even a small amount, then Stake's conclusion that the data support transfer in good-faith situations proves problematic.[25]

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20. *See* Merrill, *supra* note 3, at 1131–32.

21. Professor Merrill advocated nearly the reverse of this system—compensation from the trespasser to the title owner in cases of bad-faith adverse possession. *See id.* at 1146. As he recognized, however, his suggestion is nowhere in the statutory law, and seldom evinces itself in decisions. *See* Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 70 (2002) (advocating a similar model, with adverse possession governed by a "pliability" rule: a property right in the true owner followed by a "call option" in the adverse possessor, before complete adverse possession would occur); *see also* Susan Lorde Martin, *Adverse Possession: Practical Realities and an Unjust Enrichment Standard*, 37 REAL EST. L.J. 133 (2008) (endorsing a requirement that adverse possessors who would be "unjustly enriched" by their efforts be obliged to pay original owners for the property).

22. Stake, *supra* note 10, at 2460.

23. *Id.* at 2463.

24. *See id.* at 2454.

25. *See id.* at 2471 ("[T]he . . . experiments support adverse possession only when AP is acting in good faith."). If there is a sunk-investment effect like the one I suggested above, however, then the record owner is often likely to have a much greater endowment-effect claim to the property, because of the generally much greater investment in the contested property than has the adverse possessor. The endowment effect would then seem only to support strong color-of-title cases as well, and even then only such cases in which the adverse possessor has some reasonable basis for believing her claim to be backed not just by title, but by previous investment in the property.

Like the other justifications considered above, moreover, Stake's model lacks a central component: an explanation of why the titleless trespasser's interests and welfare should be thought competitive with, much less eventually able to trump, the title owner's. The fourth justification provides this explanation: the fact that the title owner has "slept on his rights" for such a long period that it is appropriate to penalize him by taking away his property interest. To do the work required of it, though, this explanation must be fleshed out beyond the standard recitation.[26] When an owner sleeps on his rights, what he really does is fail to evict the trespasser—whether because he has failed to notice her, or is aware of her presence but has not bothered to chase her away. This behavior can be thought problematic—it can be the basis for a penalty—only if the owner has some affirmative obligation to notice and evict. Whence does that obligation arise? Scholars seem not to have given too much direct consideration to this question, but an explanation is readily available. Property interests arise, relevantly, when the supply of a good is limited and the good itself is desirable in greater quantities than are available for free acquisition (i.e., the good is scarce).[27] With regard to such property, then,[28] the requirement that an owner not sleep on his rights must arise from a conclusion that justice does not permit an owner of goods both to remove the scarce good from potential ownership and use by other desiring parties and also completely to abandon any functional interest in the good itself, neither using it nor preserving it for future

26. *See, e.g.*, *id.* at 2434–35 (dismissing standard recitation).

27. *See, e.g.*, Joshua Getzler, *Theories of Property and Economic Development*, 26 J. INTERDISC. HIST. 639, 639 (1996) ("Economic reasoning suggests that markets themselves call property rights into existence: Persons contract to set up institutions enforcing stable, definite entitlements to scarce resources . . . ."). Certainly land, which provides the archetypal case for the application of adverse possession, is substantially, though not entirely, inelastic. Human initiative can increase marginally the absolute supply of usable landmass; consider the dykes of Holland or the reclamation of the swamps of the Meadowlands. *See generally* ROBERT J. HOEKSMA, DESIGNED FOR DRY FEET: FLOOD PROTECTION AND LAND RECLAMATION IN THE NETHERLANDS (2006) (discussing the dykes of Holland); Robert M. Hordon, *Meadowlands, Hackensack*, *in* ENCYCLOPEDIA OF NEW JERSEY 506–07 (Maxine N. Lurie & Marc Mapen eds., 2004). These endeavors, though, are both extremely costly and ultimately limited. Similarly, some of the functional value of some plots of land can be multiplied by, for example, erection of multiple-storey buildings, or the development of technologies that increase agricultural output per acre. (These processes could also be reversed, however, as will result if global warming recurs and results in heightened sea levels.)

28. In principle, all of the claims made in this Article should apply to personal property as well as real. *But see* Patty Gerstenblith, *The Adverse Possession of Personal Property*, 37 BUFF. L. REV. 119 *passim* (1989) (arguing that "the most important element required to establish adverse possession of personal property is the good faith and reasonable reliance of the adverse possessor"). Space limitations, however, require constraining the primary focus of the portions of this Article dealing with property interests to real-property examples and contexts.

use nor even monitoring it sufficiently to know whether or not it is being put to any use or misuse by any other parties.

The "sleeping on one's rights" justification is also not itself complete. While it does provide the necessary explanation for why a title owner can ever be deprived of ownership while his title remains clear and is not challenged by any other colorable-title claimant, it by itself can provide no explanation for why a *trespasser* on the property should be the beneficiary when the pervasive dereliction of the title owner justifies withdrawing the benefits of title ownership. This gap, though, is filled in part by the other justifications, particularly those of reliance and quieting title.

C. Abandonment & Recapture: A Comprehensive Theory of Adverse Possession

From the four *ad hoc* justifications just considered can be distilled a more complete account of what adverse possession is, why it matters, and how it should be delimited. A property interest is a right to control, direct, and defend a scarce resource, as against others desirous of obtaining the same interest in the same good.[29] The adverse-possession doctrine arises from the recognition that an ownership interest carries with it the nearly (but not completely) *de minimis* obligation to (1) put the good to some use; and/or (2) protect the good from use by others, either in the pursuit of conservation goals or to preserve the good for the owner's own future use. This minimal obligation carries with it by definition the obligation to pay enough attention to the property owned to know whether it has been taken or invaded continuously over a long period of time (i.e., over the statute-of-limitations period). An owner who fails of this minimal obligation has lost the right to expect vindication of his property interests at law. It may be said that this derelict owner has constructively abandoned the property.

In the normal course, this constructive abandonment would go unnoticed. While the owner fails to use or conserve or monitor his property, he doubtless does not overtly advertize his delinquency either. Thus the constructively abandoned property would go un-reclaimed for use by other desirous potential owners, but for the actions of the trespasser. The trespasser's invasion establishes the potential for constructive abandonment, and her

29. *See, e.g.*, Felix Cohen, *Dialogue on Private Property*, 9 RUTGERS L. REV. 357, 374 (1954) ("[T]hat is property to which the following label can be attached: To the world: Keep off unless you have my permission, which I may grant or withhold. Signed: Private citizen. Endorsed: The state.")

continuing occupation for the statutory period proves the default. Her behavior, then, serves a positive social good: identifying scarce resources to which the title holder has lost his claim, and bringing those resources back into circulation. Moreover, the trespasser undertakes this socially valuable action (though one no doubt motivated by personal interests, if intentional) at significant personal hazard. This hazard includes potential loss of improvements made to the property and/or even criminal punishment should the title owner notice and terminate her trespass prior to the statute's running, thus demonstrating that he had not constructively abandoned the property. Under these circumstances, it comports with justice, efficiency, and the common law of finds to award the property to the intrepid trespasser who demonstrated the constructive abandonment and who, in effect, reclaimed the abandoned property.[30] Once that award has been made, meanwhile, it makes every sense formally to issue new title to the property to the new owner, thus quieting title, obliterating the claims arising from the now-abandoned-and-extinguished title chain, and ratifying any justifiable third-party reliance stemming from the adverse possessor's long occupation or control of the relevant property.

Consider too the abandoning owner. In this explication of adverse possession, the losing owner can be deprived only in two circumstances: wherein the owner had no idea, for a significant period, that his property had been invaded, or wherein the owner knew that the property had been invaded, but failed despite that knowledge to take action for the same period of time. Sometimes, of course, this failure of knowledge or action is excusable, and the doctrine includes tolling provisions to account for such circumstances.[31] It is hard to pity an owner who loses title to his property after he has for years known of another's continuing trespass and who has left the property to that trespasser without suit, complaint, or "blessing" of the trespass sufficient to rob it of its hostile character. In fact, it is most congruous to view this not only as constructive but as tacit abandonment. (The case would be different were the trespasser securing the owner's inaction by duress, but such intim-

30. *See, e.g.*, Hener v. United States, 525 F. Supp. 350, 354 (S.D.N.Y. 1981) ("The common law of finds treats property that is abandoned as returned to the state of nature and thus equivalent to property, such as fish or ocean plants, with no prior owners. The first person to reduce such property to 'possession,' either actual or constructive, becomes its owner." (citing R. BROWN, THE LAW OF PERSONAL PROPERTY 15 (2d ed. 1955))).

31. *See, e.g.*, ILL. COMP. STAT. 83/9 (1934); N.J. STAT. ANN. § 2A:14-21 (West 2000); WASH. REV. CODE ANN. §§ 4.16.080, 4.16.090 (West 1989); STOEBUCK & WHITMAN, *supra* note 1, § 11.7, at 853–84 (tolling provisions "for owners who are insane, infants, imprisoned, absent from the state, or in military service when the cause of action first accrues").

idatory tactics would toll the limitations period as well.[32]) Tacit abandonment also fits the owner whose monitoring of his property is so slight that he fails to discover open and notorious occupation or possession of the property by the would-be trespasser over the statutory period. This leaves only the instance in which the owner *could not*, even with reasonable diligence, have monitored his lands sufficiently to identify and respond to trespassers within the statutory period. (Absentee owners of vast tracts of forest land during the colonial and early-Republic periods in the United States provide a useful example.[33]) An owner who lacks resources even to undertake occasional and minimal monitoring of his property will lack too the resources to make present use of that property, and the present-resource mismatch bespeaks the unlikelihood of the owner being able to make use of large portions of the property at any time in the reasonable future. Perhaps it is a necessary corollary of the adverse-possession doctrine that an individual or entity's permissible property holdings are capped, at the margin, at the quantity that the individual or entity can monitor effectively so as to avoid adverse-possession deprivations. Given that the owner could, during the pendency of the statutory period, sell some of the possessions he is incapable of monitoring to other owners more equipped (perhaps because less burdened with other property holdings of their own) in order to raise resources enough to allow him to monitor the rest, such a marginal property-ownership cap hardly seems excessively onerous.

Interesting corollaries and consequences follow from this explication of adverse possession. First, it becomes clear that none of the additional doctrinal restrictions considered above—the good-faith requirement, the intent requirement, or the color-of-title requirement—should apply.[34] As seen above, the successful adverse possessor performs a significant social good at significant personal risk, without regard to whether she initially acted in good faith or bad, and with or without specific intent or color of title. The "bad-faith" trespasser who acts without color of title, in fact, acts at significantly greater risk, because without serious defense against charges of criminal trespass. She should not find her reward uniquely tenuous at her moment of achievement. Nor would the

32. *Cf.* 1 AM. JUR. 2D *Abandoned, Lost, and Unclaimed Property* § 8 (2005) (noting that "abandonment must not be under threat, coercion, pressure or misapprehension, of any kind" (citing Katsaris v. United States, 684 F.2d 758 (11th Cir. 1982))).

33. *See, e.g.*, Paul W. Gates, *Tenants of the Log Cabin*, 49 MISS. VALLEY HIST. R. 3, 5–6 (1962); John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 842–44 & nn.118 & 122 (1994).

34. *See supra* notes 5-17 and accompanying text.

abandoning title owner have any special claims not to have abandoned the property as a result of the trespasser's bad faith or initial intent.[35]

Second, it should be clear from this explication that the adverse-possession doctrine need pose no threat to modern environmental efforts.[36] As suggested above, the minimal ownership obligation that undergirds the doctrine is not really one of productive use—at least insofar as that term is taken to mean something like the opposite of environmental conservation—but merely one of minimal monitoring and legal control. There is no reason that preservation of land in its evolving natural state, or for some particular environmental purpose (as, say, a wildlife refuge), would not be considered a "use" of the land sufficient—if genuinely undertaken—to belay any concerns about abandonment.[37] No less than extractive uses, however, conservational uses require some nontrivial level of monitoring and oversight to be effective.[38] Property

35. It follows that the abandonment-and-recapture theory of adverse possession would reject models like Professor Merrill's, which distinguish between good-faith and bad-faith possessors. *See supra* note 21 and accompanying text. The theory would permit the introduction of liability rules into the adverse-possession process, but only if applied equally to all adverse possessors and only if the liability-rule stage (i.e., the stage at which the adverse possessor could retain possession, but would have to pay compensation to the record owner) preceded a complete-interest-transfer stage such as now characterizes adverse possession.

36. Professor Sprankling raised the concern that the adverse-possession "doctrine is . . . dominated by a prodevelopment nineteenth century ideology that encourages and legitimates economic exploitation—and thus environmental degradation—of wild lands. This 'development model' is fundamentally antagonistic to the twentieth century concern for preservation." Sprankling, *supra* note 33, at 816, 840–53; *see* Latovick, *supra* note 12, at 944–45; Paula R. Latovick, *Adverse Possession of Municipal Land: It's Time to Protect This Valuable Asset*, 31 U. MICH. J.L. REFORM 475, 490–91 (1998) (decrying adverse possession as exhibiting a pro-development bias); *see also* Barnet, *supra* note 2, at 22 (same); Klass, *supra* note 2, *passim* (same); *cf.* Latovick, *supra* note 12, at 941 (decrying adverse possession as exhibiting a pro-development bias). Sprankling argued that conservationism and wilderness preservation should be considered uses of property, and in fact that lands putatively assigned to such uses should be immune from adverse possession. *See* Sprankling, *supra* note 33, at 862–67. The relationship between Sprankling's proposals and the implications of the abandonment-and-recapture model of adverse possession embraced in this Article is developed in the immediately subsequent footnotes.

37. This recognition comports with Sprankling's concerns that maintenance of property in wild or conservational form be recognized as an effective use of that property, and his recognition that "[t]he traditional distinction between productive and recreational [or conservational] activity in the exclusivity context serves no purpose." *See* Sprankling, *supra* note 33, at 866; *see also* Klass, *supra* note 2, at 286 ("This shift would result in courts focusing, for the first time, on evidence that the owner intended to leave the land in a natural state, or that the owner's actions resulted in a conservation benefit . . . .").

38. For an excellent note addressing these monitoring obligations, see Walter Quentin Impert, Note, *Whose Land is it Anyway?: It's Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 455–58 (2001). In his note, Impert recognized the key distinction between disuse and meaningful stewardship, noting that "use of land for an environmental purpose requires effort and vigilance. Land will only serve an environmentally beneficial purpose if it is not only designated for such use, but regularly monitored as well."

purportedly preserved as natural wilderness but so badly monitored that its owners have allowed trespassers to invade and occupy it for a course of years really has been effectively abandoned, and the purported conservational use entirely defeated, just as surely as would be purported farm land on which trespassers had entered and established a car dealership.[39] Conversely, trespassing conservationists who dismantle the remnants of a disused farm operation to return the land to something approaching its pristine condition, and then monitor that property against further invasion to maintain it as a protected wilderness, have used that property. They (assuming their satisfaction of the core elements of adverse possession over the statutory period) have thus earned title to the property just as would more "productive" users.[40] In between these

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Id. at 456. This is the appropriate response to Sprankling's proposal that modern conservational considerations be taken into account by "exempti[ng] privately-owned wild lands from adverse possession" entirely because the conservation-minded owner "is unlikely to visit the land because visitation is inconsistent with his preservation goal." Sprankling, *supra* note 33, at 827, 863. In support of his proposal, for instance, Sprankling asserted that "an adverse possessor's one acre corn field may provide ample notice to the resident owner of a 1000 acre farm. In contrast, an adverse possessor's activities on a one acre clearing are very unlikely to afford notice to the absentee owner of 1000 acres of forest." *Id.* at 827. This observa- observation is correct if the latter owner is *entirely* absentee. If such is the case, however, then the owner has effectively abandoned his property; he makes no effort whatever to preserve its wild nature, thus placing that wild nature at risk. Whether the trespasser who occupies the one-acre clearing will have earned adverse possession of the property will depend on whether the occupation and use meets the elements of adverse possession considered above, but if the possession is sufficient to have destroyed the wild character of the property within that one-acre clearing, then the original owner's conservational claims with regard to that clearing, at any rate, have been demonstrably pretextual. There is no reason such pretext should be rewarded by special protection from adverse possession. Sprankling worried that "[t]otal preservation of wild lands by private owners may therefore be impossible under existing law," because avoiding adverse possession requires some level of monitoring. *Id.* at 862. In fact, "total preservation of wild lands," if defined as preservation without any obligation to monitor, is impossible under *any regime* in which humans are present; if there is no monitoring to maintain the conservational nature of the property, then trespass and invasion cannot be precluded. Meanwhile, Klass has demonstrated that conservancy organizations have successfully monitored lands maintained in wild conditions, generally organized under conservation easements, and thus have successfully protected them from adverse possession. *See* Klass, *supra* note 2, at 306–09. Note, however, that Klass' preferred solution differs from the one embraced here; she would render a record-owner's conservation intent alone sufficient to thwart adverse possession by cultivation or development, even if demonstrated by nothing more than a declaration of that intent. *See id.* at 323–25. For the reasons just articulated, however, mere recordation of conservation claims is insufficient.

39. *See, e.g.*, Carl C. Risch, *Encouraging the Responsible Use of Land By Municipalities: The Erosion of* Nullum Tempus Occurrit Regi *and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197, 215–16 (1994) (making similar arguments in the context of adverse possession of property held by government purportedly for environmental purposes).

40. Some states have already specifically recognized this opportunity for adverse possession by conservation. In *Vezey v. Green*, 35 P.3d 14, 25 n.39 (Alaska 2001), the Alaska Supreme Court awarded possession based in part on the adverse possessor's "conservation-oriented uses

two extremes, the determination of whether a trespass merits treatment as an adverse possession will depend on the manner and scope of the trespass and the nature of the claimed conservational use. If the trespass is too slight to undermine the basic character of the conservational use, it should not qualify as exclusive. If it is so pervasive that it does undermine the claims of preservational use, however, then this would demonstrate that the owner's monitoring efforts had been too meager (or non-existent) to maintain the purported use of the property. In such circumstances, if the trespasser has met the other elements of adverse possession, the abandoning owner should not be heard to complain.[41]

Given how neatly this theory of abandonment and recapture accounts for the full, standard exposition of adverse possession, and

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of the property, which included planting indigenous rather than non-native plants and thinning trees and undergrowth rather than clearing them entirely." These actions "have the same legal weight as would more transformative or destructive uses: They are significant to the extent that they did, or should have, alerted the record owner to the adverse possession." *Id.*; *see also* Fife v. Andersen-Nielsen, No. A03-1990, 2004 WL 2094541 (Minn. Ct. App. Sept. 21, 2004) (finding that affirmative acts to maintain natural state of woods qualified as "use" for adverse-possession purposes).

