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## Who Needs Adverse Possession?

Nadav Shoked

*Professor of Law, Northwestern University Pritzker School of Law*

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## WHO NEEDS ADVERSE POSSESSION?

*Nadav Shoked\**

*Adverse possession is one of property law's most central doctrines. Yet, this Article contends, the need it answers has been largely misunderstood. Adverse possession's doctrinal effects are clear—and stark: when its requirements are met, an owner loses her land to an invader. To explain a doctrine instituting such a radical result, scholars resort to property law's major philosophical theories. These theories, they argue, at times demand that an owner lose her land to another person who is more committed to that land. The problem with these prevailing justifications of adverse possession, this Article shows, is that they imagine a very specific case of adverse possession: a squatter putting invaded land to a meaningful use. In reality, however, very few adverse possession cases nowadays involve homesteading squatters. Instead, most consist of neighbors bickering over the boundary separating their lots. Thus, adverse possession now functions as a tool for adjusting boundaries, often to the tune of a mere few inches or feet.*

*For this actual, as opposed to imagined, role of adverse possession, justifications grounded in philosophical theories focused on the abstract concept of property are not fully satisfactory. The justification for a doctrine performing such a mundane function must be more practical. Adverse possession must be compared, and shown to be superior, to alternative tools that can perform the same boundary-drawing function. This Article conducts such a comparison. It explains that American law retains adverse possession because, contrary to popular belief, our formal system of property boundaries—which uses map lines—is unreliable, indeed unworkable. The choice to retain this dysfunctional boundary system, some of whose imperfections necessitate adverse possession, is probably not socially efficient, but it serves the interests of a powerful industry bred by the existing system: the title insurance industry.*

*This Article thus supplements the somewhat inapposite philosophical accounts of adverse possession's function in American law with a practical one. It then stresses the normatively troubling aspects of that function.*

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\* Professor of Law, Northwestern University Pritzker School of Law. This Article benefited immensely from conversations with, and comments received from, David Dana, Nestor Davidson, Elliot Louthen, John Lovett, Timothy Mulvaney, Christopher Odinet, David Schwartz, Joseph Singer, and Laura Underkuffler. I am also grateful to participants at the Property Works in Progress Conference 2020 and the faculty workshop at Northwestern. Finally, I am very thankful to Oren Kriegel and William Siroky for outstanding assistance in research.

*Based on this critique, this Article further advocates for judicial and legislative reforms to better reflect and regulate adverse possession's true function in current American law.*

INTRODUCTION.....	2640
I. EXISTING EXPLANATIONS FOR ADVERSE POSSESSION AND THEIR LIMITS .....	2647
A. <i>Adverse Possession as Protecting Reliance</i> .....	2649
B. <i>Adverse Possession as Promoting Efficiency</i> .....	2653
C. <i>Adverse Possession as Quieting Title</i> .....	2659
II. THE NEED THAT ADVERSE POSSESSION ACTUALLY ANSWERS	2663
A. <i>The Straightforward Formal System for Land Management: A Registry</i> .....	2663
B. <i>The American Formal System for Land Management: A Record</i> .....	2665
C. <i>The Tools Rendering the American Formal System Workable: Adverse Possession and Title Insurance</i> ....	2668
D. <i>The Explanation for the American System: Social Interest</i> .....	2671
E. <i>The Explanation for the American System: Private Interest</i> .....	2674
III. LEGAL REFORMS IN LIGHT OF THE NEED THAT ADVERSE POSSESSION ANSWERS .....	2679
A. <i>Interpreting Adverse Possession's Tests</i> .....	2679
1. Hostility .....	2680
2. Notoriety .....	2682
3. Color of Title.....	2684
B. <i>Regulating Title Insurance Companies</i> .....	2687
CONCLUSION .....	2692

#### INTRODUCTION

The doctrine of adverse possession occupies a curious spot in property law. On the one hand, the doctrine enjoys a prominent position in both the law school curriculum and the practice of law.<sup>1</sup> On the other hand, scholars often note how lacking its theoretical treatment is<sup>2</sup> and, in almost all common-law

1. JOSEPH WILLIAM SINGER ET AL., PROPERTY 293 (7th ed. 2017) (“Adverse possession claims generate substantial litigation.”); Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2420 (2001) (“The topic of adverse possession receives prominent treatment in most property casebooks and courses. . . . [a]nd the doctrine has large practical importance as it could be dangerous for a lawyer not to know it.”).

2. Thomas W. Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1127 (1985) (“Surprisingly, there is very little systematic discussion of [adverse possession] in the legal literature.” (footnote omitted)); Stake, *supra* note 1, at 2421 (“For all its importance, this remarkable doctrine does not seem well understood, at least as

jurisdictions outside the United States, the doctrine has been marginalized, if not wiped out.<sup>3</sup> How to account for this contrast: a doctrine so vital to the thinking of property law teachers and to the work of American property lawyers that still remains underexplained in law reviews and has vanished from peer countries' property systems? How could a doctrine be so central yet so dispensable?

The contradiction, this Article argues, is rooted in a scholarly misunderstanding of adverse possession's role. A disconnect exists between the functions that scholars attribute to adverse possession and the functions that actually account for the doctrine's vitality—or rather, its contingent vitality—in American law. Commentators have traditionally approached adverse possession through a philosophical lens.<sup>4</sup> They treat the doctrine as a window into the nature and role of the institution of property in a democratic society.<sup>5</sup> In reality, however, adverse possession's role has been primarily, if not exclusively, practical—indeed, incidental and almost coincidental.<sup>6</sup> On the ground, adverse possession is the outgrowth not of an idea of property but of a specific land management system adhered to in America and nowhere else.<sup>7</sup> As will be seen, adverse possession probably lacks an ideological justification but is vehemently defended in America because it profits a specific, and powerful, industry: the title insurance industry.<sup>8</sup> In other words, to understand adverse possession, we need not delve into the nature of property in a capitalist system. Instead, we must explore the political and economic dynamics of land transactions within the specifically American version of a capitalist system.<sup>9</sup>

Property scholars—and first-year law students—acutely feel the need to account for adverse possession due to its extraordinary effect. Under the doctrine, if a person actually occupies, without permission, another's land in a manner that is open, exclusive, and continuous for a specified period of time, that occupier wins title to the land.<sup>10</sup> Adverse possession is thus a doctrine that transforms, through the passage of time, a trespasser into an owner: it lifts title to land from its rightful owner and bestows it on an intruder.<sup>11</sup> The doctrine thereby contradicts the basic tenet of our property law, indeed our capitalist regime, which is dedicated to protecting owners

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property doctrines go.” (footnote omitted)); Matthew Sipe, Comment, *Jagged Edges*, 124 *YALE L.J.* 853, 853 (2014) (“Modern adverse possession doctrine appears to be in regular need of re-justification.”).

3. See *infra* notes 266–71 and accompanying text.

4. See *infra* Part I.

5. See Stake, *supra* note 1, at 2420 (“[T]he doctrine strikes at the heart of our concept of property.”).

6. See *infra* Part II.C.

7. See *infra* Part II.C.

8. See *infra* Part II.C.

9. See James Y. Stern, *The Essential Structure of Property Law*, 115 *MICH. L. REV.* 1167, 1191–92 (2017) (criticizing scholars for not paying attention to issues of defining title).

10. See, e.g., *Snook v. Bowers*, 12 P.3d 771, 781 (Alaska 2000).

11. JOHN DWYER & PETER MENELL, *PROPERTY LAW AND POLICY* 76 (1998) (describing adverse possession as “[p]erhaps the most startling means of acquiring property”).

from nonowners and to empowering owners to autonomously dictate their assets' uses.<sup>12</sup> Capitalism is grounded in voluntary transactions between willing parties; adverse possession, conversely, forces an owner to part ways with her land. Worse still, the doctrine forcefully transfers the land from its owner, not just to any nonowner, but specifically to the nonowner who entered the land unlawfully. Adverse possession unabashedly rewards those ignoring property law's commands. It favors and incentivizes thieves.<sup>13</sup>

To render this extreme result intelligible, scholars and prominent jurists, from Justice Oliver Wendell Holmes to Judge Richard A. Posner, explain that the contradiction between the doctrine of adverse possession and property law's normative goals is merely illusory.<sup>14</sup> The doctrine may appear to undermine the law's rules and priorities, but to the extent it actually does so—as it might in a given individual case viewed in isolation—it is only in service to the law's overall functions and grand goals.<sup>15</sup> Perceived within the correct context, commentators argue, adverse possession does not subvert the property system. Quite the opposite: adverse possession sustains the property system.<sup>16</sup>

Two prominent theories of adverse possession exemplify this template. One theory portrays adverse possession as critical because it affords protection to the person who has grown attached to the land—the person living on it—as part of property law's general effort to protect individuals' reliance.<sup>17</sup> A second theory describes adverse possession as necessary because it permits the shifting of property from those who do not use it (i.e., the land's absentee owner) to those who do (i.e., the land's actual occupier), thereby promoting efficient use of land, as is supposedly the property system's goal.<sup>18</sup> As these examples show, theorists naturally differ in the specific normative goal they assign to property, but they contend that adverse possession comes into play when property law's basic rule respecting ownership protection no longer serves that goal. True, the doctrine subverts

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12. Thomas W. Merrill & Henry E. Smith, *What Happened to Property in Law and Economics?*, 111 YALE L.J. 357, 359 (2001) (discussing property law's expectations that nonowners know not to enter, use, or take the property of an owner, thereby ensuring owner autonomy).