41. Sprankling wondered, "What justifies these results?" Sprankling, *supra* note 33, at 816.

> *A*, the owner of 260 acres of wild forest land, loses title to a claimant who hunts on the land and sometimes cuts a few trees. *B*, the owner of a large gravel bar, loses title to a claimant who occasionally fishes on the land and removes sand and gravel. *C*, the owner of sixty-three acres of unfenced natural grassland, loses title to claimants who sometimes graze sheep and cattle on the property.

Id. (citing Kroulik v. Knuppel, 634 P.2d 1027, 1029 (Colo. App. 1981); Quarles v. Arcega, 841 P.2d 550, 561 (N.M. Ct. App. 1992); Goff v. Shultis, 257 N.E.2d 882, 885 (N.Y. Ct. App. 1970)). Sprankling concluded that they were justified only by the lingering pro-development bias in the law of adverse possession, and were unjustified in the modern context. *Id.* The abandonment-and-recapture model advanced here provides a different potential answer. If the original owners really had abandoned the property, or if their monitoring of their claimed conserving uses were so cursory as to render the claims pretextual, then the courts' recognitions of adverse possession in these instances may have been justified on those grounds. If, on the other hand, the potentially adverse-possessing uses were fleeting, minimal, or sporadic in ways that did not undermine the intended uses of the property by the owner and thus would not have been caught by monitoring sufficient to preserve those uses, then the adverse-possession awards in these cases were inappropriate under the abandonment-and-recapture model as well.

Additionally, Sprankling suggested that continued payment of taxes by a non-using owner should be treated as definitive proof that the owner intends a conservational use, thus pretermitting adverse-possession claims. *Id.* at 876. Payment of taxes should of course provide *some* evidence of non-abandonment in the conservation-lands context, just as it does in any other land context. Mere payment of taxes, however, will do nothing to preserve the lands in actual preservational forms, and thus should not obviate the owner's obligation to monitor to ensure continuing conservational status. Moreover, a failure of anyone to pay taxes results in escheat to the state, not in transfer to the adverse possessor, and as has been discussed *supra* note 30 and accompanying text, the successful adverse possessor, whether of productive or preserved property, affirmatively merits award of the property adversely possessed.

how incompletely other explanations fill that role, it is surprising that it has not been posited before. An explanation may lie in the fact that it has been an axiom of the common law that "land cannot be abandoned,"[42] and that, even if it could, abandonment requires intent.[43] There seldom follows, however, any explanation of why land cannot be abandoned, nor abandonment be constructive. It appears that the only justification for the non-abandonment axiom arises from long-defunct feudal considerations.[44] Owners have certainly *effectively* abandoned real property regularly in American history, a fact perhaps most dramatically observed in the skeletal remains of resource-rush centers turned into ghost towns.[45] Formally recognizing such abandonment would, as suggested above, do no more than return the property abandoned to the legal state of nature, surely no stranger to American law either. As for the intent requirement, American law regularly employs the legal fiction of constructive intent, which arises when "an act leading to the result could have been reasonably expected to cause that result."[46] Such constructive intent allows the law to, for instance, impute constructive contracts "created by law for the sake of justice" rather than as a

42. *See, e.g.*, Pascoag Reservoir & Dam v. Rhode Island, 217 F. Supp. 2d 206, 225 (D.R.I. 2002) (asserting, without explanation or support, that "[l]and cannot be abandoned"); Picken v. Richardson, 77 A.2d 191, 194 (Me. 1950) (noting that "a perfect legal title cannot be lost by abandonment"); 1 AM. JUR. 2D *Abandoned, Lost and Unclaimed Property* § 5 (2005) (stating that "title to real estate is not lost by abandonment unless abandonment is accompanied by circumstances of estoppel and limitation" (citing Maroney v. City of Malvern, 899 S.W.2d 476 (Ark. 1995))); *see also* James C. Roberton, *Recent Development—Abandonment of Mineral Rights*, 21 STAN. L. REV. 1227 (1969) (confirming the rule and discussing its origins and purposes).

43. Bruner v. Geneva Cnty. Forestry Dept., 865 So.2d 1167, 1172 (Ala. 2003) (quoting Johnson v. Northpointe Apartments, 744 So.2d 899 (Ala. 1999)); Griffis v. Davidson Cnty. Metro. Gov't, 164 S.W.3d 267, 278–79 (Tenn. 2005); 1 AM. JUR. 2D *Abandoned, Lost and Unclaimed Property* § 9 (2005) (citing Kitchen v. Wachovia Bank & Trust Co., N.A., 260 S.E.2d 772 (N.C. Ct. App. 1979)).

44. *See* Roberton, *supra* note 42, at 1228 n.13 ("[The only function of the policy against abandonment] was to protect a certain political relationship of the feudal system that is no longer in existence. The services, or incidents, that a tenant was required to perform for his lord were not personal obligations, but obligations that ran with the land. The rule against abandonment . . . was designed to protect the lord by ensuring that he would always have a tenant to whom he could look for performance of the incidents." (internal citations omitted)).

45. *See, e.g.*, DENNIS DRABELLE, MILE HIGH FEVER: SILVER MINES, BOOM TOWNS AND HIGH LIVING ON THE COMSTOCK LODE (2009); *see also* Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 241 (2006) (noting mass abandonment of privately owned buildings in New York City in the 1970s and 1980s.).

46. BLACK'S LAW DICTIONARY 881 (9th ed. 2009); *see also* Dirks v. Union Savings Ass'n, 168 N.W. 578, 579 (S.D. 1918) (stating that the law imputes constructive intent to defraud creditors from an act of giving a gift when knowingly insolvent).

result of parties' intent.[47] The case is the same with regard to adverse possession; the law constructively imputes abandonment when the record owner's behavior over a long period shows a complete disregard for scarce property consistent with a conclusion of abandonment, and the imputation avoids the dual injustices of allowing the record owner's disregard to remove the scarce resource permanently from the available property pool and of failing to reward the intrepid trespasser who has identified the disregard and has returned the property to the pool, whether for productive or conservational uses.

A presumption of non-abandonment, and a refusal ever to impute abandonment, makes sense in the context of vessels and cargoes lost at sea, where duress can confidently be expected to explain and justify an owner's leaving her property behind.[48] Abandonment of immobile real property on dry land presents a wholly different profile, and justifies the reverse presumption after a long period of total neglect, particularly in light of the generous tolling provisions recognized above.[49]

Any lingering concerns about the advisability of introducing a concept of constructive abandonment of real property as a prong of and partial justification for adverse possession might be allayed by assurances that constructive abandonment will have no power outside of the adverse-possession context, where, after all, the concept serves not to increase *functional* abandonment, but rather to thwart it. Such would at all events be the practical result of the abandonment-and-recapture theory, even without a formal declaration, as nothing but continuing trespass and possession would have the power to demonstrate the complete neglect necessary to justify a declaration of constructive abandonment.

II. BURYING NULLUM TEMPUS OCCURRIT REGI

Another old chestnut thought to define and delimit adverse-possession doctrine, oft recited but too seldom examined, holds that one may not adversely possess against the government. The justification for this rule is given in the Latin, *nullum tempus occurrit*

47. BLACK'S LAW DICTIONARY 370 (9th ed. 2009); *see, e.g.*, Cnty. Comm'r of Caroline Cnty. v. J. Roland Dashiell & Sons, Inc., 747 A.2d 600, 606 (Md. 2000).

48. *See, e.g.*, Hener v. United States, 525 F. Supp. 350, 355–58 (S.D.N.Y. 1981).

49. *See* sources cited *supra* note 31 (noting various tolling provisions included in the doctrine of adverse possession).

regi, meaning "time does not run against the king."[50] The tenacity of this hoary old Latin tag in the adverse-possession context is difficult to justify, given its general obsolescence and invalidity. Whatever the cause of its survival, however, the time has come to abandon the maxim and to render government (or for government to render itself) amenable to adverse possession—not just in its formal property holdings, but in its acts and regulations that impinge upon citizens' property and liberty interests.[51] The notion that *nullum tempus* actually preserves, in practice, "public rights, revenues and property from injury and loss" turns out to be false in important ways. In fact, as will be discussed below, the maxim protects inefficient or malign officials and incongruous public policies and programs from the bracing and clarifying effects that adverse-possession doctrine provides. Likewise, the notion that government land holding is, either theoretically or practically, different from non-government landholding in ways that justify specially exempting government from adverse-possession doctrine is also wrong.

A. An Unjustifiable Remnant of an Abandoned Theory of Governance

Nullum tempus arose and proceeds as a "vestigial survival of the prerogative of the Crown."[52] It has been justified in this country not on those grounds, but on grounds of public policy. "The true reason," Justice Story explained in 1821, "the law has determined, that there can be no negligence or laches imputed to the crown, and, therefore, no delay should bar its right [is] the great public policy of preserving the public rights, revenues, and property from injury and loss, by the negligence of public officers."[53] This public-policy argument, though, has grown stale, and was largely abandoned in the twentieth century. Time (in the form of statutes of limitations) runs against the king's more constrained successor, the modern liberal state, regularly. Some statutes of limitations, such as those that bar tardy criminal prosecution of most offenses, run *only*

50. BLACK'S LAW DICTIONARY 1068 (6th ed. 1990). In the American context, it sometimes goes by the alias of *nullum tempus occurrit reipublicae. See, e.g.*, Evans v. Erie Cnty., 66 Pa. 222 (1870); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1251 (1950). The most recent addition of BLACK'S LAW DICTIONARY, in fact, includes an entry for the *reipublicae* form but not for the traditional *regi* form. BLACK'S LAW DICTIONARY 1173 (9th ed. 2009).

51. *See generally infra* Section III (discussing public adverse possession of property and liberty interests taken by government restriction).

52. Guar. Trust Co. v. United States, 304 U.S. 126, 132 (1938) (citations omitted).

53. United States v. Hoar, 26 F. Cas. 329, 330 (C.C. Mass. 1821).

against government.[54] *Nullum tempus*' first cousin, the sovereign-immunity doctrine,[55] has likewise been surrendered by modern governments in the context of contract and tort suits,[56] and even with regard to suits contesting title to land.[57] At the state and municipal level, the absolute bar against adverse possession against the government has itself begun to wear away, even if only tentatively.[58] These withdrawals from the notion that the government might never be charged with its errors or neglect, or those of its officers, progressed—often expressly[59]—in recognition of the fact that *nullum tempus* arose in aid of a bygone theory of government, one contrary to modern usages.[60]

The remaining vestige of *nullum tempus*, the one that hangs on to justify excluding government from the adverse-possession doc-

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54. *See Developments in the Law*, *supra* note 50, at 1252.

55. *See, e.g.*, Sigmund D. Schutz, *Time to Reconsider* Nullum Tempus Occurrit Regi—*The Applicability of Statutes of Limitations Against the State of Maine in Civil Actions*, 55 ME. L. REV. 373, 382–84 (2003) (reviewing the shared historic roots of *nullum tempus* and sovereign immunity).

56. *See, e.g.*, Federal Tort Claims Act, ch. 646, 62 Stat. 933 (1948) (current version at 28 U.S.C. § 1346(b) (2006)) (providing for U.S. government waiver of sovereign immunity in tort suits); Tucker Act, ch. 359, 24 Stat. 505 (1887) (providing for U.S. government waiver of sovereign immunity in contract suits).

57. Quiet Title Act, Pub. L. No. 92-562, 86 Stat. 1176 (1972) (codified at 28 U.S.C. §§ 1346(f), 1402(d), 2409a) (providing for U.S. government waiver of sovereign immunity in land-title disputes).

58. Professor Latovick catalogued various state approaches to adverse possession, and their deviations from strict application of *nullum tempus*, in Latovick, *supra* note 12, at 945–78. *See also* Risch, *supra* note 39. Latovick ultimately advised states against allowing adverse possession of state property. Her support for this position, along with that of other opponents of retiring *nullum tempus* in the adverse-possession context, are considered *infra* notes 61–72, 102–03 and accompanying text. This Article does not, except incidentally, consider the contours of individual states' exceptions to the *nullum tempus* bar to adverse possession against government; instead it argues that the bar should be lifted entirely.

59. Senator Frank Church, who introduced the original version of the Quiet Title Act, explained the incongruity of sovereign immunity in a polity "where the courts are established, not for the convenience of the sovereign, but to serve the people." 117 CONG. REC. 549 (1971), *quoted in* Carlton Wayne Washington, Block v. North Dakota Ex Rel. Board of University and School Lands: *A Restrictive Interpretation of the Quiet Title Act*, 33 CATH. U. L. REV. 773, 784 (1984); *see also* Shootman v. Dep't of Transp. 926 P.2d 1200, 1206 (Colo. 1996) ("Having abrogated sovereign immunity [in *Evans v. County of El Paso*, 482 P.2d 968 (Colo. 1971)], and having recognized that *nullum tempus* is simply an aspect of sovereign immunity, we have supplied the reasoning that leads directly to our conclusion today that the doctrine of *nullum tempus* no longer applies to the State."); Evans v. Cnty. of El Paso, 482 P.2d 968, 969–70 (Colo. 1971) (summarizing state-court cases overturning sovereign immunity, concluding that "[t]he monarchical philosophies invented to solve the marital problems of Henry VIII are not sufficient justification for the denial of the right of recovery against the government in today's society"), *superseded by statute.*

60. *See, e.g.*, Devins v. Borough of Bogota, 592 A.2d 199, 202 (N.J. 1991) ("A second reason [for *nullum tempus*] was that the king established his own rules for litigation." (citing Note, *State's Immunity to the Statute of Limitations*, 38 ILL. L. REV. 418, 419 (1944))); *Developments in the Law*, *supra* note 50, at 1252–53.

trine, runs thus: governments are big and complicated; they own much land; their employees are not always earnest and diligent; and should the structure of government or the quality of its employees result in inattention to government property over the statutory period, "the public (for whom the government holds the land) should not suffer from the negligence or inattention of government agents."[61]

In a world in which *nullum tempus* has otherwise broadly been abandoned, however, this assertion makes little sense. Why should the public enjoy special protection against the effects of incompetent or venal employees in the context of preserving public lands, but not in the seemingly much more serious context of criminal prosecution?[62] A failure in the former context costs government (and the people) nothing more than money. Were government to lose some item of property to adverse possession, it could of course repurchase the property, even over the adverse possessor's objections, using the eminent-domain power. A similar failure in the criminal-prosecution context, however, costs the public the threat of an untried and potentially guilty and dangerous criminal mingling among them unchastened. Abandonment of *nullum tempus* would seem much less problematic in the adverse-possession than in the criminal-prosecution context. And given that the public's acquiescence in government employment of the incompetent, the inefficient, or the venal will *always*, more or less by definition, cost the public both wasted tax money and inferior public service, it is difficult to see how the losses occasioned by application of adverse possession to government would be in any way unique.

In fact, the public should demand application of adverse possession to its government servants in part as an early-warning system of government failure and as a means of inhibiting wasteful government capture and disuse of property that could be put to more efficient use or more effective conservation in private hands. As noted above, *all* laxity or misfeasance by government servants will harm the public good. Much of it, however, proves difficult for the

61. Latovick, *supra* note 12, at 943–44; *see also* Latovick, *supra* note 36, at 488–89; *Developments in the Law*, *supra* note 61, at 1251–52 (stating common objection); Andrew T. Fede, *The Clock is Ticking: Why the Courts or the Legislature Should Prohibit Adverse Possession and Easement by Prescription Claims in Municipal Land*, N.J. LAW. MAG., Oct. 2007, at 61 ("[G]overnmental inaction coupled with the mere passage of time should not cause a transfer of ownership or other rights in public lands to third parties without the payment of just compensation to the public.").

62. *Cf.* N.J. Educ. Facilities Auth. v. Gruzen P'ship, 592 A.2d 559, 561 (N.J. 1991); *Developments in the Law*, *supra* note 50, at 1252 ("[T]he argument that the rigors of statutes of limitations should not be applied to overworked government officials is difficult to square with the universal limitations on the government's taxing and penal functions . . . .").

public to monitor, identify, prove, or understand.[63] Successful adverse-possession against government, however, would showcase, in easily understood and fairly attention-grabbing form, plain examples of significant government failure. Government officials need maintain only exceedingly minimal oversight in order to avoid losing public property. Successful adverse possession would demonstrate that they had failed to achieve this minimal level of competence. After property has been lost by adverse possession, the public can, of course, buy it back, and for the re-purchase price it has bought itself an early and clear warning that *something* in its management of its government has gone seriously wrong.

Though successful adverse possession against the government may result from the failure of individual public employees, its occurrence *despite* the competent and honest performance of public servants would point to a failure of policy—to the desire of the public and/or of government leaders for government to do more than the resources dedicated to government will permit. Such a policy failure will result in the government having too few resources to fulfill all of the obligations that attend its plans, thus leaving some duties undone. No doubt mismatches of this sort always exist to some extent. Where they are significant, however, they will result in significant waste and frustration. Consider, for instance, a town that holds large tracts of land at its borders, with elected officials promising, and the public expecting, that the land will be put to some specific purpose (say an industrial park or a conservation district). The elected officials have not sought, however, nor has the public granted, sufficient resources to achieve the stated purpose. This is bad enough. If the mismatch between expectations and resource-dedication (or government competence) grows so large that even monitoring against long-term trespassers proves impossible for the town government (or an unwarranted application of limited manpower), however, and continues for the whole of an adverse-possession period, then the expecta-

63. *See, e.g.*, Jonathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 290 (2002) ("[I]n the public sector, it is much more difficult to identify the constraints that deter politicians and bureaucrats from engaging in corrupt or selfish policies. Even worse, collective action problems, such as rational ignorance, cause citizens in democracies to tolerate poor governmental performance until it becomes rational for voters to displace the incumbents."). As Impert notes, though government competence and incompetence, and use or misuse or disuse of property, is as important to strong economic and social health as are private uses, government lacks many of the incentive and oversight structures that apply to corporations and non-profits, which have similar diffuse-ownership and managerial-oversight problems. Impert, *supra* note 38, at 464–65. Adverse possession provides some incentive for competence in planning and execution, and some cogent insight for the general public regarding significant property-management or resource-allocation failures.

tions/resources gap has effectively locked away the land in essentially permanent limbo. In such circumstances an outside intervention like adverse possession of the property will prove a long-term good for the community. The new possessor will be able to put the property to effective productive or conservational use, while the public will be awakened from its unrealistic expectations and free to move forward on a more coherent policy path.

A rather spectacular example of this phenomenon arises from New York City. By the mid-1990s the city held more than 2,000 vacant buildings, "including some 17,000 individual dwelling units that ha[d] been vacant for decades," many without the city's knowledge much less under its competent monitoring.[64] These vacant holdings became "magnet[s] for both the city's growing homeless population and drug dealers and vandals."[65] Where squatter communities took over in areas of the Lower East Side, however, these communities often "became thriving, freestanding communities of otherwise law-abiding citizens. . . . Those squatters often took buildings that were eyesores and public nuisances at best—and were often dire threats to public safety—and transformed them into clean, renovated, and functioning housing."[66]

Another argument against relinquishing *nullum tempus* in the adverse-possession context has been that whereas in the tort and contract context a continuation of sovereign immunity would result in government agents not being held liable for their wrongful acts, to the continuing detriment of injured parties, no such concerns arise with reference to adverse possession.[67] As will be considered further below,[68] these characteristics apply in the adverse-possession context as well. As in the cases of tort or contract breach, failure to apply the adverse-possession remedy upon termination of the statutory period would result in shielding government and its officers from the consequences of their errors in policy or administration, while depriving the would-be adverse possessor of an earned reward for serving a valuable public purpose.

64. Gardiner, *supra* note 16, at 144.

65. Duhl, *supra* note 45, at 242.

66. *Id.*; *see also* Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1123–25 (2007) (recounting New York's and Philadelphia's incompetence in dealing with these properties).

67. Latovick, *supra* note 36, at 488, 504.

68. See *infra* notes 91–95 and accompanying text (detailing the community-benefitting effects of trespass, occupation, and use by citizens on government-held property that would otherwise sit disused and effectively abandoned).

B. The Government-Only Exclusion from Adverse Possession Neither Theoretically nor Practically Justified, nor Equitable

The exclusion of government property from adverse possession fails on a second ground. An argument that would successfully defend the exclusion must demonstrate why government property holding will be uniquely damaged by the application of the doctrine in ways that non-government property holdings, subject to adverse possession, will not. The arguments of this type that have been proffered thus far fail that test.[69] Professor Latovick has asserted, for instance, that "as state resources become increasingly scarce," given increasing demands on the public fisc, "protecting state land from adverse possession by law is a relatively easy and inexpensive way to ensure that the state retains the land it has" without the expense of "monitoring [its] land [or] bringing ejectment actions to clear them."[70] As a period of declining budgets for government (and indeed for everything else) has surely returned, this concern might again have resonance—but for its failure to account for the true cost and effect of sequestering abandoned lands or other "increasingly scarce" property, be it owned by government or private parties. Increasing scarceness affects not just the state as owner, but all actual and potential property owners. The "increasing scarceness" of a type of property, or of property generally, *adds* to the value and importance of the transfer of property to entities

69. Impert, *supra* note 38. Impert reviewed various efforts in case law to justify government exemption from adverse-possession doctrine. In each case, he rightly found the explanations wanting, largely because the distinctions claimed were illusory. He noted, for instance, some courts' reliance on the claim that "[t]here can be no rightful permanent private possession of a public street. Its obstruction is a nuisance, punishable by indictment. Each day's continuance thereof is an indictable offense, and it follows, therefore, that no right to maintain it can be acquired by prescription." *Id.* at 453 (quoting BYRON K. ELLIOTT & WILLIAM F. ELLIOTT, A TREATISE ON THE LAW OF ROADS AND STREETS 968 (2d ed. 1900)); *see also* 3 JOHN F. DILLON, COMMENTARIES ON THE LAW OF MUNICIPAL CORPORATIONS § 1188, at 1889 (5th ed. 1911); Latovick, *supra* note 36, at 484 (quoting ELLIOTT & ELLIOT, *supra*) (citing Heddleston v. Hendricks, 40 N.E. 408, 410 (Ohio 1895)). But this does not follow. *Any* trespass that could lead to adverse possession will remain, up until the moment when new title is acquired, an actionable and potentially indictable offense. Similarly, though the ultimate interest in public property lies diffusely in the members of the public themselves, this distinction does nothing to differentiate public lands from private. The public has the final interest in public property, just as shareholders have the final interest in corporate property. In both instances, the diffuse interest holders employ managers to oversee their interests, and are bound by the managers' actions and by the quality of their stewardship. There is here no distinction by which to hold shareholders liable for picking incompetent managers, dedicating too few corporate resources to monitoring corporate property, or holding more property than can be monitored, while excusing the public from those same responsibilities. Latovick, *supra* note 36, at 485; Impert, *supra* note 38, at 459–61 (citing Commonwealth v. Alburger, 1 Whart. 469 (Pa. 1836)).

70. Latovick, *supra* note 12, at 975.

capable of effectively using or preserving the property. Similarly, it is most important that resources be used or conserved effectively and efficiently at times of economic hardship. To the extent that governments, because of declining resources, "will have fewer dollars for monitoring their land," they, like all other owners, will surely as well have fewer resources for using or preserving that land. It is precisely in these times that the need for adverse-possession against government, along with all other owners, is greatest, and the total social cost of excluding government from the rules of adverse possession is highest.[71]

Some states have defended the government exclusion by asserting that property dedicated to public use or trust is inalienable.[72] This argument initially seems a tautology: the property is untransferable because it is untransferable. At a deeper level, however, it presents a welter of confusion and incoherence. First, it confuses the *authority* to do something with the *ability* to do it. If a farmer gives his son the family cow with the injunction: "for heaven's sake, don't lose this cow, or do anything with it but sell it at market," then the son lacks the authority to trade the cow for magic beans, to let it wander off into the woods, or otherwise to disobey his instructions. He does not, however, lack the *ability* to do those things. Similarly, even if it is true that government officials lack permission to transfer public property, this prohibition says nothing about whether those same officials have the ability, by misfeasance or negligence, to ignore and thus potentially abandon public property to persistent trespassers, and thus lose the property by adverse possession; nor does it provide anything other than a conclusory assertion for excepting government, uniquely, from the adverse-possession process.

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71. *See, e.g.*, Risch, *supra* note 39, at 218 (considering economic advantages flowing from the transfer of land from effective-abandonment disuse by government to productive use by other land holders); Impert, *supra* note 38, at 465–67 (same). Latovick also argues that "[p]reventing adverse possession of state land . . . avoids confrontation with trespassers. The state is not forced to oust trespassers to protect its interest and thus can avoid the risks involved in ejectment actions." Latovick, *supra* note 12, at 975. This argument is incorrect unless the government has both *completely* and *perpetually* abandoned the trespassed property. If the abandonment has been something less than complete and perpetual, then the trespassers will still have to be ejected—just some significant time down the road, when the trespassers' and third-parties' expectations and reliance interests and sunk costs and legitimate claims to the property have flourished and multiplied. If, meanwhile, the abandonment *has been* both complete and perpetual, then no countervailing advantage can ever arise to compensate for the costs and injustices flowing from the government's refusal to permit the adverse-possession mechanisms to run.

72. *See* Latovick, *supra* note 36, at 483–84 (citing Montgomery Cnty. v. Maryland-Washington Metro. Dist., 96 A.2d 353, 357 (Md. 1953); Delmar W. Doddridge, *Distinction Between Governmental and Propriety Functions in Municipal Corporations*, 23 MICH. L. REV. 325, 332 (1925)).

Additionally, the justification is either pretextual or insupportable. It is pretextual if it means that government property "dedicated to public use" is inalienable, while other government property differently dedicated (held, for instance, in the government's proprietary capacity) is not—with government officials declaring which is which. (This is particularly true because, by definition, any land that has been trespassed and occupied long enough to have been rendered amenable to adverse possession will not actually have been used for any government or public purposes at all for quite some time.) It is unsupportable if it means that *all* government property is inalienable, or that no government official enjoys the power to alienate or re-designate any property once it has been dedicated to the public use. If either of these were so, the result would be ever-increasing concentration in public hands of property held without regard to current public need or resources, and without consideration of private-sector needs or abilities to make use of the permanently cloistered property.[73]

Nor do practical considerations about the government's relative ability to use or monitor its holdings, in this technological and bureaucratic age, successfully distinguish government property holdings from private, or provide a necessity justification for the government exclusion. This impracticability argument, perhaps the argument of oldest American pedigree, springs originally from *Lindsey v. Lessee of Miller*.[74] In that case a settler had moved onto land in the Ohio Territory in 1783, had it surveyed, and occupied it. The settler bore a land warrant issued by the Commonwealth of Virginia in recompense for service in the Virginia militia during the Revolutionary War.[75] The Court determined that the warrant could not grant title to the Ohio Territory land, thus leaving the

73. These objections apply in spades to claims that "land subject to a public trust may not be acquired by adverse possession, without regard to whether the land is alienable." Latovick, *supra* note 36, at 484 (citing Thurston v. City of Forest Park, 89 S.E.2d 509, 511 (Ga. 1955); Town of Chouteau v. Blankenship, 152 P.2d 379, 383 (Okla. 1944)). If property "subject to a public trust" is said *not* to be alienable, the analysis above applies directly. If, however, such property *is* alienable by public officials, then those officials have not only the ability but also the authority to remove the public-trust designation from the property. If officials have both the ability and the authority to change the designation of property by sale, then there arises no reason why they should be excused any changes in the designation of property that arise from their abandonment of that same property through adverse possession, particularly given the presumably heightened duty of careful monitoring and maintenance owed by such officials to specially designated "public-trust" property.

74. Lindsey v. Lessee of Miller, 31 U.S. 666 (1832).

75. *See id.* at 672 ("The defendants offered in evidence a patent issued by the commonwealth of Virginia, in March 1789, to Richard C. Anderson, for the same land, which was rejected by the court. They then gave in evidence an entry and survey of the land, made in January 1783, which were duly recorded on the 7th of April in the same year; and proved possession for upwards of thirty years.").

settler only an adverse-possession claim against a later claimant who enjoyed good title issued by the United States.[76] The Court rejected the notion that the settler's occupation could defeat the United States' ability to issue an original title to the property. It embraced the "well settled principle that the statute of limitations does not run against a state."[77] Its reasoning: if the statute, and thus adverse possession, applied, "the public domain would soon be appropriated by adventurers" because "it would be utterly impracticable, by the use of any power within the reach of the government, to prevent this result."[78]

This practical eighteenth- and nineteenth-century justification for retaining the regal trappings of *nullum tempus* to protect the frontier lands of the young American Republic has long since expired. In the first years of the Republic, the federal government owned some 230 million acres of frontier land,[79] more than 50% of the then-total area of the United States,[80] with the government land holdings soon to grow by another half-billion acres (to about 80% of the then-total[81]) in 1803 with the Louisiana Purchase.[82] Even before the purchase, a single trip from the seat of government at Philadelphia to the outer reaches of the 1800 Republic took weeks.[83] After the purchase, such a trip required the years-long efforts of the Louis & Clark expedition.[84] The technologies available for monitoring these vast tracks of undeveloped government property were little more than horsepower, shoe leather, and eyesight, and the manpower with which to undertake such efforts was equally limited; the

76. *See id.* at 670–73.

77. *Id.* at 673.

78. *Id.*

79. ERNEST C. BAYNARD, III, PUBLIC LAND LAW AND PROCEDURE § 1.3, at 4 (1986).

80. *Top 10 Nation-Building Real Estate Deals*, SMITHSONIAN MAGAZINE (Sept. 07, 2009), http://www.smithsonianmag.com/history-archaeology/Top-10-Nation-Building-Real-Estate-Deals.html (noting that from 1783 until 1803, the United States owned approximately 490,000 square miles of the 830,000 square-mile landmass of the United States).

81. BETSY A. CODY, CONG. RESEARCH SERV., 95–599 ENR, FEDERAL LAND MANAGEMENT AGENCIES: MANAGEMENT OF OUR NATION'S LANDS AND RESOURCES 1 (1995).

82. *See* BAYNARD, *supra* note 79, § 1.5, at 5–6.

83. As late as 1783 the journey from Boston to New York via stage coach took from a week to ten days, a much shorter distance on well-established roads. 3 THE UNITED STATES: ITS BEGINNINGS, PROGRESS AND MODERN DEVELOPMENT (Edwin Wiley ed., 1912). No significant East-West road was even begun until construction of the National Road began in 1806. James M. Rubenstein, *Roads*, *in* 7 DICTIONARY OF AMERICAN HISTORY 175–80 (Stanley I. Kutler, ed., 3d ed. 2003). The trip to the western boundary of the Republic was thus one largely over track, trail, and forestland from Philadelphia to Pittsburgh, and then down the Ohio to the junction with the Mississippi.

84. It took the expedition more than a year to travel merely from St. Louis to the continental divide, the western boundary of the Louisiana Purchase. The trip to the Pacific took approximately eighteen months. *See* JULIE FANSELOW, TRAVELING THE LEWIS AND CLARK TRAIL 290 (3d ed. 2003).

entire civilian workforce of the federal government numbered only 2000–4000.[85] The turn of the twenty-first century presented a radically different picture. The size of federal holdings had declined in absolute terms to about 650 million acres (about 28% of the country's surface area),[86] while the federal workforce had exploded to more than 2.7 million civilian personnel,[87] and travel time across the country had shrunk to a matter of hours. (State and municipal payrolls grew congruently over the period.[88]) Meanwhile, the means by which public servants could monitor government lands—photograph, video, and satellite technologies being just three—had multiplied, and the costs of such monitoring had plummeted.[89] In the years since the turn of the twenty-first century those monitoring tasks have become even easier and cheaper; any modern citizen can gain a bird's eye view of virtually any tract of land in the country simply by logging on to the universally available Google Earth, among other resources.[90]

Positing a modernized version of this argument, Professor Latovick has argued that municipal centers suffer a particular challenge in monitoring and effectively employing urban parcels seized for tax default.[91] The technological improvements that lessen the burden of monitoring in the countryside, though, have similar ameliorative effect in many urban contexts; Google Earth provides city views as well.[92] To the extent that the challenges of monitoring

85. R.A. BROWN, THE PRESIDENCY OF JOHN ADAMS 33 (1975) (estimating "apparently no more than two thousand" employees); FORREST MACDONALD, THE PRESIDENCY OF THOMAS JEFFERSON 34–35 (1976) (estimating around 4000 employees, including 3000 post office employees).

86. *See* CODY, *supra* note 81, at 1; *see also* ROBERT L. GLICKSMAN & GEORGE COGGINS, MODERN PUBLIC LAND LAW IN A NUTSHELL 1, 6–7 (2d ed. 2001).

87. *See* U.S. CENSUS BUREAU, FEDERAL GOVERNMENT CIVILIAN EMPLOYMENT BY FUNCTION: DECEMBER 2007 (2007), http://www2.census.gov/govs/apes/07fedfun.pdf. For total federal government employment figures from 1962 to 2008, see U.S. OFFICE OF PERSONNEL MGMT., TOTAL GOVERNMENT EMPLOYMENT SINCE 1962, http://www.opm.gov/feddata/HistoricalTables/TotalGovernmentSince1962.asp.

88. Though state and local payroll figures for 1800 are sketchy, current state payrolls exceed 5.2 million employees, while local governments employ more than 14 million employees. *See* U.S. CENSUS BUREAU, *supra* note 87. This represents approximately four times as many employees as there were Americans in 1800. *See* U.S. HOUSE OF REPRESENTATIVES, RETURN OF THE WHOLE NUMBER OF PERSONS WITHIN THE SEVERAL DISTRICTS OF THE UNITED STATES (1801), *available at* http://www2.census.gov/prod2/decennial/documents/1800-return-whole-number-of-persons.pdf.

89. *See, e.g.*, Stake, *supra* note 10, at 2446–48 (considering rapidly decreasing monitoring costs).

90. *See generally* GOOGLE EARTH, http://earth.google.com.

91. *See* Latovick, *supra* note 36, at 488.

92. *See generally* GOOGLE EARTH, *supra* note 90. Most of these images are one to three years old, well within the statutory period, and are updated regularly. *See Blurry or Outdated Imagery: Data and Imagery*, GOOGLE EARTH, http://earth.google.com/support/bin/answer.py?answer=21417 (last updated Oct. 13, 2010). The service provides those in charge

increase in urban environments, moreover, so too increase the need for non-negligent management of urban properties by their owners and the cost of owner negligence—whether the owners be government or private. The effective abandonment of a rural plot will not necessarily lead to the deterioration of the quality and value of surrounding land holdings. In higher-density settings, however, neglect of disused properties can lead to rapid diminishment of property values and safety in the surrounding communities.[93] Government failure to use, repair, sell, and even monitor urban properties for the whole of the statutory period could well devastate these communities, causing costs and losses to the general public every bit as relevant as those revenues lost to the fisc if the fall of *nullum tempus* were to result in adverse possession of those properties. It is far better for a community that its government's neglect of its property be mitigated by occupation by benign trespassers bent on maintaining the property, behaving like good citizens, and avoiding the attention of negligent or distracted public officials for the length of the statutory period. Trespassing and occupation by persons antithetical to the good order of the community, meanwhile, constitutes exactly the sort of danger likely to arise from long-term neglect of government property. Such trespassing will of course presumably force public expenditures on monitoring of the public property—but only remedially, after the damage to the neighborhood has occurred; a government too penurious or incompetent to respond to the misuse of government property even in these circumstances has no business owning such property for any period of time.[94] As for which type of trespassers

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of monitoring a practical, cost-effective, publicly available way to stay apprised of possible adverse-possession attempts. And, of course, access to Google hardly exhausts even the free, publicly available tools that government can access to use and monitor its property. *See, e.g.*, Brian Craig, *Online Satellite and Aerial Images: Issues and Analysis*, 83 N.D. L. REV. 547 (2007).

93. *See, e.g.*, RESEARCH FOR DEMOCRACY, BLIGHT FREE PHILADELPHIA: A PUBLIC-PRIVATE STRATEGY TO CREATE AND ENHANCE NEIGHBORHOOD VALUE 21–22 (2001), http://astro.temple.edu/~ashlay/blight.pdf; Ayse Can, *GIS and Spatial Analysis of Housing and Mortgage Markets*, 9 J. HOUSING RES. 61, 63–69 (1998), http://www.knowledgeplex.org/kp/text_document_summary/scholarly_article/relfiles/jhr_0901_can.pdf; *see also supra* notes 64–66 and accompanying text (discussing the neglect of government-owned buildings in New York City and re-conquest and revival by squatters).