13. See Abraham Bell & Gideon Parchomovsky, *Pliability Rules*, 101 MICH. L. REV. 1, 55 (2002) (“[A]dverse possession is a legal mechanism that sanctions private takings of property.”).

14. See, e.g., Richard A. Posner, *Savigny, Holmes, and the Law and Economics of Possession*, 86 VA. L. REV. 535, 560 (2000) (“Adverse possession . . . improves rather than challenges the system of property rights.”).

15. Larissa Katz, *The Moral Paradox of Adverse Possession: Sovereignty and Revolution in Property Law*, 55 MCGILL L.J. 47, 50 (2010) (“[T]he morality of adverse possession is not a particularized morality, concerned with the relative deserts of the owner and squatter or the relative merits of the uses they have for the land . . . . Rather, the morality of adverse possession is indirectly established through the role of adverse possession in allowing property law to serve its moral function.”).

16. See WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 860 (3d ed. 2000) (“If we had no doctrine of adverse possession, we should have to invent something very like it.”).

17. See *infra* Part I.A.

18. See *infra* Part I.B.

property's normal rules but only because such subversion at times becomes normatively vital. Adverse possession steps into the breach when the mechanical protection of property becomes detached from that protection's normative mission.

This account is normatively appealing and, as even this tentative presentation of its reliance and efficiency variants shows, is logically consistent. That logical consistency, however, hinges on a certain factual assumption respecting how adverse possession actually operates. That assumption is, it turns out, plainly invalid.

Arguing that adverse possession implements a compelling need to sidestep the harsh rules of property law so as to protect the more attached, or more efficient, user of land must envision a specific user. To be consistent, the claims imagine an intruding user engaged in activities whose importance (to human attachments, to economic efficiency, etc.) justifies sidestepping property law's dictates. The normative argument for adverse possession descriptively conceives a possessor who, for example, occupies a house or cultivates a farm on land that a faraway absentee owner owns. That image is not purely sentimental.<sup>19</sup> To a great extent, it is grounded in the history of property law and the circumstances surrounding the original emergence of the doctrine of adverse possession.<sup>20</sup>

In modern times, however, this quaint image has no resonance. The idea of the squatter occupying otherwise forgotten land has little to do with adverse possession's realities in 2021.<sup>21</sup> Casebook staples in the field notwithstanding—and those staples are, it should be noted, mostly cases

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19. John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 816, 826 (1994) (explaining that the law's assumptions "apply neatly to the classic case—adverse possession of a developed parcel, such as land improved with a house or farm—upon which the limitations model was premised in agricultural England").

20. The doctrine's emergence reflects the original common law that did not separate possession from ownership and that did not require documents for land transfers but rather completed transactions through occupation of land. See 5 GEORGE THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 573–74 (1979). Ownership was not based on the modern concept of title, but on actual possession ("seisin"). See *id.*

21. An analysis of all reported state court decisions from 2019—identified through a Westlaw search—found eighty-seven adverse possession of land cases. Only one arguably involved a squatter. *Philadelphia v. Galdo*, 217 A.3d 811 (Pa. 2019). There, a neighbor expanded his possession of his own land to also include an adjoining city-owned vacant lot. *Id.* at 813–14. Even ignoring this factual caveat, the case's doctrinal relevance here is somewhat questionable because adverse possession claims against governments have traditionally constituted a separate body of law. See JOSEPH WILLIAM SINGER, PROPERTY 168–69 (5th ed. 2016). Of the remaining eighty-six adverse possession cases, one was a "color of title" case. See *Chapman v. Settles*, 265 So. 3d 866 (La. Ct. App. 2019). On color of title, see *infra* Part III.A.3. Two cases involved failed claims under specific state statutes setting foreclosure procedures. *US Bank Tr., N.A. ex rel. LSF8 Master Tr. v. Trimble*, 296 So.3d 867, 869 (Ala. Civ. App. 2019); *Herrmann v. Bank of Am., N.A.*, 97 N.Y.S. 344, 347–48 (App. Div. 2019). One involved a dispute between co-owners. *Hodge v. Wright*, 435 P.3d 126, 130 (Okla. Civ. App. 2019). One was a family dispute. *Scott v. Hicks*, 567 S.W.3d 266, 272 (Mo. Ct. App. 2019). And one combined a family inheritance dispute with a boundary dispute. *Hammond v. Hammond*, 438 P.3d 408 (Or. Ct. App. 2019). All other cases involved pure boundary disputes, as did the three reported federal adverse possession decisions.

distinguished by their remoteness in time or place<sup>22</sup>—the prototypical current adverse possession controversy follows a different, and much less stirring, factual pattern. Standard adverse possession cases nowadays involve disputes over fences intruding on a neighbor's land,<sup>23</sup> bushes or trees mistakenly planted beyond the property's border,<sup>24</sup> driveways that cross the property line,<sup>25</sup> and the like. *Boundary disputes*, rather than the standing of squatters or homesteaders, form the realm of adverse possession in contemporary American law.<sup>26</sup>

And for boundary disputes, the normative justifications for adverse possession's treatment of squatters and homesteaders are inadequate, if not wholly irrelevant. Asserting that protecting the intruder is crucial for assuring meaningful attachments or efficient land uses is somewhat far-fetched when the intrusion consists of a few feet—or inches—of a fence, garden, or path. Providing the planter of a tomato bush<sup>27</sup> or the leveler of a driveway<sup>28</sup> ownership of those few feet or inches of land—at the expense of the tract's true owner—does not clearly and forcefully promote meaningful human attachments or efficient land uses. Standing alone, the plight of the tomato planter or driveway leveler does not justify disturbing settled principles of property ownership protection. The maintenance of a stray tomato bush or a driveway's few inches could hardly be said to give voice to property's essence in our capitalist system. The legal system's choice to protect these intrusions through adverse possession thus cannot easily be justified through appeals to property philosophy.

Because adverse possession in practice is concerned not with accommodating squatters but with settling boundary disputes, it must be justified as a mechanism performing that very specific function—rather than any grand philosophical assignment. Property law's reliance on adverse possession is warranted only to the extent that, as a practical matter, adverse possession is an effective tool for policing borders.

Until now, commentators normatively assessing adverse possession, preoccupied with abstract philosophies of property, have largely failed to fully compare adverse possession to other mechanisms that carry out the

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22. See, e.g., JESSE DUKEMINIER ET AL., PROPERTY 150 (8th ed. 2017) (using *Van Valkenburgh v. Lutz*, 106 N.E.2d 28 (N.Y. 1952)); SHELDON F. KURTZ ET AL., CASES AND MATERIALS ON AMERICAN PROPERTY LAW 196 (6th ed. 2012) (using *Tapscott v. Cobbs*, 52 Va. (11 Gratt.) 172 (1854)); SINGER ET AL., *supra* note 1, at 299 (using *Nome 2000 v. Fagerstrom*, 799 P.2d 304 (Alaska 1990)).

23. See, e.g., *Brown v. Gobble*, 474 S.E.2d 489, 492 (W. Va. 1996).

24. See, e.g., *Chuckta v. Asija*, 903 A.2d 243, 244 (Conn. App. Ct. 2006) (forsythia bushes); *Lewis v. Aslesen*, 635 N.W.2d 744, 745 (S.D. 2001) (trees).

25. See, e.g., *Trokey v. R.D.P. Dev. Grp., LLC*, 401 S.W.3d 516, 520–21 (Mo. Ct. App. 2013).

26. RICHARD A. POSNER, ECONOMIC ANALYSIS OF LAW 90 (5th ed. 1998) (observing that boundary cases are the majority of adverse possession cases); SINGER, *supra* note 21, at 164 (“Most disputes covered by the law of adverse possession are border disputes.”).

27. *Spangler v. Schaus*, 264 A.2d 161, 165 (R.I. 1970).

28. *Trokey*, 401 S.W.3d at 523.

same function of boundary setting.<sup>29</sup> But only a comparison of this kind could validate adverse possession's alleged worth and necessity.<sup>30</sup> This Article engages in such a comparison and finds adverse possession lacking.

To conduct such a comparison, this Article turns our attention back to property law's basic task—defining and protecting rights in land<sup>31</sup>—and examines the most straightforward system the law can employ to define land's boundaries: reliance on formal property lines. The system of formal property boundary lines is a structure necessary for all transactions.<sup>32</sup> Individuals would be unable to buy and sell land if no agreed-on system for delineating property's borders—the contours of the land traded—existed.<sup>33</sup> A boundary-setting and -tracking system is thus a common, indispensable resource. Yet it is not costless. Maintaining the mapping system and assuring that all transactions accurately reflect it requires expenditures. The state can dedicate the funds necessary for these tasks, thereby providing owners with a reliable formal boundary system.<sup>34</sup> Alternatively, the system can be left to the private market, where private owners, through individual transactions, manage it.<sup>35</sup>

To economize their own costs, the American states have opted for the private option.<sup>36</sup> But once a state makes this choice, the resultant system will inevitably suffer from certain inaccuracies. For example, because no central authority dictates a common vocabulary or mandates consistent descriptions, disparate transactions can contradict each other in their descriptions of the same lot. The deed for Lot A will place its boundary with Lot B at one spot, while the deed for Lot B will place the same boundary with Lot A at another spot.<sup>37</sup> One deed selling Lot A will identify one boundary, while a later deed for that same lot A will designate another.<sup>38</sup>

Adverse possession is the law's means to contend with such mistakes. Adverse possession is striking to most observers due to its blunt rejection—

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29. See, e.g., Michael V. Hernandez, *Restating Implied, Prescriptive, and Statutory Easements*, 40 REAL PROP. PROB. & TR. J. 75, 106–08 (2005) (contending that prescription is unjust toward the owner while assuming that simple and full reliance on the public record for determining property rights would be possible in the doctrine's absence); Merrill, *supra* note 2, at 1129–30 (assuming that adverse possession is an efficient way to manage such disputes).