94. A government that lacks the resources or competence to monitor and provide stewardship of public property even when such property has been actively occupied by trespassers who have violated the community's peace has abdicated its central obligation to ensure public safety. Its only acceptable option in such circumstances would be to transfer the property to the ownership of some entity capable of rendering it something other than a bastion of disorder. A government acts with similar, if less flagrant, improvidence if it owns so much more property than it is capable of managing that it cannot even identify its holdings. Latovick argues that municipalities should not be subject to adverse possession because "[i]n many cities the difficulty lies in *identifying all municipally owned parcels* and monitoring

are likely to appear: the potential to take title by adverse possession will provide incentives for the citizenly trespasser to invest time and effort in occupation of the property; the lack of such incentive will ensure that only those who have nothing to lose, and who plan to make no investments in the property or the community, will have any interest in invasion. This urban illustration, in fact, highlights the myriad and serious real-world costs of continued government abandonment of its responsibility for its properties, and of the positive contributions made by adverse possessors.[95]

Finally, while government continues, at least in part, to resist application of adverse-possession doctrine to its property holdings, it has shown no reluctance to apply the doctrine to private property for government benefit.[96] This lopsided application of the doctrine fails the simplest test of equity, and smacks not of a government of limited authority protecting the interests of its constitutive citizens, but of an independent plenary entity rigging the rules in its favor in order to snap up property for its own advantage and its own purposes.[97] The one-way application of the adverse-possession doc-

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those parcels to determine whether or not someone is encroaching." Latovick, *supra* note 36, at 489 (emphasis added); *see also id.* at 505–06 (noting potential value of overlooked parcels as also significant). Something has gone seriously awry if a government cannot even say what property it owns, and it has gone awry in a way that cannot help but seriously harm the public—most likely and most emphatically those portions of the public that have to live and work in the areas that receive the least public attention and investment. Adverse possession in such circumstances provides not an unacceptable encroachment on a competent government's turf, but a minimal check against profound and potentially debilitating government failure.

95. A companion argument is that government exemption from adverse possession must continue lest government efforts to preserve wild and conservation lands be jeopardized. This claim is subject both to the objections raised to general arguments for *nullum tempus* and to the critique of conservation-lands exceptions generally. *See supra* note 36–38. A government that fails minimally to steward "wild lands," in the face of continuous, open, notorious, and years-long trespass, has not achieved—or even fairly undertaken—an environmental purpose; its claim is pretextual. A government that genuinely wishes to achieve conserving use, but lacks the resources to provide necessary monitoring, acts responsibly and achieves its purpose not by holding onto land it can neither conserve nor even monitor, but rather by deeding that land to parties, such as conservation non-profits, with interests in conserving the land, and with their good intentions secured by legal vehicles such as conservation deeds or trusts. *See supra* note 38.

96. *See, e.g.*, Impert, *supra* note 38, at 468–69. In fact, the federal government has not even scrupled to apply adverse possession to state lands that passed to state title upon admission to the Union, overriding the state's own claims to sovereign immunity against such adverse possession. *See* Block v. North Dakota, 461 U.S. 273 (1983); Washington, *supra* note 59, at 775–77, 790–800 (discussing *Block*).

97. This fundamental theoretical injustice has predictable and practical justice-denying effects. *See, e.g.*, Sean D. Clarkson, *Breaking the Curse of Vermont's Phantom Roads*, VT. B.J., Winter 2004–2005, at 28, 30 (recounting the plight of home owners threatened with loss of property to the state on the basis of claims based on centuries-old and centuries-abandoned dedications of roadways to the state of Vermont). Clarkson notes that "though public highways may be established by dedication and acceptance [in Vermont], they may

trine seems particularly problematic and perverse in the United States in light of federal and state constitutional constraints against government taking of private property without just compensation, constraints under which private citizens do not labor.[98]

C. Abandonment & Recapture Theory and the Abolition of the Government Exclusion

Adverse possession of government property thus fits nicely within the abandonment-and-recapture framework articulated in Section I. When a government fails to perform even the most cursory monitoring of its property holdings over the statutory period, it has effectively abandoned that property. Whether the abandonment arises as a result of public-servant error, public-policy error, a mismatch between public perceptions and fiscal realities, or otherwise, the effect is to remove valuable and scarce resources from any effective use or conservation efforts and to place those resources in limbo. The public is necessarily badly served by such a development, even if the fault lies partly with the public. The adverse possessor, then, does the public a number of affirmative services. First, the adverse possessor's trespass and capture demonstrates to the public that something significant has gone wrong in either its or its servants design or administration of public priorities. Second, the adverse possessor's capture of the publicly abandoned property withdraws the property from limbo and returns it to the property stock. In most instances, the adverse possessor will keep her new-forged title to the property the public had abandoned and

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not be discontinued in the same or similar manner," resulting in "phantom roads" disused since the eighteenth century arising to cloud title and deprive owners of property. *Id.*

98. *See, e.g.*, Kimberly A. Selemba, *The Interplay Between Property Law and Constitutional Law: How the Government (Un)Constitutionally "Takes" Land Dirt Cheap*, 108 PENN ST. L. REV. 657 (2003) (concluding that compensation ought to flow to private parties whose lands pass to government authorities by the working of adverse possession). It is not clear that the best course would be to reverse the one-way application of the doctrine—to allow private entities to possess against government, but not to allow government to possess against private citizens. In fact, the internal logic of this Article suggests subjecting all owners to the consequences of their abandonment and the consequent claims of new possessors. Adverse possession *by* government, though, presents significant concerns in light of the takings-compensation obligations under which American governments work. In particular, any grant of authority permitting government to possess adversely against its citizens must be structured to avoid allowing government opportunistically to evade its compensation obligations simply by entering as trespasser and essentially daring property holders to eject it. Perhaps these concerns could be assuaged by requiring government to initiate compensation proceedings each time it trespasses or regulates in a way it reasonably concludes likely to give rise to a takings-compensation claim, and by tolling the adverse-possession period in all cases in which government fails to initiate such proceedings.

will put it to her own productive or conservational uses, thus (proportionally) invigorating the local economy or environment. In these cases, especially in circumstances in which the public claim has been long ignored and the private reliance upon settled expectations has been extensive, the result will do basic justice to all parties and will thwart opportunistic and improvident disruptions engineered by public officials in search of transitory accumulations to the public fisc.[99] In some instances, the public—shocked awake to its own or its servants' errors by the loss of the property—may determine that the uses for which the property had initially been held, though abandoned, must be recovered, and may therefore find itself re-purchasing the adversely possessed lands from the new owner so as to complete the long-forgotten purpose. In this hypothetical instance, the cost of condemnation will constitute the fee owed to the adverse possessor for exposing and effectively obliterating the policy or personnel problems that had so long stymied the property's intended public purpose.

Government, though, does not acquire only complete items of property. It also acquires from private individuals specific incidents and attributes of property ownership that constitute less than the whole interest in an item of property, as by zoning regulations. Similarly, it acquires liberty interests from individuals both by regulation and by civil and criminal statute. The next section considers whether, having swept aside the maxim of *nullum tempus* in the context of complete property interests, governments would advance the public interest and the cause of good government by introducing an analogue to adverse possession into its application and enforcement of laws and regulations that impinge upon citizens' property and liberty interests.

III. PUBLIC ADVERSE POSSESSION OF PROPERTY AND LIBERTY INTERESTS TAKEN BY GOVERNMENT RESTRICTION

As Section I demonstrates, the fundamental virtue of adverse possession is that it provides a practical means of identifying the effective abandonment of scarce resources, and awarding the abandoned resources to the parties who both demonstrated the abandonment and identified themselves as parties committed to returning the property to either productive or conservational uses.

99. *See, e.g.*, Clarkson, *supra* note 97, *passim* (discussing Vermont's attempts to seek forfeiture of private property based on public roads platted in the eighteenth century, which were soon-thereafter disused and forgotten).

Section II then considered the wisdom of freeing adverse-possession doctrine from the historical anomaly of *nullum tempus occurrit regi* and applying it to government-held property.

Acceptance of these propositions provides a basis for yet more valuable applications of the adverse-possession doctrine. In the modern state, vast government effort flows to the regulation of citizens' activities both business and personal. Each such restriction, whether regulatory or statutory, works a positive or negative restriction on citizens' property or liberty interests, even though it falls shy of the complete acquisition of any given article of property.

Since the founding of the Republic some theorists have embraced a concept of property broad enough to include such attributes of property ownership (which may be referred to as "property interests," as distinct from complete property ownership itself) and of individual liberty (i.e., liberty interests).[100] Many others hesitate to define property so broadly.[101] Whether directly or by analogy, however, an expanded conception of the doctrine of adverse possession can play a role in the monitoring, moderation, and mitigation of government acquisition of these property and liberty interests from its citizens quite similar to that played in the complete property-ownership context in the following manner. By passing enactments that restrict liberty or property interests, government arrogates those interests to itself. Having done so, it obliges itself to stop citizens from, as it were, trespassing on the interests that it has formally claimed as its own and from which it has excluded them. If government properly monitors the boundaries of its claim, and regularly "ejects" or prosecutes "trespassers" (in the form of citizens who violate the enactment by asserting their property or liberty interests), then government thereby fulsomely "uses" its restrictions, maintaining a viable claim to them. If, on the other hand, government fails to patrol the boundaries of some given restriction over an appropriate period, while citizens pervasively, openly, and

100. *See, e.g.*, James Madison, *Property*, NAT'L GAZETTE (Phila.), Mar. 29, 1792, *reprinted in* 1 THE FOUNDERS' CONSTITUTION 598 (Philip B. Kurland & Ralph Lerner eds., 1987) ("[Property] [i]n its larger and juster meaning . . . embraces every thing to which a man may attach a value and have a right; and *which leaves to every one else the like advantage.*"); John Martinez, *Wrongful Convictions as Rightful Takings: Protecting "Liberty-Property,"* 59 HASTINGS L.J. 515 (2008) (arguing that the inextricable link between liberty and property compels compensation in wrongful convictions); Loren A. Smith, *Life, Liberty & Whose Property?: An Essay on Property Rights*, 30 U. RICH. L. REV. 1055, 1056, 1063–64 (1996) (equating property rights with civil liberty).

101. *See, e.g.*, Steven Semeraro, *Sweet Land of Property?: The History, Symbols, Rhetoric, and Theory Behind the Ordering of the Rights of Liberty and Property in the Constitutional Lexicon*, 60 S.C. L. REV. 1, 7–9 (reviewing varying interpretations of the relationship between liberty and property interests).

notoriously trespass on government's claim to have restricted their access to the property or liberty interest, then government will have effectively abandoned its restriction, and thus its claim to the relevant property or liberty interests. As in the more traditional adverse-possession context, the abandoned interest then passes to the hands of the trespassers-turned-new-owners—in this case, the general public.

Significant benefit would flow from adapting adverse-possession doctrine in this manner. Along with the massive expansion of government personnel detailed above[102] has come a concomitant expansion of just the sort of restrictions of property and liberty interests that this adverse-possession expansion is designed to target. The Federal Register has famously grown to nearly 3 million pages;[103] the federal criminal code grows relentlessly and explosively;[104] state regimes have grown similarly.[105] Employing adverse-possession doctrine as a moderating influence, one capable of pruning back some of the more extravagant, unwieldy, or unintended—and at all events widely ignored—manifestations of this restrictive undergrowth, will result in a significant decrease in sporadically and haphazardly (if not willfully or maliciously) deployed government restrictions on citizens' behavior.[106]

This proposed expansion of the doctrine proves rather less radical than it may initially appear. A trespasser may already earn property interests less than that of complete ownership by means of prescription, which is essentially adverse possession of easements and related property interests in the use (but not the ownership) of land.[107] These easements can include easements of passage along

102. *See supra* notes 85–88 and accompanying text.

103. As of February 25, 2010, the Federal Register totaled more than 2.9 million pages excluding indices and "sections affected" lists. *See* OFFICE OF THE FEDERAL REGISTER, FEDERAL REGISTER PAGES PUBLISHED ANNUALLY (2008), http://www.llsdc.org/attachments/wysiwyg/544/fed-reg-pages.pdf.

104. *See, e.g.*, ABA, THE FEDERALIZATION OF CRIMINAL LAW 7–11 (1997) (indicating that nearly half of federal criminal statutes have been enacted in the past thirty years); William J. Stuntz, *The Pathological Politics of Criminal Law*, 100 MICH. L. REV. 505, 514 (2001) (noting that 183 federal offenses were included in the title on federal crimes in 1873, but that this figure rose to over one thousand by 2000, with total federal offenses estimated at over three thousand).

105. *See, e.g.*, Stuntz, *supra* note 104, at 513–14 (showing massive growth in state criminal codes); *see also* Darryl K. Brown, *Democracy and Decriminalization*, 86 TEX. L. REV. 223, 224 n.3 (2007) (cataloging articles demonstrating comprehensive criminalization of conduct).

106. *See infra* Part III.A (detailing burdens arising from inconsistent and arbitrary regulation); *infra* Part III.B (detailing the injustice arising from occasional prosecution of largely dormant criminal statutes).

107. *See generally* STOEBUCK & WHITMAN, *supra* note 1, § 8.7, at 451–57 (citing Truc v. Field, 169 N.E. 428 (Mass. 1930) (easements by prescription)). Prescriptive easements are earned not when "the claimant occupies or possesses the disseisee's land," as in adverse

certain strips of another's property (thus forbidding the property owner from foreclosing the route of passage); easements of light and air that flow in across another's property, or of view across another's property (thus forbidding the property owner from building in ways that obstruct the flow or the view); and related easements.[108] Conversely, underlying property owners can also adversely possess easement interests held by others in their property.[109] With *nullum tempus* retired, government will be subject to the adverse possession not only of complete property interests, but of easements and other use rights as well.

When private parties—and sometimes government—acquire such interests they do so by purchase or transfer of individual interests. Government, though, has an additional mechanism available to it. When a zoning authority restricts building to a certain height, or requires setbacks of a certain distance, or limits the footprint of building area permitted on a plot of land, it has essentially obtained for itself an easement in the underlying property to the extent of the restriction.[110] With *nullum tempus* swept away, it follows that easements taken in this manner should also be amenable to adverse possession by underlying property owners. The interesting question then becomes on whose behalf and by whose efforts this "regulatory" adverse possession should occur. If treated as an individual easement in every piece of property to which it applies, the zoning regulation should be amenable to defeat by each property owner for her own benefit; long disuse of the zoning-regulation-based easement by the government (i.e., abandonment), combined with active trespassing on the easement by an individual property owner (e.g., by building higher than the height restriction or in front of the set-back) over the prescriptive period would result in adverse possession by recapture of the easement (or the relevant portion thereof) by the trespassing underlying owner herself.

Zoning regulations are not, however, or are not only, individual easements in each affected piece of property. They are also general

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possession proper, but when "he makes some easement-like use of it . . . for the period of the statute of limitations," earning "rights that correspond to the nature of [the] use." *Id.* § 8.7, at 451.

108. *See id.* § 8.1, at 435 (easements for driveways, roads, rail lines, walkways, etc.); *see also* Thruston v. Minke, 32 Md. 487 (1870); Stanton v. T.L. Herbert & Sons, 211 S.W. 353 (Tenn. 1919) (negative easements).

109. *See, e.g.*, Rabinowitz v. Goldstein, 78 N.Y.S.2d 882, 883 (Sup. Ct. 1948).

110. Actually, zoning restrictions most resemble negative easements. *See* STOEBUCK & WHITMAN, *supra* note 1, § 8.1, at 439–40 (describing negative easements). "Easement" is used in the text for brevity's sake.

regulations designed to affect an entire class of property.[111] It might be argued, then, that the (or an additional) proper mechanism for the adverse possession of the property interests asserted by government through zoning restrictions would be adverse possession by the public on behalf of the public. In this model of adverse possession, broad, persistent and open violation of a restriction by the regulated public, coupled with administrative quiescence, would result in abandonment of the restriction by that authority and effective return of the property interest to the public against whom the restriction had previously applied.

This "group model" of regulatory adverse possession similarly proves less radical than it may initially seem. Adverse possession of property interests by the public as a result of collective activity already exists in American property law in the form of public prescriptive easements.[112] Moreover, the model would merely adopt and regularize waiver rules that have already developed in the context of "private zoning" (which arises, for example, in places such as subdivision developments)[113] for application to public zoning and related regulatory regimes.[114] (Adopting the individual model as well would regularize and provide a firm legal footing for equitable doctrines of estoppel and laches that have been applied intermittently in both public and private zoning contexts.[115]) The current state of the law in these areas, and its applicability as a foundation for the development of rules for adverse possession of property and liberty interests taken by government regulation, are addressed in Section III.A. below.

With regard to criminal statutes, meanwhile, this expansive vision of adverse possession both resembles and incorporates the insights of the doctrine of desuetude, by which courts may refuse

111. *See id.* § 9.11, at 575 (quoting Katobimar Realty Co. v. Webster, 118 A.2d 824 (N.J. 1955)).

112. *See generally* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.18 (2000) ("The public may acquire servitudes by . . . prescription. . . . [T]he right to use the servitude benefit extends to the public at large.").

113. *See infra* Part III.A.1 (discussing restrictive covenants and waiver doctrine as applied to restrictive-covenant enforcement).

114. Applying adverse possession to property interests acquired by government as a result of zoning regulations, and applying AP desuetude to liberty interests acquired as a result of criminal enactments, discussed *infra*, can together serve as a model for applying adverse possession to liberty or property interests acquired by government in regulatory contexts other than zoning, and would be consistent with Dean Calabresi's expansive vision of desuetude as a tool by which courts might force legislatures to reaffirm or abandon potentially obsolete legislation of all kinds. *See* GUIDO CALABRESI, A COMMON LAW FOR THE AGE OF STATUTES 163–66 (1982). Space does not permit explicit exploration of such additional applications in this Article, though.

115. *See infra* Part III.A.2 (discussing the individual model and concluding that it presents unique challenges best addressed in a separate forum).

to enforce (primarily criminal) statutes that prosecutors have long ignored in the face of pervasive public violation.[116] Desuetude, like adverse possession, rests on the recognition that interests can be abandoned by neglectful claimants and recaptured by assertive new possessors who had ostensibly been excluded from or denied the relevant interests.[117] Desuetude enjoys little modern application[118] despite widespread scholarly support,[119] largely because of concerns that its application would violate separation-of-powers requirements, discomfort with the indeterminate nature of the doctrine, and difficulty in finding a constitutional locale for it.[120] Developing an adverse-possession rationale and mechanism for desuetude significantly allays the relevant separation-of-powers concerns; provides a ready-made set of rules, structures, and precedent by which to govern desuetude; and de-constitutionalizes the process of declaring a governmental withdrawal of private liberty or property interests desuete. The history and content of the desuetude doctrine, previous attempts to locate the doctrine in American legal tradition, and the means, methods, effects, and benefits of locating desuetude in an expanded conception of adverse possession are considered in Section III.B.

A. "Regulatory" Adverse Possession

1. Disuse and Violation of Private-Zoning Provisions

Many communities, including subdivisions and condominium associations, established in recent decades have adopted covenant restrictions.[121] These covenant restrictions serve essentially as freely entered, contractually established zoning ordinances, setting community standards such as limits on the acceptable uses of property within the community (e.g., residential-use restrictions), minimum set-backs and separations, and building footprints and

116. *See infra* Part III.B.

117. *See infra* Part III.B.1.

118. *See* Note, *Desuetude*, 119 HARV. L. REV. 2209, 2211 (2006) (noting that at present "West Virginia alone recognizes desuetude as a valid defense" (citing Comm. on Legal Ethics v. Printz, 416 S.E.2d 720 (W. Va. 1992))).

119. *See infra* Part III.B.1.

120. *See infra* Part III.B.1.

121. *See* Jay M. Zitter, *Waiver of Right to Enforce Restrictive Covenant by Failure to Object to Other Violations*, 25 A.L.R.5TH 123 § 2[a] (1994). Private community restrictions have grown in popularity in recent decades, but are not a wholly recent development. Instances of covenant restrictions stretch back at least into the middle of the nineteenth century. *See, e.g.*, Hanna v. Am. Nat'l Bank & Trust Co., 639 N.E.2d 1326 (Ill. App. Ct. 1994) (acknowledging the creation of a restrictive covenant established in 1860).

outbuilding limitations.[122] When robustly enforced, these covenant restrictions receive wide judicial support, though courts tend to construe ambiguous provisions against the more restrictive and in favor of the freer use of the land.[123] When enforcement grows inconsistent or arbitrary, however, courts stand ready to deny further enforcement. If a community allows persistent and widespread violations of a specific covenant provision, courts will often find the community to have waived future enforcement of the restriction.[124] If a community allows a single violation to persist overlong, it may find itself unable to complain later under a laches theory.[125] If the specific parties complaining about a violation of a covenant condition have themselves acquiesced to other instances of that violation that were of similar scope and were similarly susceptible to their knowledge, they will often not be heard to complain on grounds of estoppel.[126]

These bars to enforcement arise in equity.[127] As is often the case in equity, the standards for applying the enforcement restrictions prove somewhat indeterminate and distinctly fact-based.[128] As a general matter, however, abandonment of a covenant restriction will be found when the restriction has been violated by a sizeable contingent of the community in ways available to the community's observation.[129] A course of violations will result in abandonment or waiver only of the specific restriction violated, and only to the general extent violated.[130] Thus, for instance, a community's acquiescence in intrusions of up to seven feet into a required 50-foot set-back worked an abandonment of the restriction only to the extent of the extant incursions.[131] It did not result in complete

122. Zitter, *supra* note 121, § 2[a].

123. 39 AM. JUR. 3D *Proof of Facts* § 4 (1994); *see also* Cordogan v. Union Nat'l Bank, 380 N.E.2d 1194 (Ill. App. Ct. 1978).

124. *See* Connelly v. Shafer, 837 S.W.2d 344 (Mo. Ct. App. 1992); 39 AM. JUR. 3D *Proof of Facts* § 16 (1996).

125. *See, e.g.*, City of Forth Worth v. Johnson, 388 S.W.2d 400, 403 (Tex. 1964).

126. *Connelly*, 837 S.W.2d at 347–48.

127. *See* 39 AM. JUR. 3D *Proof of Facts* § 1 (1996); Zitter, *supra* note 121, § 2[a]. *See generally* Preece Coal Co. v. Island Creek Coal Co., 111 F.3d 132 (6th Cir. 1997) (waiver, laches, and estoppel are equitable defenses); Maksym v. Loesch, 937 F.2d 1237, 1247–48 (7th Cir. 1991) (laches, generally).

128. *See* 39 AM. JUR. 3D *Proof of Facts* §§ 1, 4, 16 (1996); Zitter, *supra* note 121, § 2[a] at 144.

129. 39 AM. JUR. 3D *Proof of Facts* § 16 (citing Landen Farm Cmty. Servs. Ass'n v. Schube, 604 N.E.2d 235 (Ohio Ct. App. 1992)).

130. *See id.* §§ 16, 17.

131. *See* Hanna v. Am. Nat'l Bank & Trust Co., 639 N.E.2d 1326, 1329, 1333 (Ill. App. Ct. 1994) ("[E]very building on the south side of Deming . . . violates the 50 foot setback line from 5.61 feet to 6.78 feet. . . . A partial disregard of a building line restriction will not

abandonment of the restriction so as to allow the construction "flush to the sidewalk, with no setback remaining."[132] Nor did the community's acquiescence in the construction of some multiple-family dwellings in the subdivision, or in the zoning for business use of a single lot, result in the abandonment of the set-back restriction, or of all covenants generally.[133]

Zoning regulations have been subject to some of these bars to enforcement—but only some, and only sporadically. A zoning authority may find itself estopped from enforcing a zoning regulation when some particular and special act or omission of the authority has caused a property owner reasonably to rely on the act or omission when violating the zoning restriction.[134] It might also find its enforcement barred by laches when the enforcing authority has enjoyed knowledge of the relevant violation for an inordinately long period, and has failed to act to suppress the violation.[135] In general, though, the courts are wary of applying equity against government at all.[136] They make exceptions primarily when the zoning authority has made explicit assurances to a property owner upon which the owner has detrimentally relied, rather than in cases in which the property owner's claim arises from a demonstration of long-standing quiescence.[137] Importantly, courts have rejected claims that zoning authorities have waived their power to enforce by acquiescence and inaction in the face of violations.[138] They have similarly rejected any claim that authority or permission to violate long-unenforced zoning provision can arise as a matter of right.[139]

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necessarily operate as an abandonment of it altogether, where a material and beneficial part remains.").

132. *Id.* at 1327.

133. *See id.* at 1334–35.

134. *See* Hollywood Beach Hotel Co. v. City of Hollywood, 329 So. 2d 10, 15–16 (Fla. 1976); 25 AM. JUR. 3D *Proof of Facts* § 2 (1994).

135. 25 AM. JUR. 3D *Proof of Facts* §§ 2, 14 (1994); *cf.* Cannon v. City of Durham, 463 S.E.2d 272, 274 (N.C. Ct. App. 1995) (applying doctrine of laches to a citizen's suit challenging city's purchase of land and construction of a ballpark).

136. *See, e.g.*, Guar. Trust Co. v. United States, 304 U.S. 126, 132 (1938); Arthur E. Bonfield, *The Abrogation of Penal Statutes by Nonenforcement*, 49 IOWA L. REV. 389, 418 (1963) ("[I]t is [generally] said that an estoppel will not run against the state."); Mary V. Laitos, Danielle V. Smith & Amy E. Mang, *Equitable Defenses Against the Government in the Natural Resources and Environmental Law Context*, 17 PACE ENVTL. L. REV. 273 *passim* (2000). "[C]ourts are reluctant to allow the application of equitable defenses against the government when their application would defeat the public interest, even if the result confers an unfair advantage onto the government. . . . [C]ourts generally define the public interest very broadly, making it difficult to successfully prevail on these defenses against the government." *Id.* at 273–74 (footnotes omitted).

137. *Compare* 25 AM. JUR. 3D *Proof of Facts* § 2 (1994), *with id.* § 14.

138. *See id.* § 14.

139. *Id.* § 3.

Adoption of adverse-possession doctrine in the zoning-regulation context would fill these gaps. It would provide a mechanism by which waiver-like arguments could be raised against the regulating authority. As discussed above, non-enforcement of a restriction in the face of widespread, open violation would result in adverse-possession of the property interest (i.e., the right to violate the restriction free of zoning-board consequence) by the relevant regulated community, thus employing the power of the public prescriptive easement in the post-*nullum tempus* world.[140] It would also provide a legal (rather than merely an equitable) footing for waiver theory (and possibly for estoppel and laches theories as well, if the individual regulatory adverse-possession model were also adopted), resulting in more robust and more predictable restraints on enforcement following long periods of violation and non-enforcement. Finally, it would provide clear and reliable mechanics of enforcement by adopting the well-established elements and mechanisms of adverse possession.

2. The Mechanics of Regulatory Adverse Possession

As discussed above, the property interests government acquires by enacting zoning restrictions are essentially easements.[141] Adverse possession of easements and other use interests in property is called prescription,[142] and proceeds by elements slightly modified from those of standard adverse possession to fit the use-right context.[143] To find transfer of a property interest by prescription, courts look primarily for "actual, open, notorious [and] hostile . . . *use*" of the property interest; the "continuous" and "exclusive" elements have diminished and modified meanings consistent with the use-right objects of prescription.[144]

In the prescription context, the actual use required is use of the kind for which the easement will be established (or, alternatively, use which renders impossible an easement-holder's use of that easement).[145] Would-be adverse possessors of property interests that the government assumes by zoning restriction will show actual use

140. *See supra* note 112 and accompanying text (discussing the public adverse-possession model and the public prescriptive easement).

141. *See supra* note 110 and accompanying text (discussing the easement nature of zoning restrictions).

142. *See supra* note 112 and accompanying text (discussing prescription).

143. *See* STOEBUCK & WHITMAN, *supra* note 1, § 8.7, at 452, 455–56 (citing Confederated Salish & Kootenai Tribes v. Vulles, 437 F.2d 177 (9th Cir. 1971)).

144. *See id.*

145. *See id.* § 8.7, at 452–53.

of the restricted property interest by violating the restriction. Thus, for instance, an adverse possessor will actually use—or rather, trespass upon—a zoning restriction limiting building heights to thirty feet by building higher than that limit.

Open and notorious use leading to prescription is essentially the same as that leading to adverse-possession proper.[146] Most zoning violations will be open and notorious by nature, as with violations of set-back and height restrictions; only those which can be conducted without public visibility or public knowledge could pose any difficulty in this regard. Thus, for instance, while a violation of a single-family residence ordinance (setting aside the ordinance's potential constitutional problems[147]) might create no public edifice, it would be susceptible to public knowledge so long as the unrelated residents made no secret of their relationship or of their arrangements. If, however, the violation consisted of the installation of a forbidden septic system that the owners had installed in the dead of night, objection should arise on open-and-notorious grounds.

Hostility requires that the trespass occur without permission of the record owner.[148] In the zoning context, government has made itself the record owner of the negative easements in question by prescribing the underlying property owners' otherwise legal and practical uses of their property. Hostility to the record owner, then, requires actual *violation* of the zoning-restriction-created easement. Securing a variance or other formal legal sanction will foreclose hostility. Securing a zoning permit that conforms to the restrictions, however, and then building beyond the permission granted, or obtaining a permit that authorizes building in excess of the zoning regulations would both constitute hostility.

The exclusivity requirement is substantially relaxed in the prescriptive context. The trespassing user need show only that uses by others, including the record owner, do not interfere with the trespasser's own actual use.[149] Prescriptive continuity is likewise relaxed; it requires only "frequency of use . . . normal for the kind of easement claimed."[150] Zoning violations that create a permanent structure or physical feature—violations of height restrictions and set-backs, for instance—or that constitute a continuing feature,

146. *See id.* § 8.7, at 456.

147. *See id.* § 9.7, at 552–54 (citing Vill. of Belle Terre v. Boraas, 416 U.S. 1 (1974)).

148. *See id.* § 8.7, at 453 (citing Rettig v. Kallevig, 936 P.2d 807 (Mont. 1997)).

149. *See id.* § 8.7, at 455 (citing Fowler v. Matthews, 204 S.W.2d 80 (Tex. Civ. App. 1947)).

150. *See id.* § 8.7, at 456 (citing Confederated Salish & Kootenai Tribes v. Vulles, 437 F.2d 177 (9th Cir. 1971)).

such as on-going violations of use restrictions, should quickly satisfy these elements.

Because adverse possession of property interests restricted by zoning and other regulation so closely resembles prescription, the adverse-possession periods employed by each jurisdiction in the prescriptive-easement context can be adopted in the prescription-against-zoning setting. Successful prescription would require complete non-enforcement during the prescriptive period.

As noted above, the core value of integration of adverse-possession theory into zoning regulation lies in its power to disable future enforcement of regulations that the public has roundly disobeyed and the enforcement authorities have effectively abandoned. As discussed, this public model closely resembles (or, argua-arguably, is even a form of) a public prescriptive easement,[151] and creates a mechanism largely similar to (but significantly more structured than) waiver and abandonment in the private-zoning context.[152] As a result, the public model can draw extensively from both of these sources. They provide a guide in answering questions about the scope of the interest that should properly be adversely possessed through the public process. When private zoning provisions are waived, they are not waived completely; they are only waived to the extent they have been violated and unenforced.[153] Public prescriptive easements create, at least in the wiser jurisdictions, public-use rights limited to the actual uses and degree of use to which the public has put the property without the owners' objection.[154]

These rules provide sound guidelines for the public regulatory adverse-possession model. Qualifying violations of a restriction should bar enforcement of the restriction only to the extent of those qualifying violations. Conversely, enforcement of a restriction should serve to disrupt a continuing pattern of violation only with regard to the type or magnitude of violation enforced against. Thus, for instance, consistent qualifying violation of a 30-foot height restriction by five to ten feet should result in abandonment of the authority to enforce the height restriction up to a height of forty feet—not complete abandonment of the height restriction entirely. Likewise, a pattern of enforcement of a set-back regulation only against gross violations (e.g., violations of more than twenty feet) but of non-enforcement of lesser violations should

151. *See supra* note 112 and accompanying text.
152. *See generally supra* Part III.A.
153. *See supra* note 130 and accompanying text.
154. *See, e.g.*, RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 2.18 cmt. c (2000).

result in abandonment of the authority to enforce the restriction at those smaller distances; enforcement in certain specific circumstances should not bar adverse-possession of interests resulting from violations in materially different circumstances to which the authorities acquiesced throughout the prescriptive period.

The example of private-zoning waiver also provides useful content to answer the dilemma of how many qualifying violations must occur without objection throughout the prescriptive period before abandonment will be found. While those equitable determinations have established no fixed minimum quantity of violation, they have established that isolated or rare violations neither provide sufficient opportunity for the public to have demonstrated its general rejection of the regulatory stipulation nor give the authorities sufficient notice of general violation or opportunity to respond aggressively.[155] Enough violations would have to occur to demonstrate a general (though not necessarily complete) public disregard for the restriction and a manifest (though not necessarily conscious) disregard of the violations by the authorities.

This raises the question of the private model—whether individuals who violate property-interest-restricting regulations should be able to adversely possess the restricted property interest for themselves as a result of their solo violations. Some support for extending the doctrine to individual violations arises from the equitable doctrines of laches and estoppel—currently applied in both the public and private zoning contexts—which focus on individual rather than collective violations, and from the arguments from fundamental fairness that underlay those doctrines.[156] In the normal course of things, individuals can also adversely possess easements in their land held by others, including—but for *nullum tempus*—government.[157] Nevertheless, property interests that arise in government as a result of regulation differ fundamentally from property interests that arise in government as a result of purchase or other individual claim. The explicit purpose of regulation is to establish a generally applicable negative easement in the property of all members of a community, ostensibly for the reciprocal benefit of all burdened members of the community. Establishing a method of individual withdrawal from this structure (potentially, eventually) by right could seriously undermine the entire project. Moreover, it would open the door to malfeasance on the part of

155. *E.g.*, 39 AM. JUR. 3D *Proof of Facts* § 16 (1996) (citing Stephenson v. Perlitz, 537 S.W.2d 287 (Tex. Civ. App. 1976)).

156. *See, e.g.*, 25 AM. JUR. 3D *Proof of Facts* §§ 4, 14 (1994) (citing Perry v. State, 512 N.E.2d 841 (Ind. 1987)).

157. *See generally supra* Part II.

favoritism-seeking property owners and favoritism-granting officials who, for whatever inducement, prove willing to overlook some individual violations while enforcing against others, thus keeping the general property-interest restriction alive and applicable to the community at large. Any private model, therefore, would require significant additional safeguards and considerations to prove both equitable and just. While such safeguards may exist, and might render a private model viable and valuable, their discovery must await some later consideration.

B. Adverse-Possession-Based Desuetude

1. Desuetude Thus Far

The doctrine of desuetude holds, roughly, "that statutes may be abrogated not only by a vote of the legislator, but also by . . . the tacit consent of all."[158] In the modern context this has been taken to mean that "under some circumstances statutes may be abrogated or repealed by a long-continued failure to enforce them . . . in the face of a public disregard so prevalent and long established that one could deduce a custom of its nonobservance."[159] The doctrine's roots stretch back to the Code of Justinian,[160] and it has played a significant role in some civil-law traditions, especially that of Scotland.[161] However, its position within the common law has always proven problematic. In both English and American precedent, the doctrine has received occasional application,[162] amidst a general theme of suspicion and rejection.[163] The logic of English rejection is straight-forward, since "[t]he one fundamental dogma of English constitutional law is the absolute legislative sovereignty

158. JOHN CHIPMAN GRAY, THE NATURE AND SOURCES OF THE LAW 190 (2d ed. 1921) (quoting DIG. 1.3.32.1 (Julian, Digest 84)). *But see* Mark Peter Henriques, Note, *Desuetude and Declaratory Judgment: A New Challenge to Obsolete Laws*, 76 VA. L. REV. 1057, 1068 (1990) ("The definition of desuetude depends to some extent upon the author of the treatise or opinion.").

159. Bonfield, *supra* note 136, at 394, 396.

160. *See id.* at 395 (citing the DIGEST OF JUSTINIAN, the INSTITUTES OF JUSTINIAN, and the CODE OF JUSTINIAN as early examples of the doctrine).

161. *Id.* at 398–405 (detailing the doctrine's particular applicability in the German and Scottish legal traditions, as compared to other Continental and British legal systems where it has found less purchase).

162. *See id.* at 405–08, 423–28 (detailing applications of the doctrine in English legal history and in American legal history, respectively).