30. The adverse possession literature sometimes simply assumes that the formal system is effective and adverse possession is therefore the element introducing uncertainty. See, e.g., Stake, *supra* note 1, at 2439 (“Compared with the rules of title transfer, which determine record title primarily from documents that remain reliable for many years, the elements of adverse possession are indeterminate.”).

31. Thomas W. Merrill & Henry Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 8 (2000).

32. See Stewart E. Sterk, *Property Rules, Liability Rules, and Uncertainty About Property Rights*, 106 MICH. L. REV. 1285, 1288 (2008) (arguing that property is about regulating search costs in an efficient manner).

33. See Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1355 (1982).

34. See *infra* Part II.A.

35. See *infra* Part II.B.

36. See *infra* Part II.B.

37. See, e.g., *Harris v. Walden*, 333 S.E.2d 254, 257–58 (N.C. 1985).

38. See, e.g., *Macallister v. DeStefano*, 463 N.E.2d 346, 349–50 (Mass. App. Ct. 1984).



indeed, overruling—of legal property lines.<sup>39</sup> But the truth is that in America there are no real formal property lines because the law adopted a private option for boundaries' management. Adverse possession serves as the law's acknowledgment that that private option is inherently imperfect. Adverse possession treats that imperfection, but it does not, and does not portend to, treat it perfectly. It cannot fully replace a comprehensive (but expensive) public system in providing certainty to market actors. Adverse possession does not solve all mistaken boundaries cases—for example, it only deals with long-standing mistakes.<sup>40</sup> Furthermore, its very existence adds more uncertainty to the system.<sup>41</sup> A buyer purchases land under the risk that the boundary of the purchased tract is not as it seems or that it might shift over time: a neighbor might have gained, or might later gain, some of the purchased land through adverse possession.

The risks that the absence of a formal public system creates, and buyers' desire to mitigate them, generate a demand for a market product.<sup>42</sup> Buyers in a property world that lacks a strong public system of boundary management wish for some assurances. As with other risks individuals would rather not bear, like those of fire or accident, the market provides that assurance through insurance. For a price, a title insurance company will assume on the buyer's behalf the risk of mistakes in the description of a property or the rights therein.

While American lawmakers' decision to retain this mostly private system of property boundary management could have been based on an informed assessment of the relative social benefits and costs of each system,<sup>43</sup> this Article's analysis concludes otherwise. Drawing on the literature on interest group dynamics and surveying land registration and adverse possession practices in other common-law systems, this Article finds that title insurance companies are the culprits behind America's dedication to its inefficient private boundary system. For their industry's survival, these entities are heavily interested in the absence of a reliable formal system for managing boundaries. That system, in turn, demands that the law retain adverse possession.<sup>44</sup> Adverse possession is one price, alongside payment of insurance premiums, that the general public—all landowners in America—pays to subsidize the title insurance companies.<sup>45</sup> Alas, brute interest group dynamics, rather than high-minded ideals regarding property's goals, are responsible for adverse possession's remarkable endurance.

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39. See *supra* notes 10–13 and accompanying text.

40. Comment, *Enhancing the Marketability of Land: The Suit to Quiet Title*, 68 YALE L.J. 1245, 1256 (1959) (“Statutory provisions barring actionable claims not asserted within a specified time contribute little to improving the saleability of land.”).

41. See CHARLES C. CALLAHAN, *ADVERSE POSSESSION* 101, 106 (1961) (noting the possibility that adverse possession doctrines can introduce, as well as resolve, uncertainty).

42. See *infra* Part II.C.

43. See *infra* Part II.D.

44. This holds whether or not the specific policies title insurance companies issue cover adverse possession. The companies do not need adverse possession—they need the weak formal boundary system, which, in turn, needs adverse possession.

45. See *infra* Part II.E.

This conclusion is not merely of theoretical import. Beyond explaining adverse possession's current role better than traditional justifications, it also performs important prescriptive functions. Adverse possession's nature as an imperfect mechanism for settling boundary disputes should affect judges' attitudes toward three of the doctrine's legal elements. The doctrine's true, and decidedly practical, function in our contemporary land system should guide the interpretation of the tests applied to discern whether two of the doctrine's most contested conditions for awarding land to the intruder—hostility and notoriety—have been satisfied in a given case. It should also impact the treatment of a special category of cases known as “color of title” cases. Additionally, this Article's findings respecting adverse possession's true function should engender legislative reforms. They suggest that the mechanisms used for drawing property boundaries should be perceived as a “public utility”: a vital natural monopoly, not dissimilar to traditional services legally characterized as utilities, such as electricity or railroads.<sup>46</sup> The title insurance market must accordingly be made subject to a certain form of administrative regulation, inspired by the same regulation that governs utilities.<sup>47</sup>

This Article proceeds as follows. Part I reviews the traditional explanations for adverse possession and highlights their shortcomings. Building on these criticisms of the existing accounts, Part II suggests that adverse possession's true function is to settle the boundary disputes that are inevitable in our land system. For this purpose, this part presents the competing regimes that can manage land transactions, identifies the American regime's flaws, and explains why those flaws generate the need for adverse possession. Part II also assesses the reasons why American law adheres to an inherently flawed system necessitating adverse possession. It establishes that adverse possession is necessary to our land management system due to states' inability to move toward a centralized system—a move that would require overcoming title insurance companies' resistance. Part III considers prescriptive ramifications of this finding. It recommends better ways of understanding and interpreting different elements of adverse possession doctrine. It also suggests a framework for regulating the title insurance industry.

#### I. EXISTING EXPLANATIONS FOR ADVERSE POSSESSION AND THEIR LIMITS

A landowner has the basic power to exclude.<sup>48</sup> She has the legal power to decide who may enter her land.<sup>49</sup> If some individual enters that land without such permission, that individual is deemed a trespasser.<sup>50</sup> Because trespass

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46. *See infra* Part III.B.

47. *See infra* Part III.B.

48. J. E. PENNER, *THE IDEA OF PROPERTY IN LAW* 71 (2000) (“[T]he right to property is a right to exclude others from things . . . .” (emphasis omitted)).

49. *Jacque v. Steenberg Homes, Inc.*, 563 N.W.2d 154, 156 (Wis. 1997) (accepting that the continued plowing of land, despite the owners' protests, was intentional trespass).

50. *See, e.g., Walker Drug Co. v. La Sal Oil Co.*, 972 P.2d 1238, 1243 (Utah 1998).

is a tort,<sup>51</sup> the owner can petition a court for an injunction ordering the intruder's removal.

If the trespasser meets the requirements of adverse possession, however, that trespasser cannot be removed.<sup>52</sup> To establish such an adverse possession claim, the trespasser must show that she: (1) actually possessed the land, (2) in an open and notorious manner, (3) exclusively, (4) adversely to the owner's interests, and (5) continuously for a number of years the statute details.<sup>53</sup> The time period that the different states institute ranges from five to forty years.<sup>54</sup> States sometimes modify these requirements or add further ones,<sup>55</sup> but they do not alter adverse possession's essence: adverse possession is an exception to trespass.

As a defense to a trespass claim, adverse possession is readily explicable. It reflects an application to the property context of the general statute of limitations rule, which bars claims brought too long after the occurrence of the facts giving rise to those claims.<sup>56</sup> Good reasons justify such a temporal block on trespass claims, as on all other legal claims. Retaining evidence becomes difficult as time passes;<sup>57</sup> a defendant comes to assume that the claim will not be brought (and thus, for example, refrains from keeping financial reserves for a payout);<sup>58</sup> and courts should not concern themselves with claims that the parties themselves have neglected.<sup>59</sup>

These are all good reasons to shield an intruder from a delayed trespass claim, but adverse possession goes further. Adverse possession not only prevents a trespasser from being removed, it actually transfers ownership of the intruded land to her.<sup>60</sup> If the requirements detailed above are met, the trespasser becomes the land's owner at the expense of its real, or title, owner. Indeed, she might proceed herself to bring a trespass claim against the owner if the owner ever attempts to reenter the land.<sup>61</sup> This remarkable result of a

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51. *See, e.g.*, *Hoery v. United States*, 64 P.3d 214, 217 (Colo. 2003) (en banc).

52. SINGER, *supra* note 21, at 43.

53. *See Apperson v. White*, 950 So. 2d 1113, 1116 (Miss. Ct. App. 2007).

54. 10 THOMPSON ON REAL PROPERTY § 87.01 (David A. Thomas ed., 2019).

55. Some states, for example, require the possessor to pay taxes. *See, e.g.*, IND. CODE § 32-21-7-1 (2021).

56. *See, e.g.*, *Harig v. Johns-Manville Prods. Corp.*, 394 A.2d 299, 302 (Md. 1978) (noting that “the adoption of statutes of limitations reflect[s] a policy decision regarding what constitutes an ‘adequate period of time’ for ‘a person of ordinary diligence’ to pursue his claim” (quoting *Walko Corp. v. Burger Chef Sys., Inc.*, 378 A.2d 1100, 1104 (Md. 1977))).

57. *United States v. Kubrick*, 444 U.S. 111, 117 (1979) (noting that statutes of limitation “protect defendants and the courts from having to deal with cases in which the search for truth may be seriously impaired by the loss of evidence, whether by death or disappearance of witnesses, fading memories, disappearance of documents, or otherwise”).

58. *Order of R.R. Telegraphers v. Ry. Express Agency, Inc.*, 321 U.S. 342, 348–49 (1944) (discussing the limiting role that statutes of limitations play on the enforcement of statutory versus common law actions to recover wages).

59. *Burnett v. N.Y. Cent. R.R. Co.*, 380 U.S. 424, 428 (1965) (“[T]he courts ought to be relieved of the burden of trying stale claims when a plaintiff has slept on his rights.”).

60. *See* 10 THOMPSON ON REAL PROPERTY, *supra* note 54, § 87.03.

61. *Id.*

successful adverse possession claim defies easy explanation.<sup>62</sup> Special rationales—not the mere procedural grounds provided for the statute of limitations’ usual operation as a defense to a claim—must back this extraordinary effect.<sup>63</sup>

Starting in the late nineteenth century, jurists have attempted to uncover these rationales.<sup>64</sup> In the ensuing decades, several explanations have been developed and refined. Here, this Article groups them into three categories: reliance, efficiency, and quieting title.<sup>65</sup> It relies on this tripartite scheme for convenience alone. Certain explanations might fall into more than one of the categories, disparate explanations might operate in tandem, and other, perhaps better, categorization schemes are imaginable. This part’s goal, however, is not to promote a specific ordering scheme for adverse possession’s justifications. Rather, it is to present the disparate explanations the literature offers for adverse possession and to detect their weaknesses—and, where present, strengths—so as to construct a better account in Part II.

#### A. Adverse Possession as Protecting Reliance

“The true explanation of title by prescription seems to me to be that man, like a tree in the cleft of a rock, gradually shapes his roots to his surroundings, and when the roots have grown to a certain size, can’t be displaced without cutting at his life.”<sup>66</sup> Oliver Wendell Holmes’s statement is probably the most famous sentence written to explain adverse possession in America.<sup>67</sup> It gives voice to a notion in line with common intuition, whereby at its heart, adverse possession is a tool set to maintain the important relationship a person develops over time with the land on which she finds herself. The idea has retained resonance in legal and scholarly discussions about adverse possession.<sup>68</sup> Naturally, over the intervening years since Holmes wrote his vaunted lines, the study of property law has greatly evolved, and many new

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62. Adverse possession is unique in this effect among the defenses to trespass. *See, e.g.*, 42 U.S.C. § 2000a (establishing a right of entry under public accommodation laws); *United States v. Schoon*, 971 F.2d 193 (9th Cir. 1991) (analyzing the effects of claimants’ necessity defense).

63. In most states, the statute of limitations merely limits the ability to bring an action for recovery of possession, as it does with respect to all torts. Courts then made the added move to actually transform the possessor into the owner through judicial doctrine. *See* 3 AMERICAN LAW OF PROPERTY: A TREATISE OF THE LAW OF PROPERTY IN THE UNITED STATES § 15.2 (A. James Casner ed., 1952). In a few states, the statutes themselves are couched in terms indicating that the occupant acquires title through their operation. *See id.* § 15.2, at 761.

64. For the literature’s history generally, see John Lovett, *Disseisin, Doubt, and Debate: Adverse Possession Scholarship in the United States (1881–1986)*, 5 TEX. A&M L. REV. 1 (2017).

65. For a similar breakdown, see Lee Anne Fennell, *Efficient Trespass: The Case for “Bad Faith” Adverse Possession*, 100 NW. U. L. REV. 1037, 1059–63 (2006).

66. Letter from Oliver Wendell Holmes to William James (Apr. 1, 1907), in *THE MIND AND FAITH OF JUSTICE HOLMES: HIS SPEECHES, ESSAYS, LETTERS AND JUDICIAL OPINIONS* 417, 417–18 (Max Lerner ed., 1946).

67. *See, e.g.*, Lovett, *supra* note 64, at 14 n.73; Merrill, *supra* note 2, at 1131; Stake, *supra* note 1, at 2419.

68. *See, e.g.*, *Tioga Coal Co. v. Supermarkets Gen. Corp.*, 546 A.2d 1, 5 (Pa. 1988) (“We believe that Justice Holmes’ view of adverse possession represents sound public policy.”).

sophisticated theories have emerged. Several of these still draw on Holmes's original insight when approaching adverse possession.<sup>69</sup> They have developed Holmes's insight further and provided it with stronger normative backing by situating it within currently prevalent understandings of property as an institution invested in the protection of individuals' personhood or of social reliance interests.

One influential rereading of the roots idea of adverse possession integrated it into a personhood theory of property.<sup>70</sup> Under the personhood theory of property, the law affords varying protections to different properties in accordance with the given property's importance to its owner's life.<sup>71</sup> Some assets—a home, a family heirloom—are deeply embedded in an individual's personhood. Other assets—money, stock—are not part of the individual's personality; they are only held for their market value and are hence fungible. The law protects personhood properties more forcefully than fungible ones: the latter are, by definition, replaceable, while the former are specifically necessary for maintaining one's personality.<sup>72</sup>

This theory of property can readily account for adverse possession by echoing Holmes's old insight. The adverse possessor has been on the land for a lengthy period of time; that land has become part of her life.<sup>73</sup> For her, the property is now a personhood property.<sup>74</sup> The original owner, on the other hand, has not been on the land. Worse still, she has been ignoring it—she was not even aware someone else was using it. Just as over time the land has come to form part of the possessor's personality, it has become fully fungible for the owner.<sup>75</sup> Hence the law, via adverse possession, prioritizes the interests of the possessor, who holds the personhood interest in the land, over those of the owner, who now holds a mere fungible interest.<sup>76</sup> Personhood theory adherents thereby situate adverse possession's roots explanation within a property theory focused on individual rights.

The roots explanation, first introduced by Holmes, also fits into a less individualistic, more socially oriented, property theory. Over the past two decades, such social theories have proliferated.<sup>77</sup> They go by different names, but collectively, they can be referred to as progressive property

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69. Merrill, *supra* note 2, at 1131–32 (finding four modern variants of Holmes's insight).

70. See generally Margaret Jane Radin, *Property and Personhood*, 34 STAN. L. REV. 957 (1982).

71. *Id.* at 987.

72. *Id.* at 978–79.

73. See Margaret Jane Radin, *Time, Possession, and Alienation*, 64 WASH. U. L.Q. 739, 741–42, 748 (1986).

74. *Id.* at 748.

75. *Id.*

76. *Id.*

77. See, e.g., Nestor M. Davidson, *Standardization and Pluralism in Property Law*, 61 VAND. L. REV. 1597, 1616 (2008); Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 863–65 (2009); Jedediah Purdy, *A Freedom-Promoting Approach to Property: A Renewed Tradition for New Debates*, 72 U. CHI. L. REV. 1237, 1237–38 (2005). See generally Daphna Lewinsohn-Zamir, *The Objectivity of Well-Being and the Objectives of Property Law*, 78 N.Y.U. L. REV. 1669 (2003).

theories.<sup>78</sup> They theorize that property's function is to promote human flourishing, and flourishing consists of much more than mere individual entitlements.<sup>79</sup> Relationships with others are also vital for human flourishing.<sup>80</sup> Furthermore, because property law aims to enable all society members to flourish, it might sometimes force an owner to relinquish some of her powers to accommodate other individuals' needs. Property ownership thus encompasses not only individual rights but also obligations toward others.<sup>81</sup>

For progressive theories, adverse possession illustrates this social and obligation-oriented nature of property. The doctrine highlights the fact that property focuses on protecting an individual's reliance on her surroundings as necessary for human flourishing.<sup>82</sup> The possessor, who has been on the land, relies on the persistence of her relationship with that land.<sup>83</sup> She builds her life and social relationships there and becomes attached to the surrounding community. The owner, for her part, should be subject to an obligation of allowing the possessor to maintain that attachment and community, especially because her past behavior—when she, the owner, did not intervene with the possessor's stay—permitted that attachment to strengthen.<sup>84</sup> It would be unfair toward others to permit the owner to step in and attempt to unravel these communal connections.<sup>85</sup>

Viewed as necessary for protecting a personal attachment to land (under personhood theories) or a social attachment to a community (under progressive theories), the reliance-based explanation of adverse possession does more than merely justify the doctrine. It asserts that without adverse possession, property law cannot, in certain circumstances, live up to its promise of fortifying individuals' relationships and the stability of communities.<sup>86</sup> The reliance-based explanations thus transform the doctrine from an aberration in property law demanding an excuse into a key element of the law, exemplifying its overall goals.

Unfortunately, while adverse possession theoretically secures attachments and relationships—and thus can draw from the reliance justification—in reality, it hardly ever does. The reliance justification's adherents themselves have admitted a certain such disconnect. Specifically, they note the difficulty

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78. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743 (2009).