163. *See id.* at 409 (citing historical instances of the doctrine's disapproval as a basis for its rejection in modern British jurisprudence). For an extended discussion of the bases of American objection to the doctrine, see *infra* notes 188–215 and accompanying text.

or despotism of the King in Parliament."[164] Under the unwritten English constitution, no party or body has the power to disregard a parliamentary pronouncement on any grounds.[165]

In the United States, of course, the constitutional system is complicated by co-equal branches and the separation of powers, rendering the objections to desuetude here more varied and perhaps more confused. American courts now unquestionably enjoy at least one arena in which they, unlike their English peers, can "make rules which override or derogate from" legislative acts,[166] by way of judicial review to vindicate constitutional imperatives. This perhaps explains why many scholarly defenders of desuetude have sought to ground the doctrine in the Due Process and/or Equal Protection Clauses, thus constitutionalizing it.[167]

These scholars' attempts to find a place in the American legal system for desuetude spring from basic considerations of justice and fairness.

> First, a very long-continued and well-settled failure to enforce a widely-ignored statute is as much a positive expression of public policy as would be its express legislative abrogation. The reason for this is that such a protracted course of administrative conduct must at least reflect the electorate's acquiescence to the provision's demise as effective law. Otherwise, the politically responsive administrators of our penal laws would have suffered—over such an appreciable period—the consequences of their long disregard of public preference. Second, when the community has acquiesced in an enactment's long-continued administrative nullification by not

164. A.V. DICEY, LAW OF THE CONSTITUTION 145 (10th ed. 1959), *quoted in* Bonfield, *supra* note 136, at 409. Of course, this justification sounds antiquated to modern American ears, and, not incidentally, smacks more than a little of the authoritarian worldview from which *nullum tempus* springs.

165. *Id.* at 40.

166. *Id.* (describing the English system of parliamentary supremacy).

167. *See, e.g.*, ALEXANDER M. BICKEL, THE LEAST DANGEROUS BRANCH 143–56 (2d ed. 1986) (discussing desuetude in the context of the constitutional void-for-vagueness doctrine); Bonfield, *supra* note 136, at 409–18 (reviewing the connection between desuetude and the equal protection and due process doctrines); Corey R. Chivers, *Desuetude, Due Process and the Scarlet Letter Revisited*, 1992 UTAH L. REV. 449, 463–65 (1992) (locating desuetude in the Due Process Clause); William J. Stuntz, *Substance, Process and the Civil-Criminal Line*, 7 J. CONTEMP. LEGAL ISSUES 1, 34–38 (1996) [hereinafter Stuntz, *Civil-Criminal*] (locating a constitutional doctrine of desuetude in substantive and procedural due process considerations, and comparing it to a fundamental-rights/privacy inquiry); Stuntz, *supra* note 104, at 592 ("A constitutionalized desuetude doctrine would ... make criminal law and criminal adjudication more transparent ... and hence more lawlike."); Cass R. Sunstein, *What Did* Lawrence *Hold? Of Autonomy, Desuetude, Sexuality, and Marriage*, 2003 SUP. CT. REV. 27 *passim* (2003) (discussing the relationship between desuetude and procedural due-process theory).

> terminating it, the provision disappears as law in any meaningful sense. It is neither observed nor enforced, and is virtually eradicated from the legal consciousness of the body politic. "[T]he most casual conversation of the citizens reveals that such a statute is distinguished from, not confused with, other elements of the legal system."[168]

In fact, the failure to locate some rule of desuetude in the American system awards the executive branch an essentially plenary power to disrupt any citizen's liberty at any time. "Since almost anyone, or everyone, may have breached a desuet[e] enactment, an ever present ability to exhume and apply [such enactments] endows the enforcement agencies with unfettered power to persecute whomever they please for essentially unreviewable and most often unprovable reasons."[169]

Under these scholars' proposals, the desuetude doctrine is analogized to the constitutional void-for-vagueness doctrine,[170] in both its discretion-limiting and fair-notice obligations.[171] Some have also considered the opportunities for equal-protection-denying invidi-

168. Bonfield, *supra* note 136, at 391 (alteration in original) (footnotes omitted); *see also* BICKEL, *supra* note 167, at 147–48, 150–53 (summarizing concerns about the lack of notice provided by disused statutes, selective prosecution, and blackmail, and noting that a declaration of desuetude would press a deadlocked legislature to address restrictions no longer consistent with contemporary morality); MORTIMER R. KADISH & SANFORD H. KADISH, DISCRETION TO DISOBEY 130–31 (1973) (raising fairness and reliance considerations as support for the desuetude doctrine); Bonfield, *supra* note 136, at 392; Sunstein, *supra* note 167, at 49–50 (claiming that desuetude ensures "that unenforced laws [which] lack support in public convictions . . . may not be brought to bear, in what will inevitably be an unpredictable and essentially arbitrary way").

169. Bonfield, *supra* note 136, at 414; *see also* Kim Forde-Mazrui, *Ruling out the Rule of Law*, 60 VAND. L. REV. 1497, 1514 (2007) ("Because virtually everyone, acting conscientiously and reasonably, violates traffic laws every time they drive, an officer can identify a crime to justify a stop, search, interrogation, and arrest of virtually any motorist he chooses." (footnote omitted)); Linda Rodgers & William Rodgers, *Desuetude as a Defense*, 52 IOWA L. REV. 1, 5 (1966) (explaining that unenforced statutes "invite[] sporadic, discriminatory[,] . . . [u]neven and inadequate enforcement," which "is a certain formula for stimulating contempt for the legal order"); Stuntz, *Civil-Criminal*, *supra* note 167, at 35 ("By retaining prohibitions that once were real crimes but have since lapsed (without being repealed), the state can make a large portion of its citizenry criminals, giving police the ability to search or arrest whomever they wish and prosecutors the ability to charge or threaten whomever they wish."); Stuntz, *supra* note 104, at 592 ("[T]he unenforced crime's continued existence gives the government the same strategic power that all overbroad crimes give: the power to induce guilty pleas for other, more serious crimes that the government cannot prove.").

170. *See, e.g.*, BICKEL, *supra* note 167, at 149; Bonfield, *supra* note 136, at 412–18.

171. Bonfield, *supra* note 136, at 412–15. Professor Bonfield analogizes desuetude to "that line of due process and equal protection cases which declared statutes invalid because they invested an administrative authority with plenary power to fix the lawfulness or unlawfulness of defined particular conduct," and notes that "[t]he depth of the American commitment to the abrogation of enacted law by desuetude is perhaps best revealed by analogy to the due-process fair-notice or fair-warning cases." *Id.* at 412–13, 415.

ous discrimination that emanate from a mass of long-unenforced, routinely-flouted, yet unrepealed-and-still-enforceable directives.[172] Like the vagueness and notice rules, constitutional desuetude would find its situs somewhere in, among, or between the Due Process (substantive and/or procedural) and Equal Protection Clauses.[173]

The mechanics of constitutional desuetude are in many regards as amorphous as its exact textual location. Desuetude has occurred, according to the formulation of Professor Bonfield (who made a significant effort to formulate a constitutionally based American desuetude doctrine), when "the act's violation has repeatedly come to the notice of its administrators," without response being taken, so as to demonstrate "a clear and conscious administrative policy of total nonenforcement."[174] Additionally, "the administrative failure to apply the statute to sufficient breaches of its provisions must be know[n] or apparent to the community at which it is directed."[175] The executive's inaction must be "without exception and protracted enough to establish a reasonable public expectation that the conduct involved will no longer be punished."[176]

To this theoretical basis Bonfield added a number of content-specific, yet still nebulous, supplemental considerations. These included caveats that longer periods of nonenforcement would be necessary if "active political conflict over the acceptability of" nonenforcement accompanied the quiescence,[177] or if nonobservance of the provision were "less notorious and widespread,"[178] while "more notorious and widespread . . . nonobservance" would allow a "relatively shorter" period of nonenforcement to suffice.[179] Bonfield provided no metrics by which to determine the basic length

172. *See, e.g., id.* at 410–12 (discussing the difference between non-discriminatory exercise of prosecutorial discretion that passes muster under the Equal Protection Clause and discriminatory enforcement that does not).

173. Professor Sunstein would locate his American-style desuetude in procedural due process. *See* Sunstein, *supra* note 167, at 27. However, his formulation—desuete enforcement of constitutionally important interests—necessarily invokes fundamental-interest analysis that would force the inquiry well beyond pure procedural considerations. *Accord* Stuntz, *Civil-Criminal*, *supra* note 167, at 37 (comparing constitutional desuetude to fundamental-rights analysis, and substantive and procedural due-process analysis); *see also infra* notes 181–200, 208-216 and accompanying text (considering Professor Sunstein's "important constitutional interests").

174. Bonfield, *supra* note 136, at 419.

175. *Id.*

176. *Id.*

177. *Id.* at 420.

178. *Id.* at 421.

179. *Id.*

of abandonment required, no practical scale for making his relative adjustments, and no standard by which the relative notoriety of nonobservance could be judged.[180]

Similarly, Professor Sunstein, who has more recently attempted to discern a hidden application of desuetude in the *Lawrence v. Texas*[181] decision, suggests that "a distinctly American variation" of desuetude arises to inhibit prosecution "when constitutionally important interests are at stake . . . if [the] criminal prosecution is brought on the basis of moral judgments lacking public support, as exemplified by exceedingly rare enforcement activity."[182] He elucidated: "any use of desuetude" under his theory, should "be limited to certain interests that have a threshold of importance," and when "those interests are implicated, the state may not rely on a justification that has lost public support."[183] Sunstein recognized the need to be able to define, under his theory, "interests that have a threshold of importance,"[184] but failed to provide a means.[185] Other

180. In fairness, Bonfield's model did include some concrete specifics. Desuetude would be found, for instance, only if "[t]he nonenforcement [were] geographically congruent with that body politic under whose authority it was promulgated. . . . [A]n adequate failure to apply a state statute in several counties will not sufficiently deny fair warning of that law's vitality to residents of those counties or the rest of the state." *Id.* at 420. Similarly, Bonfield specified that "American penal statutes can be partially abrogated by desuetude either as to their separable provisions or applications," *id.* at 421, and that once a provision were judged desuete, re-enactment by the legislature would be required before the law could again be enforced, *id.* at 422.

181. 539 U.S. 558 (2003).

182. Sunstein, *supra* note 167, at 27–28.

183. *Id.* at 51 (footnote omitted).

184. *See id.* ("[W]e must have an antecedent way, to some extent independent of public convictions, to determine whether an interest has some kind of constitutional status.").

185. *See id.* Sunstein suggested that *Lawrence* best be understood as employing his "desuetude, American style," in that

> the *Lawrence* Court must have concluded that as a matter of principle, the right to engage in same-sex relations had a special status in light of the Court's precedents taken along with emerging public convictions—and that the moral arguments that supported the ban were no longer sufficient to justify it.

Id. at 51–52. As a definition or metric of "interests that have a threshold of importance," however, this formulation fails as part dodge, part bootstrap. It is a dodge insofar as it justifies current decisions about "importance" on previous, precedential determinations of importance without explaining or critiquing those determinations, or explaining the proper means of determining—or rejecting—legitimate descent from those precedents, or explaining why *that* list is both legitimate and complete. It is a bootstrap insofar as it bases the "importance" justification on emerging "public convictions," because the emerging public convictions are presumably themselves the cause of the exceedingly rare public enforcement that constitutes the desuetude prong of his important-interests-plus-desuete-enforcement formulation. *See id.* at 55–56. Sunstein in fact had a difficult time trying to describe the "important interest" that was, under his formulation, at stake in *Lawrence* itself. *See id.* at 60–72.

scholars have also proved vague about the mechanics of desuetude.[186]

Some of these scholars have in fact suggested that some U.S. Supreme Court decisions of recent decades are best understood as covert desuetude decisions,[187] but the Supreme Court has refused to embrace this position.[188] Rather, efforts to find a constitutional footing for the desuetude doctrine have met with little practical success and significant objection. Despite Professors Sunstein's, Bonfield's, and Bickel's claims that *Poe v. Ullman*[189] was "really" a desuetude decision, the plurality decision in that case never suggested that the underlying criminal statute (forbidding dissemination or use of contraceptive devices or information about contraception[190]) had grown unenforceable by long disuse. Rather, it refused to determine the constitutionality of the statute essentially because it predicted that Connecticut authorities would not, by "tacit agreement,"[191] exercise their still-extant authority to prosecute under the statute.[192] Even this suggestion, on discretionary grounds, of a mechanism vaguely reminiscent of desuetude drew from Justice Douglas a sharp exclamation in dissent that desuetude is "contrary to every principle of American or English common

186. *See, e.g.*, Stuntz, *Civil-Criminal*, *supra* note 167, at 37 ("Judges would have to make substantive judgments based not on any structured legal analysis but on their own normative intuitions."); Stuntz, *supra* note 104, at 597 ("[D]esuetude [is] probably not susceptible to detailed legal analysis. [The] doctrine[], if [it] ever exist[s], will likely be little more than an accumulation of seat-of-the-pants judgments by particular trial judges and appellate panels."). *See generally Desuetude*, *supra* note 118, at 2212–13 ("[T]here has not been a concerted effort in the American judicial system to craft a doctrinal approach to desuete statutes that can be broadly and easily applied. . . . This Note brackets these concerns for future scholars or, better still, for judges applying the doctrine, and focuses instead on the more abstract arguments for and against judicial abrogation of unenforced statutes.").

187. *See, e.g.*, BICKEL, *supra* note 167, at 154 ("There might have been nothing amiss in language a shade more explicit. . . . The consequence of the opinion, nevertheless, must be that a prosecution of persons situated as are [plaintiffs] would fail on the ground of desuetude."); Bonfield, *supra* note 136, at 436 (characterizing Poe v. Ullman, 367 U.S. 497 (1961), as a de facto constitutional-desuetude case); Sunstein, *supra* note 167 *passim*.

188. *Cf.* Bonfield, *supra* note 136, at 423–24 ("American courts seem to insist that a legislative enactment cannot be rendered ineffective by nonuse or obsolescence, nor repealed by the failure of those entrusted with its administration to enforce it." (internal quotation marks omitted)).

189. 367 U.S. 497 (1961) (Frankfurter, J., plurality).

190. *See id.* at 498.

191. *Id.* at 508.

192. *See id.* at 501–08; *see also id.* at 529–30 (Harlan, J., dissenting) ("I think both the plurality and concurring opinions confuse on this score the predictive likelihood that, had they not brought themselves to appellee's attention, he would not enforce the statute against them, with some entirely suppositious 'tacit agreement' not to prosecute, thereby ignoring the prosecutor's claim, asserted in these very proceedings, of a right, at his unbounded prosecutorial discretion, to enforce the statute."); *id.* at 535–36.

law."[193] Douglas' admonishment accorded with the Court's pronouncement in *District of Columbia v. John R. Thompson Co.*[194] that "[c]ases of hardship are put where criminal laws so long in disuse as to be no longer known to exist are enforced against innocent parties. But that condition does not bear on the continuing validity of the law; it is only an ameliorating factor in enforcement."[195]

The prospects for constitutional desuetude have not demonstrably brightened since those decisions. In *Griswold v. Connecticut*,[196] the culmination of the Connecticut contraceptive cases that began with *Poe v. Ullman*, Justice Douglas for the Court unsurprisingly gave no consideration to desuetude, instead declaring the enactment unconstitutional on substantive-due-process grounds.[197] And though Professor Sunstein argues that *Lawrence v. Texas*[198] may best be understood as an exposition of his "American-style" desuete enforcement of important constitutional interests,[199] the decision certainly never styled itself an exercise of desuetude doctrine, nor did the *Lawrence* Court's discussion adhere meaningfully to any coherent, recognizable vision of desuetude without labeling it as such.[200]

193. *Id.* at 511 (Douglas, J., dissenting).

194. 346 U.S. 100 (1953).

195. *Id.* at 117. This is a somewhat cryptic assertion. Does it suggest that, *as a matter of constitutional desuetude*, enforcement of long-disused statutes must be "ameliorated"? If so, to what extent and under what conditions? The opinion provides no further elucidation of the question. Rodgers & Rodgers read it to "suggest[] that mitigation of punishment is a salutary device for softening the impact of the application of an ancient statute." Rodgers & Rodgers, *supra* note 169, at 6.

196. 381 U.S. 479 (1965).

197. *See id.* at 481–86.

198. 539 U.S. 558 (2003).

199. Sunstein, *supra* note 167, at 27.

200. *See generally Lawrence*, 539 U.S. 558. As Sunstein recognized, the opinion was "remarkably opaque." Sunstein, *supra* note 167, at 29. The majority opinion explicitly declared itself to be basing its opinion on substantive due-process rather than equal-protection grounds. *See Lawrence*, 539 U.S. at 567, 573, 574–75. But it failed to indicate whether the decision was based on rational-basis review or some sort of heightened scrutiny. *See id.*; Sunstein, *supra* note 167, at 46. A simple desuetude decision could therefore have been very short indeed—but its effects would presumably have been limited to Texas. A simple-but-national desuetude decision would have required extensive review of the enforcement of anti-sodomy laws nationwide, but would not have required analysis of the substantiality of the liberty interest involved. Sunstein's "American-style" desuetude formulation, of course, requires desuetude + important interest, and would explain the efforts (however opaque) to find substantive-due-process grounding for the liberty interest involved. However, Sunstein's proposal cannot explain the Court's effort to establish the partial roll-back of sodomy laws despite its failure to establish an *absence* of nationwide *prosecutions* over a relevant period (or its failure to identify and defend the relevant desuetude period). Sunstein attempted to sketch a "desuetude-type rationale" in which "[a] law might fit with existing social values in one state, but those values might be rejected in the rest of the union," but recognized that "[c]ertainly the standard desuetude idea cannot be invoked in a state in which the law in question is actively enforced," and so limits his "emphasis . . . [to] the fact that in Texas

The impression that desuetude has no appropriate place in the American constitutional system does not stop at the Supreme Court level. Numerous additional courts have rejected the notion that desuetude can render current enforcement unconstitutional from long disuse. Most often, these objections "rest[] upon the proposition that the executive branch of government cannot nullify an act of the legislative branch by failure to enforce, any more than it can effect a repeal by direct fiat."[201]

In addition to lacking any fixed constitutional location or anything resembling even grudging or fleeting recognition from the Supreme Court or most lower courts, constitutional desuetude suffers as well from the amorphous character of its content.[202] As noted above, Professor Bonfield's constitutional desuetude lacks concrete standards; desuetude would occur when the disuse of a provision has demonstrated "clear and conscious administrative policy of total nonenforcement," and has been "protracted enough to establish a reasonable public expectation that the conduct involved will no longer be punished."[203] These standards, though, introduce significant difficulties inherent in "knowing" the hearts and minds of the administrators or the public.[204] Given prosecutorial interest in maintaining a sweeping remit, prosecutors will likely prove uniquely unwilling to admit that any quiescence in enforcement, however long, represents "a clear and conscious administrative policy of total nonenforcement," and hence an abandonment of their future discretion to enforce again.[205]

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itself, the sodomy statute, hardly ever enforced, created problems of both unpredictability and arbitrariness." Sunstein, *supra* note 167, at 54–55. In short, there is much in *Lawrence* that cannot be made to cohere under any recognizable theory of desuetude, even of desuetude + important interest.