79. *See id.* at 743–44.

80. *See id.*

81. *See generally* Gregory S. Alexander, *The Social-Obligation Norm in American Property Law*, 94 CORNELL L. REV. 745 (2009).

82. *See generally* Joseph William Singer, *The Reliance Interest in Property*, 40 STAN. L. REV. 611 (1988).

83. *Id.* at 666–67.

84. *Id.*

85. *Id.*

86. On the centrality of community stability to relational property theories and the resultant need for the law to assure residents the ability to stay in their communities, see, for example, Nadav Shoked, *The Community Aspect of Private Ownership*, 38 FLA. ST. U. L. REV. 759, 803–05 (2011).

presented by the fact that adverse possession awards ownership not only to individual invaders but also to invading entities such as corporations.<sup>87</sup> Personhood and progressive property theories center on human beings; a corporation does not have much of a personhood interest, and its flourishing is not empathically embraced by progressive scholars. This one inconsistency can perhaps be written off as an inevitable, and maybe worthwhile, cost of adopting a doctrine necessary for human flourishing in a legal system that mostly does not distinguish humans from corporations.<sup>88</sup> Still, even if not debilitating in and of itself, this inconsistency is symptomatic of the reliance account's more general and unacknowledged removal from the doctrine's actual operation.

While in the abstract, adverse possession can be viewed as invested in protecting reliance interests important for personhood or human flourishing, the doctrine's real-world application no longer performs that function. This section's review explained that personhood accounts view adverse possession as protecting a person from losing her home or farm; progressive accounts view adverse possession as keeping a person in her community. That means, however, that these accounts are all afflicted by the flaw noted in the introduction to this Article: almost all modern adverse possession cases are not about keeping a possessor in her home or community.<sup>89</sup> They are about granting a neighbor a few extra feet (or inches) of land located at the margins of her property.<sup>90</sup>

For boundary disputes, concepts of roots or reliance are inescapably tenuous.<sup>91</sup> An individual's loss of a few feet of land when a boundary is adjusted does not displace her roots. Even if the intruder must remove a few bushes she planted or a driveway she paved, a major unsettling of her reliance is unlikely.<sup>92</sup> If an intruder endures a loss in a boundary dispute, she is not forced to leave her house or community. Consequently, neither the personhood nor the progressive variants of the roots account can justify the need to expand protection through adverse possession to the intruding possessor in such disputes.

The reliance rationale has distinguished provenance and finds further support in some of the most influential contemporary property theories.<sup>93</sup> It could explain the archetypal adverse possession case of yore and, in the process, effectively shed light on property law's goals in a democratic

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87. SINGER ET AL., *supra* note 1, at 309; Radin, *supra* note 73, at 749.

88. *See, e.g.*, Blake v. McClung, 172 U.S. 239, 259 (1898) (citing County of Santa Clara v. S. Pac. R.R. Co., 118 U.S. 394, 396 (1886)) (clarifying that the Fourteenth Amendment applies equally to corporations).

89. *See supra* note 21 and accompanying text.

90. *Id.*

91. David A. Dana & Nadav Shoked, *Property's Edges*, 60 B.C. L. REV. 753, 757 (2019) (explaining that the importance of the owner's interests, and thus the extent of their legal protection, diminishes as one gets closer to the property's boundary).

92. The law recognizes other doctrines protecting the intruder in those extraordinary circumstances involving major reliance interests. *See infra* note 138 and accompanying text.

93. Another modern interpretation of Holmes's claim connects it to the literature on the endowment effect. *See Stake, supra* note 1, at 2459–63.

society. Despite these theoretical merits, however, the reliance account does little to justify adverse possession as it operates in modern form. Accomplishing that mission requires an explanation that does not apply exclusively to the (today, mostly irrelevant) case of a squatter's protection.

### B. Adverse Possession as Promoting Efficiency

While personhood and progressive theories advocate protecting property when property is put to certain uses, efficiency theories of property are agnostic with regard to the specific uses to which property must be dedicated.<sup>94</sup> Hence, they might more successfully account for adverse possession's current function. Efficiency-minded commentators argue that society recognizes and protects legal institutions, such as property, not due to a commitment to some objective judgment respecting desirable behaviors or uses but rather because these institutions increase overall social utility.<sup>95</sup> Applied to property, this framework proclaims that the law's goal is to assure the most valuable uses of land.<sup>96</sup> Individuals are awarded ownership over land because an individual's decision regarding her asset's use is much likelier to maximize its value than a decision another makes.<sup>97</sup> If one individual is deemed an asset's owner, she reaps the benefits of a wise decision respecting its use. Correspondingly, she pays the costs of an unwise decision. She thus has an incentive—that others do not have—to make the best decisions for the asset. Furthermore, as the person closest to the asset, she knows best its conditions and potential.<sup>98</sup> For these reasons, private decision-making over assets' use and transfer is deemed superior to common holding or state control.<sup>99</sup>

Adverse possession, of course, diverges from this baseline: it deprives the individual owner of the power to determine her land's uses. Still, efficiency-minded commentators have endeavored to justify adverse possession as promoting property's overall goal of assuring efficient land use.<sup>100</sup> Adverse possession does so, the argument goes, by moving an asset from an individual who does not value it much to another who values it more.<sup>101</sup>

As noted, to win an adverse possession claim, an individual must actually possess the land.<sup>102</sup> She must possess it exclusively—that is, while the owner herself is not possessing the land.<sup>103</sup> Furthermore, she must possess it undisturbed by the owner for a lengthy period of time. That the possessor is

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94. JEREMY WALDRON, *THE RIGHT TO PRIVATE PROPERTY* 79 (1988).

95. See, e.g., POSNER, *supra* note 26, at 11–12.

96. Cf. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AM. ECON. REV. 347, 348 (1967).

97. See generally Garrett Hardin, *The Tragedy of the Commons*, 162 SCI. 1243 (1968).

98. See Henry E. Smith, *Property and Property Rules*, 79 N.Y.U. L. REV. 1719, 1754–55 (2004).

99. *Id.*

100. Dr. Karl T. Muth & Ashley D. Cox, *Adverse Possession: A Modern Perspective*, 47 REAL EST. L.J. 6, 15–16 (2018).

101. ROBERT COOTER & THOMAS ULEN, *LAW AND ECONOMICS* 154 (6th ed. 2012).

102. See *supra* notes 53–54 and accompanying text.

103. *Smith v. Tippett*, 569 A.2d 1186, 1190 (D.C. 1990).



on the land for a long while, as the owner ignores her (and the land), indicates that the possessor values the land much more than the owner.<sup>104</sup> Therefore, from an efficiency perspective, it is better if the possessor controls the land.<sup>105</sup> Adverse possession assures this desired result by lifting ownership from the owner—who has been “sleeping” on the land<sup>106</sup>—and granting it to the possessor—who values and uses it.<sup>107</sup>

This efficiency case for adverse possession might appear rather simplistic.<sup>108</sup> It makes two assumptions that must be established or explained away: one pertaining to the parties’ respective valuations of the land and a second pertaining to the infeasibility of a market transaction between the parties.

First, the idea that the adverse possessor inherently and necessarily values the land more than its owner is not obvious. To satisfy an adverse possession claim’s elements, the possessor need not improve the land, just possess it. No structures need be built; permanent, or even temporary, habitation need not be established.<sup>109</sup> The quintessential evidence for possession—fencing<sup>110</sup>—does not automatically entail any work on, or betterment of, the enclosed area.<sup>111</sup> Conversely, the fact that the title owner has been “sleeping on” (ignoring) the land does not always imply that she is undervaluing or underutilizing it.<sup>112</sup> Active use is not always a land’s best use: preservation is a socially and economically valuable use.<sup>113</sup> Even in traditional

104. Stewart E. Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 80 (1987).

105. JAMES GORDLEY, FOUNDATIONS OF PRIVATE LAW 144 (2006).

106. Originally the law was probably much more concerned with the demerits of the owner who was ignoring the title than it was with the possessor’s merits. See JAMES BARR AMES, *Lectures XVII. The Nature of Ownership* (1909), reprinted in LECTURES ON LEGAL HISTORY AND MISCELLANEOUS LEGAL ESSAYS 192, 197 (1913).

107. See John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 526, 539–40 (1996) (observing that adverse possession was “adjusted for wilderness land in a manner that tended to vest title in the industrious user rather than the idle claimant”).

108. Fennell, *supra* note 65, at 1064 (“The dual notion of punishing a ‘sleeping owner’ and rewarding a ‘working possessor’ sometimes makes an appearance in discussions of adverse possession—but often as a straw man worthy of ridicule. The reasons for scorn are clear enough.”).

109. *Nome 2000 v. Fagerstrom*, 799 P.2d 304, 309 (Alaska 1990) (“Whether a claimant’s physical acts upon the land are sufficient[] . . . does not necessarily depend on the existence of significant improvements, substantial activity or absolute exclusivity.”).

110. *Ofuasia v. Smurr*, 392 P.3d 1148, 1155 (Wash. Ct. App. 2017) (“Fences are typical expressions of hostility . . . . The existence of a fence may be dispositive evidence of hostile possession.”).

111. Similarly, to avoid losing land through adverse possession, the title owner need not actively use, let alone develop, it. She solely needs to verify, before the period of limitations passes, that no trespasser is on the land. If a trespasser is found, she need only evict that trespasser or grant her permission to stay.

112. See, e.g., Jeffrey M. Netter et al., *An Economic Analysis of Adverse Possession Statutes*, 6 INT’L REV. L. & ECON. 217, 219 (1986) (observing that “optimizing behavior does not require that land be continuously in service”).

113. See Sprankling, *supra* note 19 (suggesting that the idea is out of step with modern policy, as sometimes less intensive uses are best for society); Stake, *supra* note 1, at 2434–35 (same).

developmental terms, sometimes land is best kept underdeveloped.<sup>114</sup> This allows for the management of land supply, which increases values in the long term, prevents real estate bubbles, leaves land available for development patterns that might become popular later, and so on.<sup>115</sup>

These observations require refining the efficiency justification as presented above. An intruder's lengthy possession of land does not necessarily imply that the owner values the land less than her, but it probably provides a strong indicator.<sup>116</sup> It serves as a proxy; by no means a perfect proxy but a proxy nonetheless.<sup>117</sup> An imperfect proxy inevitably generates risks of mistake: relying on this proxy, adverse possession might end up awarding land to a possessor who in fact values the land less than its owner. Still, the law tolerates this risk due to land's unique nature as an asset. Unlike most other assets, land is a limited resource.<sup>118</sup> The law thus places a special premium on not seeing land go to waste.<sup>119</sup> Adverse possession staves off such waste by neglectful owners, and for that reason, society finds acceptable the risk of mistake the doctrine introduces.<sup>120</sup> Adverse possession does not *assure* that land is used in the most valuable way, but it *increases* the likelihood of that eventuality; given that eventuality's importance, the increase in its likelihood is worthwhile—despite potential costs.<sup>121</sup>

Aside from assuming that the possessor uses the land better than its owner, the efficiency account of adverse possession must make a second assumption, which pertains to the impossibility of a deal between those parties. Why is adverse possession needed to shift the land to its more effective user to begin with? Under economic analysis's own terms, for the desirable transfer of an asset to its better user, no external intervention is needed. The individual who values an asset more than its current owner will pay more money for it than what the current owner demands.<sup>122</sup> Hence, a

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114. See Netter et al., *supra* note 112.

115. See, e.g., Stephen F. Williams, *Running Out: The Problem of Exhaustible Resources*, 7 J. LEGAL STUD. 165, 181–85 (1978).

116. Merrill puts it somewhat differently, explaining that while the owner is only required to monitor the land, he is thereby forced to assert his right to exclude and therefore “is in effect being asked to ‘flush out’ offers to purchase his property, to make a market in the land.” Merrill, *supra* note 2, at 1130.

117. EDUARDO MOISÉS PEÑALVER & SONIA K. KATYAL, PROPERTY OUTLAWS: HOW SQUATTERS, PIRATES, AND PROTESTERS IMPROVE THE LAW OF OWNERSHIP 128–29 (2010).

118. Edward H. Rabin, *Zoning and Other Matters*, 24 STAN. L. REV. 426, 428 (1972) (reviewing DONALD G. HAGMAN, URBAN PLANNING AND LAND DEVELOPMENT CONTROL LAW (1971)).

119. See generally Jedediah Purdy, *The American Transformation of Waste Doctrine: A Pluralist Interpretation*, 91 CORNELL L. REV. 653 (2006).

120. See Katz, *supra* note 15, at 63–64 (arguing that an owner who fails to set the agenda for his land and make others conform to it deserves to lose title since, as an institution, property's goal is to have someone set an agenda for the asset).

121. Furthermore, if courts are aware of this goal and the risks of the doctrine, they can reduce the risks of mistake by adjusting the doctrinal tests they use. See, e.g., Fennell, *supra* note 65, at 1066–67; Donald C. Morgan, Comment, *Balancing Interests: How the Prescriptive Easement Doctrine Can Continue to Efficiently Support Public Policy*, 50 WAKE FOREST L. REV. 1253, 1267 (2015).

122. See R. H. Coase, *The Problem of Social Cost*, 3 J.L. & ECON. 1, 3–4 (1960).

transaction will be accomplished. It follows that if a possessor indeed values land more than its title owner, the former will simply purchase it from the latter. If such a deal does not materialize, then the possessor does not truly value the land more. The forced transfer of the land in such circumstances to that possessor through adverse possession decreases utility as it ignores the parties' bargaining preferences, which reflect their true valuations.<sup>123</sup>

The only way to maintain that the forced deal might still increase utility is to presume that the voluntary deal between the owner and the possessor does not materialize, not because the two parties do not desire it but due to some other, external reason.<sup>124</sup> The assumption is that the deal would be efficient—the possessor does value the land more than the owner—but is blocked on account of “transaction costs.”<sup>125</sup> Reaching a deal, any deal, always involves bargaining, and bargaining is not costless. A buyer might desire to buy but cannot find the seller,<sup>126</sup> she might value the asset more than its holder but has no way of learning or transmitting that fact,<sup>127</sup> or she might need intermediaries to draft an agreement.<sup>128</sup> Such transaction costs often preclude the consummation of a deal that would benefit both parties. In such cases of market failure, the law must facilitate the efficient deal. It might even have to force the deal. Read in these terms, adverse possession is a legal intervention necessary to achieve an efficiency-enhancing transfer that the market cannot autonomously produce.<sup>129</sup>

The challenge for the efficiency argument is to identify those transaction costs that supposedly block the efficient market deal. Why is it prohibitively expensive for the owner who does not value the land, and the possessor who does, to transact? One answer is that the owner might be tempted to extort the possessor, thereby making the deal artificially unappealing and hindering it.<sup>130</sup> Knowing that the possessor has already invested in the land, as she has been on it for years, the owner could demand an exorbitant price that does not accurately reflect her valuation of the land<sup>131</sup> and which the possessor cannot afford.<sup>132</sup>

This claim is not without its limitations.<sup>133</sup> Criticism grows even more compelling when considering the reality this Article highlights, whereby

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123. Fennell, *supra* note 65, at 1064.

124. Muth & Cox, *supra* note 100, at 15–16.

125. See Sterk, *supra* note 104, at 81.

126. Stake, *supra* note 1, at 2443 (explaining that adverse possession is a solution to the problem of the missing seller).

127. Sterk, *supra* note 104, at 72.

128. For example, she might simply lack the liquid resources to express her valuation in terms of willingness to pay. Jack M. Beerman & Joseph William Singer, *Baseline Questions in Legal Reasoning: The Example of Property in Jobs*, 23 GA. L. REV. 911, 964–65 (1989).

129. See Netter et al., *supra* note 112, at 220.

130. See, e.g., A. Mitchell Polinsky, *Resolving Nuisance Disputes: The Simple Economics of Injunctive and Damages Remedies*, 32 STAN. L. REV. 1075, 1092–93 (1980) (recognizing this risk).

131. Merrill, *supra* note 2, at 1131 (noting how, because the possessor has “sunk costs” in the land, the owner can extract “quasi-rents” from her).

132. See *id.*

133. See *id.* at 1132.

most adverse possession cases involve boundary disputes. The supposition that an owner can draw on extraordinary market power to abuse the possessor is far from evident.<sup>134</sup> First, the power might be mutual: just as the owner is the only potential seller the possessor can deal with, the possessor might be the sole buyer the owner can approach. This actuality is almost inevitable in boundary disputes.<sup>135</sup> Second, the notion that the owner can safely assume that the possessor cannot walk away from the land—and is thus susceptible to extortion—ignores the fact that the possessor’s sunk investments might be negligible. As noted, adverse possession does not require the possessor to improve the land. Hence, the possessor’s acts on it might amount to no more than erecting a fence, planting a bush, or removing debris.<sup>136</sup> Such investments are rarely priceless: the possessor’s fear of losing them is unlikely to embolden an owner to make exorbitant demands.

True, a case could be imagined of an owner silently observing an intruder constructing major improvements for years and then popping up demanding payment.<sup>137</sup> In such a case, the demand could indeed be extortionate and unreflective of the land’s true value to either party, thereby derailing a mutually beneficial deal. Such circumstances could perhaps materialize in an extreme case of a boundary dispute: a neighbor might mistakenly build a small part—perhaps no more than a few inches—of her house’s foundation or of one of its walls on the owner’s land. To remove the intruding foundation or wall, the neighbor would have to demolish her entire house, and thus the owner enjoys an awesome power in negotiating with the neighbor. But, property law already renders this eventuality almost impossible. Several doctrines—improving trespasser, relative hardship, and unjust enrichment—preclude the owner from procuring an injunction to have such intruding buildings removed.<sup>138</sup> Consequently, in the most easily imaginable circumstances of a rather hard-to-imagine scenario of the scheming owner, the law already thwarts the owner’s efforts to extract outrageous rents from the possessor.<sup>139</sup>

Perhaps a case could still somehow crop up where adverse possession would be the only way to avoid an asking price’s unreasonable inflation.<sup>140</sup> But the need to resort to extreme and unlikely sets of hypothetical facts only highlights the difficulty in pinpointing the transaction costs allegedly barring

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134. Even the claim that an actor’s market power is a transaction cost is contested. See Lee Anne Fennell, *The Problem of Resource Access*, 126 HARV. L. REV. 1472, 1481 (2013).