201. John R. Thompson Co. v. Dist. of Columbia, 203 F.2d 579, 594 (D.C. Cir. 1953), *rev'd*, 539 U.S. 558 (2003); *see also* Bonfield, *supra* note 136, at 428–30 (detailing the generally negative state-court response to desuetude, and such courts' use of separation-of-powers-based arguments); Rodgers & Rodgers, *supra* note 169, at 2–4, 14–19 (describing American judicial quiescence in the face of enforcement of long-disused statutes, and common objections to the desuetude doctrine—particularly the claim that the desuetude doctrine would result in judicial intrusion into the legislative sphere).

202. *See, e.g.*, J.R. Philip, *Some Reflections on Desuetude*, 43 JURID. REV. 260, 266 (1931); Rodgers & Rodgers, *supra* note 169, at 29 (noting and objecting to the "perpetual uncertainty as to the rules" of desuetude that characterize Bonfield's and other desuetude proposals).

203. Bonfield, *supra* note 136, at 419.

204. *Cf.* Stuntz, *Civil-Criminal*, *supra* note 167, at 36 ("Separating strategic from nonstrategic arrests or prosecutions involves the same sort of inquiry as so-called 'pretext search' claims—it requires the court to look behind the formal charges to determine the government's motive, a hard thing to do successfully. That is one reason why pretext search doctrine exists only in law review articles; the cases routinely repudiate any inquiry into the reasons why the police searched or arrested.").

205. *Id.* ("[A]ny rule that turns on government motives encourages government officials to claim whatever motive is legally protected.").

Prosecutors would gain nothing, and lose power, by such an admission. Similarly, while it seems relatively easy to demonstrate a significant train of violation of any given enactment, difficulties of proof are multiplied extensively if a declaration of desuetude hinges not only on demonstrations of objective acts of multiple violation, but on establishment of the subjective, plural, large-group recognition of the desuetude of an individual statute.

The difficulties of these subjective determinations underscore the lack of objective measures in Bonfield's desuetude structure. If Bonfield's model follows Professor Bickel in addressing desuetude only to those "statute[s] that ha[ve] never been enforced and that ha[ve] not been obeyed for three quarters of a century,"[206] then it is doomed to have little practical effect. It seems that Bonfield actually intended something more robust, including shorter desuetude periods for "more notorious and widespread" forms of violation,[207] but he provided no metrics.

Indeterminacy similarly shoots straight through Sunstein's desuetude-plus-important-interest formulation. Sunstein leaves undefined the period required to achieve the desuete prong of his formulation, except to suggest that it must be long enough to demonstrate that the "criminal prosecution is brought on the basis of moral judgments lacking public support."[208] This formulation raises the sort of subjectivity problems raised by Bonfield's proposals, along with the difficulty of differentiating between public conclusions based on "moral judgments" rather than, presumably, judgments based in expediency or other considerations. The inquiry truly enters the morass, however, when Sunstein attempts to flesh out the content of "important constitutional interests." Despite significant effort, he finds it difficult to establish with any certainty even the important interest that he thought had been vindicated by his American-style desuetude in *Lawrence* itself,[209] and his limited attempt to establish principles by which an important constitutional interest might generally be identified proves part dodge, part boot strap.[210] Can Supreme Court justices meaningfully and coherently declare, as Sunstein tentatively suggests, that consensual-but-casual sex between consenting adults constitutes, as a constitutional matter, an interest sufficiently important to be subject to desuetude analysis, but consensual-but-casual sex between

206. BICKEL, *supra* note 167, at 148.
207. Bonfield, *supra* note 136, at 421.
208. Sunstein, *supra* note 167, at 27–28.
209. *See id.* at 60–72.
210. *See supra* note 185.

consenting adults that involves payment does not?[211] Would the principle that justifies such a distinction also justify allowing home-grown marijuana enjoyed in the family home to fall within desuetude analysis, but not privately purchased product?[212] On what basis—whether yea or nay? Without agreed and anchored guiding principles, these determinations threaten to devolve into nothing more than an assertion of individual justices' subjective policy preferences, in which case the application of American-style desuetude becomes just as much of a lottery as the rare-enforcement lottery that Sunstein offers his formulation as a strategy for avoiding.[213] Of course, these difficulties are not unique to Sunstein's formulation; they arise any time constitutional determinations of fundamental rights arise.[214] This problem of enunciating fundamental principle may explain the Court's long retreat from substantive due process[215] and Sunstein's own attempt to develop a theory of *Lawrence* that more fully implicates "procedural due process, rather than the clause's substantive sibling."[216] Because Sunstein's formulation of desuetude requires threshold determination of the constitutional importance of the activities prohibited by the potentially desuete statute, however, the formulation necessarily encompasses those problems.

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211. *See* Sunstein, *supra* note 167, at 62 ("The more basic claim must be that special constitutional status attaches to sexual intimacy, not to sexual relationships, and that intimacy in the relevant sense is not involved when sex is exchanged for cash. Hence no fundamental right is involved. To be sure, this argument is not entirely convincing. Many sexual relationships (including many that fall within the category protected by *Lawrence*) do not involve intimacy (except by definition)." (footnotes omitted)).

212. *See id.* at 51. Sunstein raises the possibility, but provides no principled means by which to answer it.

213. *See id.* at 59 ("To be sure, the effect of a rarely enforced law is similar to that of a lottery, and in that respect there is a degree of ex ante equality. But that's the problem. Criminal punishments should not operate like lotteries.").

214. *See, e.g.*, Griswold v. Connecticut, 381 U.S. 479, 481–82 (1965) ("Coming to the merits, we are met with a wide range of questions that implicate the Due Process Clause of the Fourteenth Amendment. Overtones of some arguments suggest that *Lochner v. New York* should be our guide. But we decline that invitation as we did in [cases such as *West Coast Hotel Co. v. Parrish*]. We do not sit as a super-legislature to determine the wisdom, need, and propriety of laws that touch economic problems, business affairs, or social conditions. This law, however, operates directly on an intimate relation of husband and wife and their physician's role in one aspect of that relation." (citations omitted)).

215. *See* Sunstein, *supra* note 167, at 37–38 (noting that with regard to substantive due process, "since *Bowers*, or at least since *Washington v Glucksberg*, the Court has said something like this: 'Thus far, but no further!' Since 1985, the Court has been extremely reluctant to use the idea of substantive due process to strike down legislation, and before *Lawrence*, the Court seemed unwilling to add to the list even if the logic of prior cases suggested that it ought to do so." (footnotes omitted)).

216. *Id.* at 28.

2. Adverse-Possession-Based Desuetude

Siting a non-constitutional desuetude doctrine in an expanded notion of adverse possession solves many of these problems. Most fundamentally, it provides a firm location for desuetude within the American legal system. Adverse possession, unlike desuetude, does not stand "contrary to every principle of American or English common law" ;[217] it is an ancient and respected feature of that law. And while most governments in the United States still cling to *nullum tempus* in many adverse-possession contexts, those governments' abandonment of the outdated doctrine would hardly violate well-settled principle; rather it would bring adverse-possession into line with modern practice generally.[218] Applying adverse possession law to government would almost by logical dictate, when considered in concert with the public-prescription principle, permit extension of the doctrine to the restriction and recovery by the public of property interests less than that of complete ownership that have been acquired by government by, for example, zoning laws.[219] If, as suggested above, the principle at the heart of adverse possession is one of abandonment and recapture,[220] then the sole short step remaining to complete the process of anchoring desuetude (which embraces the same abandonment-and-recapture principle) firmly in American common law is the recognition that government can both make and abandon claims against the liberty interests of its citizens just as it makes and abandons claims against their property interests (or, alternatively, that the claims are really all of the same timber).[221]

The very non-constitutionality of adverse-possession-based desuetude ("AP desuetude") provides benefits. The Supreme Court has often explained the desirability of avoiding constitutional determinations if other grounds for decision are available.[222] A

217. Poe v. Ullman, 367 U.S. 497, 511 (1961) (Douglas, J., dissenting).

218. *See supra* Part II (discussing the anachronistic nature of retention of *nullum tempus* in the adverse-possession context).

219. *See supra* Part III.A (discussing the interplay between adverse possession and zoning and related regulation).

220. *See supra* Part I (discussing a proposed abandonment-and-recapture basis of adverse possession).

221. *See supra* note 100 (quoting James Madison's discussion of the expansive nature of property interests).

222. *See, e.g., Ullman*, 367 U.S. at 503 ("'The Court [has] developed, for its own governance in the cases confessedly within its jurisdiction, a series of rules under which it has avoided passing upon a large part of all the constitutional questions pressed upon it for decision.'" (alteration in original) (quoting Ashwander v. Tenn. Valley Auth., 297 U.S. 288, 346 (1936) (Brandeis, J., concurring))). The *Ullman* Court focused on the question of whether the facts before it presented a sufficiently adversarial posture in which to determine

constitutional rule of desuetude obviously provides no opportunity to avoid resolution on constitutional grounds. AP desuetude, on the other hand, would serve exactly that purpose. As the Supreme Court noted in *Lawrence*, Texas admitted in 1994 that it had never previously enforced its anti-sodomy statute against consenting adults acting in private.[223] If this pattern of non-enforcement continued until the *Lawrence* case arose, the Texas courts may well have found that the statute,[224] enacted in 1973[225] and never relevantly enforced, had died the death of desuetude by the time Texas attempted its first enforcement against Lawrence and his companion.[226] Had it, then there would have been no constitutional case for the Supreme Court to decide. If the Court was correct that "[i]n those States where sodomy is still proscribed, whether for same-sex or heterosexual conduct," meanwhile, "there is a pattern of nonenforcement with respect to consenting adults acting in private,"[227] then AP desuetude would have pushed the "demean[ing]"[228] specter of such laws being applied in such circumstances entirely from the American legal scene on non-constitutional grounds. And if the *Ullman* majority correctly characterized Connecticut's long

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the constitutionality of the Connecticut contraception statute, but Justice Brandeis' explication of the restrictions by which the Court limits its constitutional interventions extended much more broadly, to include these admonitions relevant to the advisability of non-constitutional desuetude:

> 2. The Court will not anticipate a question of constitutional law in advance of the necessity of deciding it. . . .
>
> 3. The Court will not formulate a rule of constitutional law broader than is required by the precise facts to which it is to be applied.
>
> 4. The Court will not pass upon a constitutional question although properly presented by the record, if there is also present some other ground upon which the case may be disposed of. . . .
>
> 5. The Court will not pass upon the validity of a statute upon complaint of one who fails to show that he is injured by its operation.

Ashwander, 297 U.S. at 346–47 (Brandeis, J., concurring) (footnotes omitted) (citations omitted) (internal quotation marks omitted).

223. *See* Lawrence v. Texas, 539 U.S. 558, 573 (2003).

224. TEX. PENAL CODE ANN. § 21.06(a) (West 2003).

225. 1973 Tex. Gen. Laws 917.

226. Because the defendants in *Lawrence* pleaded *nolo contendere*, "the facts and circumstances" of the arrest, including its date, were not included in the state-court record. Lawrence v. State, 41 S.W.3d 349, 350 (Tex. Crim. App. 2001) (en banc). The arrest appears, however, to have occurred on September 17, 1998. Hendrik Hertzberg, *Unnatural Law*, THE NEW YORKER, Dec. 16, 2002, at 33,. If this arrest represented the first relevant application of the anti-sodomy statute in its nearly twenty-five years on the statute books, then AP desuetude would have rendered the statute desuete under all but one of Texas' adverse-possession limitations periods, and only a few months shy of desuetude under the longest. *See* TEX. CIV. PRAC. & REM. CODE ANN. §§ 16.024–.027 (West 2002) (codifying three, five, ten, and twenty-five year periods).

227. *Lawrence*, 539 U.S. at 573.

228. *Id.* at 575.

failure to enforce its contraceptive statutes (i.e., finding that the state had never enforced the law against married couples since its enactment in 1879[229]), then AP desuetude would similarly have resolved that case on non-constitutional grounds.

As a practical matter, AP desuetude would achieve the same kind of results as were achieved in cases like *Lawrence* and *Griswold*, with much less uncertainty—and possibly with much greater speed and consistency. Some might argue that the result in *Lawrence*—a declaration from the Supreme Court that criminal prohibitions of sodomy violate the U.S. Constitution—encourages claims based on constitutional grounds. For every *Lawrence*, though, there may be a *Bowers*[230] (or vice versa, for those who prefer the latter decision to the former), especially given the Court's reticence to expand fundamental-rights jurisprudence and the potential randomness of deviations from that reticence.[231] Additionally, it is the very rare state court case that rises to the U.S. Supreme Court for federal constitutional review, while *all* state court cases would be subject to non-constitutional desuetude review (and all federal cases to the same review—of right—in federal district and appellate court).[232]

The non-constitutional nature of AP desuetude, along with the mechanisms that adverse possession itself provides, allow this form of desuetude to avoid many of the indeterminacies that have hampered proposed constitutional versions. First, because AP desuetude lacks a constitutional foundation, it escapes the confusion of fundamental-rights and substantive-due-process doctrine. Courts need not determine whether the liberty (or property) interest withdrawn by any given statute constitutes a "constitutionally important interest" before employing desuetude analysis. Instead, the court simply measures whether the public has flouted the government's claim to have denied the liberty interest (i.e., violated

229. *See* Poe v. Ullman, 367 U.S. 497, 501–02 (1961) (noting that the Connecticut contraception law had never been enforced against anyone except in a single test case that was ultimately abandoned by state prosecutors). *But see* Rodgers & Rodgers, *supra* note 169, at 8 n.48 (quoting a letter from counsel for plaintiff in *Ullman* indicating that "[o]nly one who ha[d] not lived in Connecticut could have thought that there was any conscious refusal to prosecute under the birth control statute").

230. Bowers v. Hardwick, 478 U.S. 186 (1986) (upholding Georgia's anti-sodomy statute), *overruled by Lawrence*, 539 U.S. 558.

231. *See supra* notes 208–216 and accompanying text (discussing the lack of clear principles supporting a desuetude doctrine that relies on concepts of fundamental rights).

232. *Cf.* Rodgers & Rodgers, *supra* note 169, at 12 ("[I]f statutes are enforced intermittently, the burden of establishing discrimination becomes prohibitive, for this form of prosecutorial persecution is not likely to be sufficiently visible or demonstrable to reveal the real necessity for a check. It is here that the possibility of at least a marginal form of relief by ultimate resort to the Supreme Court becomes unrealistic." (footnote omitted) (internal quotation marks omitted)).

the enactment) in a public manner over the requisite period.[233] If it has, and if the executive branch has acquiesced in the public's "trespassing" on the governmental claim throughout the period, then the people have adversely possessed their liberty interest, and the government's discretion further to restrict the liberty interest under the original enactment has lapsed. Under AP desuetude, enforcement authorities and the public jointly determine the "importance" or moral soundness of the liberty interest in question by their decisions about whether to enforce and to violate the prohibition, respectively. The courts need only acknowledge the result.

AP desuetude similarly dispenses with the need to make a separate evaluation of whether failure to prosecute over a given period arises as a demonstration of "a clear and conscious administrative policy of total nonenforcement," or of "a reasonable public expectation that the conduct involved will no longer be punished."[234] Rather, failure to enforce over the relevant statutory period in the face of open and notorious violations of the restriction on liberty would result in a conclusive determination in two parts. First, the prosecutorial powers had exercised their discretion *not* to restrict the liberty interest for so long that they had abandoned the claim to be able to enforce the restriction again in future. Second, the public had re-captured the liberty interest inherent in enjoying the right to undertake the conduct in future free of threat of prosecution.

Both the nature of AP desuetude and the steps necessary for its invigoration go some distance in answering the separation-of-powers concerns that have always clung to other explications of the desuetude doctrine.[235] First, in order for AP desuetude to develop, governments that have enacted *nullum tempus* by statute[236] will have to repeal or amend those provisions, thus expressly demonstrating legislative approval for applying the process of abandonment and recapture to government as well as to private citizens. Only where courts apply *nullum tempus* merely by convention rather than statutory obligation could the process of evolution toward AP desuetude begin without overt legislative assistance.[237] Of course,

233. *See infra* Part III.B.3 (discussing the mechanics of AP desuetude in greater detail).

234. Bonfield, *supra* note 136, at 419.

235. *See supra* note 201 and accompanying text (discussing separation-of-powers concerns).

236. *See, e.g.*, 43 U.S.C. § 1068 (2006) (permitting private-party adverse possession of federal lands under claim or color of title—albeit only at the discretion of the Secretary of the Interior; implicitly rejecting adverse possession in other contexts).

237. *Cf.* Cont'l Oil Co. v. Chi. & Nw. Ry. Co., 148 F. Supp. 411, 418 (D. Wyo. 1957) ("It is a general and accepted rule of law that title by prescription or adverse possession can not

legislatures could directly facilitate the development of desuetude, under the aegis of adverse-possession doctrine or otherwise, by explicit statutory authorization, but none has done so.[238] Additionally, while the separation-of-powers objection to desuetude has always been something of a red herring, it is particularly so when applied to AP desuetude.[239] Until the prescriptive period runs, the administrators charged with enforcing the relevant statutory restriction of course enjoy discretion about when, whether, and how to enforce the restriction.[240] Under AP desuetude, failure to enforce in the face of notorious violation will result in the return of the liberty interest—i.e., the right to undertake the conduct without fear of prosecution or other governmental interference—to the public, which will have the practical effect of foreclosing executive discretion to prosecute in the future. In other words, the exercise *vel non* of executive authority at one period will potentially constrain the exercise of that same executive's authority at another period. The courts will judge whether the executive has behaved in a manner sufficient to cause that restraint to arise. Neither the executive nor the courts will have legislated at any point. The enactment claiming to withdraw relevant liberty interests from the public will remain on the books, and will continue to exert the precatory power that unenforced statutes are sometimes thought to wield.[241] Of course, it

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be acquired against the state unless specifically permitted by statute. We have no such statute. This principle of law is well settled in Wyoming." (citations omitted)).

238. This despite the provision of a blueprint for just such legislation as long ago as 1966. *See* Rodgers & Rodgers, *supra* note 169, at 25–28 (proposing a revision to the Model Penal Code which would explicitly have embraced the desuetude doctrine).