135. The same probably applies to nonboundary cases, too. Because the owner has not acted with respect to the relevant land for a lengthy period of time, little reason exists to assume that it is generating much market interest.

136. See *supra* note 109 and accompanying text.

137. See, e.g., Merrill, *supra* note 2, at 1131; Thomas J. Miceli & C. F. Sirmans, *An Economic Theory of Adverse Possession*, 15 INT’L REV. L. & ECON. 161, 164 (1995).

138. See SINGER, *supra* note 21, at 169–70.

139. Fennell, *supra* note 65, at 1060–61 (detailing the legal tools rendering impossible such extortion of possessors).

140. See Bell & Parchomovsky, *supra* note 13, at 58 (justifying adverse possession as a cure to an owner’s “strategic behavior [setting] a trap [for] innocent occupants”).

an efficient deal between possessor and owner.<sup>141</sup> Prevalent efficiency-grounded explanations of adverse possession provide only blank statements about the prohibitive costs of using the formal system to complete the owner-possessor deal.<sup>142</sup>

An efficiency justification for adverse possession demands more. The forced transfer of property from an allegedly less efficient user to its allegedly most efficient user runs counter to the logic of economic analysis. Furthermore, it similarly runs counter to the logic of current laws.<sup>143</sup> For example, the owner of Vincent van Gogh's most important masterpiece could store it in an underground basement on a deserted island and only choose to bring it out during rainstorms for use as cover for her lawn furniture.<sup>144</sup> Still, the law does not remove it from her and bestow it to a public museum where it would clearly be much more appreciated.<sup>145</sup> A developer cannot unilaterally take hold of old unused industrial grounds that could produce more social value as commercial or residential lands; even the government itself is not always free to do so.<sup>146</sup> In a capitalist system, the law does not just redistribute property to its better user.

Given efficiency theory's, and the law's, strong belief in and commitment to market efficiency, exceptional transaction costs justifying the displacement of market transactions cannot simply be assumed. If adverse possession is to be justified on transaction costs grounds—as it must for an efficiency account—these costs must be identified. A positive answer must

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141. See Merrill, *supra* note 2, at 1131 n.38 (explaining that, given the time the landowner would have to wait postconstruction, the scenario is unlikely).

142. See, e.g., COOTER & ULEN, *supra* note 101, at 154 (“[A] rule for acquiring title by adverse possession lowers the cost of establishing rightful ownership claims by removing the risk that ownership will be disputed . . .”); Richard A. Epstein, *Past and Future: The Temporal Dimension in the Law of Property*, 64 WASH. U. L.Q. 667, 678 (1986) (“[Adverse possession] spares the rightful owner the costs of litigation that might otherwise be needed to establish title.”).

143. See *White Bros. & Crum Co. v. Watson*, 117 P. 497, 499 (Wash. 1911) (“The next step in the invasion of the right of property would be to invite the courts to measure the comparative needs of private parties, and compel a transfer to the one most needing and who might best utilize the property. If a man may be required to surrender what is his own because he does not need it and cannot use it, and because another does need it and can use it, then there is no reason why he may not be required to surrender what he needs but little because another needs it much. A doctrine so insidiously dangerous should never find lodgment in the body of the law through judicial declaration.”).

144. See JOSEPH SAX, PLAYING DARTS WITH A REMBRANDT: PUBLIC AND PRIVATE RIGHTS IN CULTURAL TREASURE 1(1999) (“Many of the greatest artifacts of our civilization can be owned by anyone who has the money to buy them, or the luck to find them, and their owners can then treat the objects however their fancy or their eccentricity dictates. A standard text puts it bluntly enough: “[A]n eccentric American collector who, for a Saturday evening’s amusement, invited his friends to play darts using his Rembrandt portrait as the target would neither violate any public law nor be subject to any private restraint.” (alteration in original) (quoting 6 FRANKLIN FELDMAN ET AL., ART LAW: RIGHTS AND LIABILITIES OF CREATORS AND COLLECTORS § 5.1.1, at 434 (1986))).

145. See Shoked, *supra* note 86, at 822 (discussing *droit de suite* and redesigning this element of copyright law to “make royalties payable to a public entity promoting public access to art”).

146. See generally *Kelo v. City of New London*, 545 U.S. 469 (2005).

be provided to the question: are there attributes of the market for land rendering certain desirable deals between owners and long-term possessors prohibitively, though artificially, expensive?

### C. Adverse Possession as Quieting Title

The only way in which adverse possession can be portrayed as efficient is as a means for reducing the procedural costs of transacting. Thus, perhaps the doctrine's explanation should be sought in justifications that are explicitly concerned not with the property system's substantive goals (for example, reliance or efficiency) but rather with the procedures employed to achieve those goals. And indeed, a justification is often provided for adverse possession that focuses not on property law's substance but on its form. Precisely because it is not focused on the law's substantive goals, such a justification is appealing to a diverse group of writers. For it can easily complement any of the explanations for adverse possession seen above.<sup>147</sup>

A body of law, such as property or contract law, is not only committed to certain substantive goals, but it is also committed to effective administration of the law.<sup>148</sup> Form, not just substance, animates legal doctrines and, at times, might even be prioritized over substance.<sup>149</sup> Thus, some specific doctrines, such as adverse possession, can perhaps best be explained as occupied not with any of the law's overriding goals but with smooth administration of the law.<sup>150</sup> The desire to promote smooth administration of property laws has been a function ascribed to the doctrine ever since its inception: adverse possession is said to be needed to "quiet title."<sup>151</sup> That is, it "makes ownership more settled or certain."<sup>152</sup> Because property, more than most other legal institutions, is geared toward facilitating impersonal interactions respecting fixed assets, such ease of administration is seen as a benefit in and of itself.<sup>153</sup> It can further serve any of property's contesting substantive goals discussed earlier. Quieting title allows individuals to rely

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147. See *supra* Parts I.A, I.B.

148. See Duncan Kennedy, *Form and Substance in Private Law Adjudication*, 89 HARV. L. REV. 1685, 1686–87 (1976).

149. See Joshua B. Fischman & Tonja Jacobi, *The Second Dimension of the Supreme Court*, 57 WM. & MARY L. REV. 1671, 1674–75 (2016) (arguing that U.S. Supreme Court Justices often align not in accordance with their substantive preferences but with their preferences respecting legal doctrines' form or methodology).

150. See Roscoe Pound, *The Theory of Judicial Decision: A Theory of Judicial Decision for Today*, 36 HARV. L. REV. 940, 951 (1923) (arguing that "rules . . . applied mechanically are more adapted to property . . . [while] standards where application proceeds upon intuition are more adapted to human conduct and to the conduct of enterprises"); Carol M. Rose, *Crystals and Mud in Property Law*, 40 STAN. L. REV. 577, 577 (1988) ("Property law . . . has always been heavily laden with hard-edged doctrines that tell everyone exactly where they stand.").

151. Quieting title is one of the earliest justifications provided for adverse possession. The earliest statute protecting possessors opened with the statement: "For quieting of Men's Estates, and avoiding of Suits, Be it enacted . . ." The Limitation Act 1623, 21 Jac. c. 16 (Eng.).

152. Stake, *supra* note 1, at 2441.

153. See Pound, *supra* note 150, at 951.

on their relationships with their lands and with their neighbors.<sup>154</sup> It also facilitates market transactions.<sup>155</sup>

Adverse possession simplifies the administration of property law—quiets title—by curbing litigation and adjusting legal realities to reflect realities on the ground. The doctrine authorizes a court to refuse to accommodate, or even hear, certain claims. A judicial willingness to adjust land rights to any relevant claim would engender an excess of litigation.<sup>156</sup> For example, if a neighbor knows that a court will never budge from a formal boundary line, the neighbor will persist in a dispute even if he does not care much about the contested land.<sup>157</sup> In such and all other potential cases, courts and parties must waste resources in investigating all rights and claims that might have ever applied to contested land.<sup>158</sup> Such investigations into the past and into all contending claims are costly affairs that often yield indeterminate findings. The constant threat of such potential claims alone suffices to cloud property ownership with uncertainty.<sup>159</sup> Adverse possession removes that cloud. It empowers a court to announce that claims are stale—to ignore claims irrespective of their actual merit.<sup>160</sup> Adverse possession streamlines property rights' definition by subjecting to a technical cutoff date all challenges to existing property rights.<sup>161</sup>

Adverse possession's mode of identifying those existing property rights that are shielded from potential litigants' claims is presented as the ultimate simplification device.<sup>162</sup> The doctrine simply announces that recognized legal rights are to be derived from facts anyone can physically observe when visiting a property today.<sup>163</sup> Adverse possession, in other words, equates legal reality with reality on the ground.<sup>164</sup> Such a move renders

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154. Stake, *supra* note 1, at 2441–42.

155. *Id.*; see also Epstein, *supra* note 142, at 678.

156. See, e.g., Henry W. Ballantine, *Title by Adverse Possession*, 32 HARV. L. REV. 135, 136–37 (1918) (detailing the many pieces of evidence an individual would have to provide if she had to prove that she holds a good interest against all potential claims); see also *supra* note 142 and accompanying text.

157. See Epstein, *supra* note 142, at 676–77.

158. See COOTER & ULEN, *supra* note 101, at 154 (“[A]dverse possession lowers the [administrative] cost[s] of establishing rightful ownership claims by removing the risk that ownership will be disputed on the basis of the distant past.”).