239. As the D.C. Circuit Court put the objection, "the executive branch of government cannot nullify an act of the legislative branch by failure to enforce." John R. Thompson Co. v. District of Columbia, 203 F.2d 579, 594 (D.C. Cir. 1953), *rev'd*, 346 U.S. 100 (1953). But of course it can. So long as the executive branch has discretion not to enforce, it can "nullify" a legislative act just by setting its discretionary enforcement level at zero. Why holding the executive branch to a longstanding pattern of discretionary non-enforcement transforms that non-enforcement into a legislative, rather than an executive, act has never been terribly clear. *See generally* Ronald J. Allen, *The Police and Substantive Rulemaking: Reconciling Principle and Expediency*, 125 U. PA. L. REV. 62, 81–86 (1976) (expanding on the separation-of-powers theme); *Desuetude*, *supra* note 118, at 2220–25 (sketching the delegation of criminal law-making authority to prosecutors).

240. *See, e.g.*, Bonfield, *supra* note 136, at 414–17 (discussing prosecutorial discretion); *Desuetude*, *supra* note 118, at 2220–25 (sketching the delegation of criminal law-making authority to prosecutors).

241. *See, e.g.*, Bonfield, *supra* note 136, at 391 ("[I]n some cases it may be that 'unenforced criminal laws survive [on the statute books] in order to satisfy moral objections to established modes of conduct. They are unenforced because we want to continue our conduct, and unrepealed because we want to preserve our morals.'" (quoting THURMAN W. ARNOLD, THE SYMBOLS OF GOVERNMENT 160 (1935))); Rodgers & Rodgers, *supra* note 169, at 15; Sunstein, *supra* note 167, at 59 ("One purpose of the criminal law is to impose expres-

will in most instances probably be wiser for the legislature to repeal the now-defunct restriction, in the same way and for the same reasons that it is best, upon the running of the statutory period, for formal title to pass from the original owner to the de facto owner of a property who has taken claim by adverse possession. In some instances, though, the legislature may well wish to enact a new version of the restriction, perhaps drawn in a somewhat different form, and perhaps including provisions for non-discretionary enforcement or dedicated enforcement resources, if it concludes that executive branch discretionary non-enforcement, now hardened into non-discretionary non-enforcement, failed to do the will of the legislature.[242] Either way, though, all legislative authority, and all legislative action, will have remained in the proper locale.[243]

3. The Mechanics of AP Desuetude

The liberty interests at stake in the AP desuetude process closely resemble the property-use interests at stake in prescriptive-easement law and in the zoning process; the adverse-possession model best suited for adoption in this context is thus the prescriptive-easement model. As discussed above, that model looks to the "actual, open, notorious [and] hostile . . . *use*" of the relevant interest for the statutory period, with the "continuous" and "exclusive" elements of classic adverse possession having specialized and limited meaning.[244] Thus, the relevant inquiries for the adverse possession of liberty interests against the government will be the following.

- *Has the public actually "used" the liberty interest by violating the government's attempt to restrict that liberty by statute?* The starting point for both adverse possession and desuetude analysis is whether the restricted property or liberty interest is being used by the public. If a restriction on liberty goes long unenforced because it goes long un-violated, desuetude is not implicated. Thus, for instance, decades

sive condemnation . . . [with] the social judgment . . . in favor of expressive condemnation but opposed to much in the way of actual prosecution.").

242. *Cf. infra* text accompanying notes 251–252 (discussing "partial-statute desuetude").

243. *See* Chivers, *supra* note 167, *passim*; *see also id.* at 489 (showing that the separation-of-powers problem dissolves upon recognition that the desuetude doctrine "do[es] not require the abrogation of a statute but rather prevent[s] its application" and enforcement).

244. *See* STOEBUCK & WHITMAN, *supra* note 1, § 8.7, at 451–52, 455–56; *supra* Part III.A (discussing elements of prescriptive easements and of adverse possession in the regulatory/zoning context).

might go by without anyone being so reckless as to store nuclear waste on private property. As a result, of course, a statute that forbade such behavior would go unexercised, but prosecutors would not lose the authority to enforce it.[245]

- *Has the public's use-by-violation been open and notorious?* The inquiry here cannot, or at least cannot always, be one of whether the public violates the restriction on Main Street at noontime. Some restrictions, such as those at issue in *Lawrence*, obviously do not lend themselves to public violation. Rather, the inquiry should be whether common violation of the restriction is common knowledge and susceptible to judicial notice, or to establishment by commonly publicly available evidence. Thus, for instance, the existence throughout Texas of substantial gay communities, without more, would have permitted the conclusion that the conduct Texas had restricted was occurring regularly in the state, and that the public and enforcement officials were generally aware that such conduct was occurring even if it was not occurring in public view. Similarly, the ready availability of birth control in Connecticut pharmacies, and the facility with which couples could import such items into Connecticut, perhaps coupled with a widespread failure of young families to grow at a rate consistent with strict adherence to the anti-birth-control restrictions, would have been enough to establish open and notorious violation of that restriction.

  As will be discussed in more detail below,[246] how much of any given restriction will fall desuete for non-enforcement will depend in large part on the scope of the behavior that can be established as

245. It follows from this that neither AP desuetude nor any other doctrine of desuetude would provide a useful vehicle for eliminating the vast array of restrictions that remain on the books but which modern conditions or mores have rendered irrelevant. Desuetude will not render these enactments desuete because, presumably, no one will have violated them throughout the relevant period. While AP desuetude will do some of the work of a careful legislature, it cannot wholly absolve representatives of their (long-abjured) duty of legislative care. Of course, these obsolete restrictions, though perhaps embarrassing, present no real threat, since there can be no surprise prosecutions against behavior in which no one is engaging.

246. *See infra* text accompanying notes 251–252.

openly and notoriously undertaken without prosecution.

- *Has the public's use-by-violation been hostile?* By way of reminder, hostility in the adverse-possession context means "without the record owner's permission."[247] In the AP desuetude context, the liber-liberty-restricting government is the analog of the record owner, the violating public analogous to the trespassing user. To satisfy the hostility element, the violations of the restriction that arise must not be with the permission of the government (e.g., by smoking marijuana as part of a permitted government study), at the government's behest (e.g., while serving in government employ), or otherwise receive the explicit sanction of government. Any "implicit sanction" arising from a recognized pattern of non-enforcement, of course, would not defeat the hostility requirement.

  Meanwhile, though, it matters not whether a statute goes unenforced because prosecutors do not wish to bring the charge or because they lack the resources to prosecute all of the things that have been rendered criminal by the legislature.[248] In the standard adverse-possession context, an inability of government to undertake even minimal monitoring of its holdings provides, as discussed above, a demonstration that government's aspirations and expenditures are so seriously and problematically mismatched as to require abandonment. Similarly, in the AP desuetude context, the failure of the legislature to provide sufficient resources to allow prosecution of its ever-metastasizing criminal and regulatory codes does not excuse the legislature from the consequences of its failure to match its wishes with reality, but rather represents a failure by the legislature to develop coherent policy, and an abandonment to executive discretion and popular self-expression of the determination of which

247. STOEBUCK & WHITMAN, *supra* note 1, § 8.7, at 453; *see also* Cameron v. Barton, 272 S.W.2d 40, 41 (Ky. Ct. App. 1954).

248. *See* Chivers, *supra* note 167, at 461 ("[I]t would seem inappropriate for the judiciary to repeal such laws as certain drug misdemeanors or petty theft laws simply because enforcers cannot spend the resources to enforce them.").

portions of its aspirations will be fulfilled with the resources it can provide.

- *Has the public's use-by-violation been continuous?* For prescriptive easements, use need not be literally continuous—as such a standard would be incoherent[249]—but merely "as continuous . . . a frequency of use [as] is normal for the kind of easement claimed."[250] In the AP desuetude context this would require not perpetual violation of the restriction throughout the statutory period, but merely regular and on-going violation consistent with the nature of the restriction and the violation. Thus it would be insufficient to demonstrate that one person had once smoked marijuana in her home and that her conduct was public knowledge, or even to show a few such occurrences over a period of years. If, however, it could be demonstrated (perhaps by demonstrating the quantity of marijuana imported into the jurisdiction) that hundreds of thousands of joints had been smoked in private locales throughout the statutory period, continuity would have been demonstrated.
- *Has the use-by-violation been exclusive?* With regard to prescriptive easements, the exclusivity element merely requires that the record owner's actions do not interfere with the trespasser's use of the property. This element is fulfilled for AP desuetude by the failure of the relevant authorities to prosecute *any* relevant violations during the statutory period. Even a single completed prosecution should be enough to defeat exclusivity and to demonstrate the continuing vitality of the prosecutorial discretion to enforce.

The exclusivity element raises the question of scope: whether violations should qualify for AP desuetude consideration even if they are narrower than the extent of the potentially desuete restriction as enacted. Allowing portions of criminal enactments to fall desue-

249. If the prescription were for a right-of-way, for instance, demanding continuous use of the right of way throughout the years of the prescriptive period would render prescription both impossible and ludicrous.

250. STOEBUCK & WHITMAN, *supra* note 1, § 8.7, at 456 (citing Confederated Salish & Kootenai Tribes v. Vulles, 437 F.2d 177 (9th Cir. 1971)).

te does introduce some theoretical measure of indeterminacy into the AP desuetude analysis, but in reality judges will be able to determine the portion of the statute rendered desuete by simple and familiar determinations of germaneness. In the sodomy-law context, for instance, "consenting adults acting in private" is a germane distinction, which, if supported by the evidence, should permit a declaration of desuetude of the restriction in those circumstances. Evidence that enforcement against private parties *had* occurred during the statutory period, but that no enforcement had occurred on (say) Tuesdays, would fail on germaneness grounds.[251] (The presence or absence of a commercial transaction presents a similarly germane distinction.) The alternative—to declare laws desuete only when no enforcement of the *entire* statutory provision in any context had occurred—would ensure that neither *Ullman* nor *Lawrence* would have been resolved, and very few other cases would either.[252] Moreover, permitting desuetude of less than an

251. *Cf.* Sunstein, *supra* note 167, at 49–50 (considering such distinctions).

252. Professor Forde-Mazrui worries that

> [a] doctrine of desuetude would afford some protection to people against the arbitrary invocation of a law that is virtually never enforced, . . . but it would do little to address the common use of speeding and other low-level traffic laws for drug enforcement or public order policing, including pursuing these enforcement objectives in a discriminatory manner.

Forde-Mazrui, *supra* note 169, at 1544 (citation omitted). This concern would surely carry great force if desuetude could only arise if the whole of a restriction went unenforced throughout the prescriptive period; surely speeding stops of some sort, for instance, will always be made every day. If germane distinctions of enforcement within a given restriction are permitted, however, then Forde-Mazrui's concern is significantly mitigated. While speeding enforcement will occur every day, speeding enforcement against drivers going only a few miles over the speed limit on open roads, that lead to searches, interrogations, and arrest on unrelated charges should—one surely hopes—occur with significantly less frequency. *Accord* Stuntz, *Civil-Criminal*, *supra* note 167, at 36 ("Now suppose the state could point to cases that began as sexual assault or public indecency arrests and ended with guilty pleas to sodomy. If this amounts to regular enforcement [justifying enforcement in all circumstances], any desuetude doctrine is pointless—the idea must be to require regular *nonstrategic* enforcement, enforcement aimed at the conduct specified in the crime rather than at something else."). Professor Stuntz is worried particularly about pretextual prosecution, "as where a contestable sexual assault case leads to a guilty plea of sodomy." William J. Stuntz, *The Uneasy Relationship Between Criminal Procedure and Criminal Justice*, 107 YALE L.J. 1, 68 (1997). An AP desuetude supple enough to make germaneness distinctions should catch many of these pretextual cases. Assume that the prohibition of consensual, private sodomy has been rendered desuete by non-enforcement. Now arises this arrest for "contestable sexual assault." Prosecutors could bring a non-pretextual charge of sexual assault. Or they could bring the pretextual claim of sodomy. It would no longer be sufficient, however, to prove simple sodomy in order to earn a conviction. Rather, prosecutors would have to prove some level of non-consensuality (or some other aggravating factor) to take the sodomy charge out of the area of desuetude. Of course, prosecutors might attempt to defeat the slide of consensual, private sodomy into desuetude by bringing prosecutions on those grounds alone within every prescriptive period, but this defense mechanism will unavoidably be available against

enactment's full reach is consistent with adverse-possession theory. A trespasser is not required to invade and occupy the whole of a property-owner's land or goods; rather, she can trespass on and use just a portion of the property, and thereby gain title to the portion properly possessed.

On the other hand, it seems wholly unworkable to permit AP desuetude to work in favor of any specific individual or set of individuals without applying to the whole of the general public. As a practical matter, the nature of AP desuetude makes it much less likely that individuals would often qualify for consideration. They would *personally* have to violate the relevant restriction continuously throughout the period in a manner that would make their own violations open and notorious to the authorities. This should occur but rarely; and were it to occur, it would demonstrate not that the individual(s) had accrued a rightful expectation of non-interference (for, among other things, there are no such things as variances or waivers in the context of criminal statutes) but instead that willful and selective non-enforcement had occurred; and this, of course, is merely a different species of the arbitrary and selective enforcement that AP desuetude (and all desuetude doctrine) is designed in large part to avert.[253]

A final issue that arises in the desuetude literature (but would apply as well in the regulatory-restriction context considered in section III.A) is what sort of legislative re-enactment of a restriction on liberty (or property) interests should qualify to "recharge" the restriction so that it might be considered renewed and amenable to future enforcement as a new restriction.[254] Professor Bonfield suggests that re-enactment of a restrictive provision as part of a broader re-enactment of a jurisdiction's "general statutory compilations" should trigger such a renewal, but that "the period required to [re-]abrogate such a re-enacted dead-letter act by subsequent nonenforcement may be appreciably reduced because of the community's awareness of its prior history."[255] Those who reject

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any doctrine of desuetude, given that the doctrine is premised on a demonstration of long-standing non-enforcement. For the "defense" to work, however, the prosecutors will have to actually earn a conviction during each period—pleading and proving only the innocuous facts (e.g., consensual, private sexual activity). The liberty restriction on consensual sodomy will remain enforceable, and the prosecutors will remain in office, only if the public acquiesces in the enforcement on those grounds (by not demanding change from their public officials and/or voting them out).

253. *See supra* note 169 and accompanying text (discussing the need, in the interest of justice, for a process by which to declare statutes desuete).

254. *See, e.g.*, Bonfield, *supra* note 136, at 438; Rodgers & Rodgers, *supra* note 169, at 15–17.

255. Bonfield, *supra* note 136, at 438.

the organic power of the desuetude doctrine of course reject this argument as well.[256] Bonfield's conclusion here once again problematically relies on evaluations of actual, subjective community awareness. The answer best suited to AP desuetude is that general re-enactments do not represent the focus of any legislative attention on the specific restriction that has been rendered desuete; in fact, it perpetuates exactly the sort of (benign or malign) neglect that had caused the desuetude in the first place. Only specific and individualized re-enactment of a desuete statute should properly qualify to renew authority to enforce the restriction (or those parts of it which had been rendered desuete).[257]

CONCLUSION

Adverse possession makes sense (perhaps only) when understood as a process of abandonment and recapture. Whether understood in that light or otherwise, the tradition of protecting government from the positive benefits offered by the doctrine has long since grown inappropriate, and must be rejected. Embrace of

256. *See, e.g.*, Rodgers & Rodgers, *supra* note 169, at 15–17.

257. As this exposition suggests, AP desuetude would follow Professor Bonfield in his conclusion that once a statute (or relevant portion thereof) became desuete, a declaration of intent by prosecutors to begin enforcing it again at some future date-certain, thus providing the populace fair notice of future enforcement, would have no effect whatever; the statute would remain desuete. Bonfield justified this conclusion on the grounds that prosecutorial re-invigoration would represent "an executive usurpation of legislative prerogative" permitting "penal-law administrators . . . to effectively create substantive criminal law." Bonfield, *supra* note 136, at 422–23. The proposition rests on similar grounds when applied to AP desuetude. As discussed above in this section, when non-enforcement triggers AP desuetude, the heretofore voluntary non-enforcement exhibited by prosecutors becomes involuntary, the liberty or property interest at issue having been successfully adversely possessed by the public. The public has regained its interest and nothing in the executive power can withdraw it again; only a legislative enactment may achieve such a feat. Rodgers & Rodgers argue that Bonfield's position is "clearly wrong" because it is "squarely inconsistent with that line of authority which permits a court, with no requirement of legislative re-enactment, to retroactively reactivate a statute earlier held to have been unconstitutional." Rodgers & Rodgers, *supra* note 169, at 18. The two cases are fundamentally dissimilar, however, at least with regard to AP desuetude. One of the fundamental duties of American courts is to rule on the constitutionality of statutes. This duty arises each time they contemplate any given statute. If a court initially judges a statute unconstitutional but later changes its mind with regard to the same statute, it has each time performed one of its core functions. Prosecutors and other executive-branch officials, on the other hand, do enjoy the power of enforcing, and the discretion of not enforcing, enforceable restrictions against citizens. If a restriction becomes unenforceable—whether because the legislature repeals it, the courts rule it unconstitutional, or, as in AP desuetude, their own non-enforcement in the face of widespread, open-and-notorious violation removes their ongoing discretion to select enforcement rather than non-enforcement, and transfers the previously-restricted interest back to the citizenry—there is no executive power by which the unenforceability can be altered.

these two conclusions reveals the deep structural connection between adverse possession and desuetude, and allows for the recognition that adverse possession can provide a manner and means by which citizens can recover to themselves property and liberty interests taken from them by government enactment, assuming that the government fails to enforce these enactments in the face of persistent public violations of coherent portions of their provisions.

Many advantages flow from re-conceiving adverse possession in this manner. Adverse possession serves fundamentally to redress the improprieties and inefficiencies that arise from completely negligent (or wholly absent) property owners maintaining a permanent ability to deny alternative uses (or attentive environmental protections) to effectively abandoned properties. These improprieties and inefficiencies accrue no less when property is held but abandoned by government than when by private entities. The whole public, and the quality of government with which the public must deal, will benefit from the bracing tonic of the adverse-possession doctrine applied to government property. As important, however, are the advantages that arise from expanding the abandonment-and-recapture mechanism to embrace property and liberty interests withdrawn from the public by government restriction. Scholars have almost uniformly supported the introduction of desuetude doctrine into American law, lamenting only the lack of a coherent basis for it and method of applying it. An expanded notion of adverse possession provides that base and that mechanism, and allows its easy expansion not only to criminal provisions, but to regulatory restrictions as well.