159. See Stake, *supra* note 1, at 2441–42.

160. See 1 JOHN STUART MILL, *PRINCIPLES OF POLITICAL ECONOMY* 214–15 (Arthur T. Hadley ed., rev. ed. 1900) (1848) (contending that adverse possession protects owners from false claims that they gained title by force or fraud); Merrill, *supra* note 2, at 1129 (arguing that adverse possession can remove potential defects in title, thereby making transacting cheaper).

161. Netter et al., *supra* note 112, at 225 (explaining that adverse possession, by providing certainty, increases land values).

162. *Id.*

163. *But see* Sterk, *supra* note 32, at 1296 (explaining that even abiding by the clear rules generates high search costs since those observing reality are unaware of the rules).

164. See Muth & Cox, *supra* note 100, at 13.

administering property rights exceptionally easy, and therein lies, commentators argue, adverse possession's great appeal.<sup>165</sup>

Yet, popular as the claim is, when actually fleshed out, the appeal of adverse possession as an administrative tool is rather superficial.<sup>166</sup> How exactly is adverse possession “quieting?”<sup>167</sup> Adverse possession is an exceptionally complicated doctrine—counting at least five elements—that necessitates intense judicial analysis.<sup>168</sup> The doctrine determines who owns contested land in light of multiple tests a court must apply individually to any given set of facts.<sup>169</sup> Some of these tests invite the court to engage in fact-intensive analysis adjusting results to specific circumstances. Consider adverse possession's hostility element, requiring (at a minimum) a determination that the possessor was never granted permission to enter.<sup>170</sup> Research into the parties' behavior and communications over years and decades is inescapable. Still other tests an adverse possession claim must satisfy are rather open-ended. For example, what counts as “actual” possession?<sup>171</sup>

According to the quieting title account, adverse possession assures an observer that the person she sees on the land is the land's owner, irrespective of any potential contradictory claims.<sup>172</sup> In actuality, however, adverse possession only tells the observer that the person she sees is the owner if a court at some later point deems that person to have actually possessed that land exclusively, in a hostile manner, and openly, for a period of time the statute sets.<sup>173</sup> These determinations afford a court much discretion to seek “fairness.”<sup>174</sup> Turning to such subtle tools for the pursuit of a “fair” result may perhaps be inevitable as long as adverse possession is a doctrine dealing with squatters' rights.<sup>175</sup> In those extreme cases, substantive questions geared toward ascertaining fairness are perhaps natural and might thus even

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165. The easy administration of property rights is often presented as the only true justification for adverse possession. *See, e.g.*, Ballantine, *supra* note 156, at 135 (“The statute has not for its object to reward the diligent trespasser for his wrong nor yet to penalize the negligent and dormant owner for sleeping upon his rights; the great purpose is automatically to quiet all titles which are openly and consistently asserted . . .”).

166. *See* Stake, *supra* note 1, at 2448–49.

167. *See* Kristine S. Cherek, *From Trespasser to Homeowner: The Case Against Adverse Possession in the Post-Crash World*, 20 VA. J. SOC. POL'Y & L. 271, 285 (2012) (explaining that it is unclear why today—unlike in the past—the land system requires adverse possession).

168. *See* Fennell, *supra* note 65, at 1062 (“A review of the law of adverse possession reveals it to be a stunningly weak vessel for delivering repose.”).

169. *See supra* note 53 and accompanying text.

170. *See* 10 THOMPSON ON REAL PROPERTY, *supra* note 54, § 87.10.

171. *Id.* § 87.04 (discussing how to determine when one has “actual” possession of property).

172. *See, e.g.*, Ballantine, *supra* note 156, at 136 (“[I]f the exercise of apparent ownership is made conclusive evidence of title, this wholesale method necessarily establishes and quiets the bad along with the good. The trespasser benefits, the true owner suffers, for the repose of meritorious titles generally.”).

173. *See* Apperson v. White, 950 So. 2d 1113, 1116 (Miss. Ct. App. 2007).

174. *See* Rose, *supra* note 150, at 591.

175. SINGER ET AL., *supra* note 1, at 311.



appear predictable to parties.<sup>176</sup> But as this Article stresses, the doctrine currently inhabits the boundary-dispute universe, and there, these substantive considerations are not as obviously important or intuitive. Courts' leeway in analyzing them is so ample that individuals' ability to predict results when contemplating contested boundaries is exceptionally limited.<sup>177</sup>

Under the scheme commonly employed to categorize a doctrine's mode of administering legal results, adverse possession is the quintessential standard.<sup>178</sup> Legal doctrines assume one of two forms: rules or standards.<sup>179</sup> Rules prescribe specific results—they draw clear lines. Judges faced with a factual pattern can mechanically apply the rule dictating an outcome.<sup>180</sup> Standards are rules' opposites as they supply a court with flexibility to analyze each case in light of policies it seeks to promote.<sup>181</sup> The argument that adverse possession is necessary to quiet rights is an argument that a standard is necessary to provide clarity—and that is a particularly peculiar argument. Rules, not standards, are normally associated with that clarification function.<sup>182</sup> As a standard, adverse possession is a very “noisy” doctrine that renders property rights more—not less—expensive to discern.<sup>183</sup>

The traditional quieting title justification for adverse possession thus cannot solve the problem the doctrine's efficiency justification encountered.<sup>184</sup> That challenge was the need to identify the transaction costs allegedly blocking a voluntary deal between owner and possessor. The quieting title justification merely refocuses the problem. If a doctrine whose application is anything but straightforward is necessary to quiet title, title in its absence must be shown to be tremendously unquiet.

Why would the property system's administration be unbearably costly in the doctrine's absence? How does property law generate legal claims whose determination is costlier than the application of an unpredictable standard cutting them off? What are the impossible difficulties that render a clumsy standard necessary as a clarifying device? Without answering these questions—as opposed to just assuming the answers<sup>185</sup>—any explanation for adverse possession's persistence remains lacking. For that reason, the next

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176. See Sterk, *supra* note 32, at 1295–97 (explaining that property rules can be costly because they entail search costs: a need for lay parties to figure out the answers to questions they cannot even recognize before consulting legal experts).

177. See also Sipe, *supra* note 2, at 855 (explaining that because adverse possession, unlike formal title, enables courts to exercise discretion through the doctrine's tests and establish their own views of the appropriate boundaries, the doctrine generates irregular boundaries).

178. See SINGER, *supra* note 21, at 162–63.

179. See Kennedy, *supra* note 148, at 1687–88.

180. *Id.* at 1688–89.

181. *Id.* at 1688.

182. *Id.* at 1688–89.

183. See *supra* note 168.

184. See *supra* Part I.B.

185. See, e.g., Fennell, *supra* note 65, at 1063–64 (assuming that modern law has better tools for quieting title); Merrill, *supra* note 2, at 1129 (assuming that adverse possession is the most efficient tool for that purpose).

part will answer those questions to thereby develop a more coherent justification for adverse possession than the existing ones this part reviewed.

## II. THE NEED THAT ADVERSE POSSESSION ACTUALLY ANSWERS

Jane is buying Blackacre from John. How does she know what Blackacre's boundaries are? How does she know what John's rights are there? In the simplest of terms, how can Jane make sure she is buying what she thinks she is buying? Practitioners and scholars are all well acquainted with the formal rules dictating the procedures for completing land transactions. Still, heretofore, these rules have hardly been thoroughly considered when justifying adverse possession.<sup>186</sup> Yet, Part I showed that the sole way to justify adverse possession is through exploring these procedures.<sup>187</sup> Adverse possession can only be vindicated if, standing alone, these formal mechanisms for defining boundaries erect an unsatisfactory system that must be supplemented by that costly doctrine.

This part therefore reviews the formal rules property law uses to set boundaries. It first introduces the seemingly optimal system—a registration system. Then it turns to the suboptimal system American law employs—a recording system. Thereafter, it presents the mechanisms rendering this suboptimal system workable: adverse possession alongside private insurance. This exercise explains the persistence of adverse possession and the role the doctrine plays in our property system. It also facilitates an assessment of that role and a comparison, which concludes this part, of the American system for setting boundaries and the optimal system.

### A. *The Straightforward Formal System for Land Management: A Registry*

Most individuals probably envision a straightforward system for transacting in land.<sup>188</sup> When Jane contemplates purchasing Blackacre, she should be able to turn to a central database telling her what Blackacre's boundaries are, who owns Blackacre, and whether there are any other rights or obligations associated with Blackacre (easements, such as rights of way, and covenants, such as building restrictions, for example). This information should be readily legible. A database should thus provide Jane with a

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186. Authors simply assume that the formal system is operable and, hence, adverse possession adds costs to it. *See, e.g.,* Stake, *supra* note 1, at 2439–40 (“Compared with the rules of title transfer, which determine record title primarily from documents that remain reliable for many years, the elements of adverse possession are indeterminate . . . . Long ago, before deeds were recorded in county courthouses, adverse possession might well have reduced the costs of litigation . . . . Today, deeds and probated wills, even old ones, are easily found, and record title is inexpensively resolved. Because the elements of adverse possession are harder to determine than record title, a concern for reducing the amount spent on the judicial system would not seem an adequate justification for continuing to adhere to the doctrine of adverse possession.”).

187. *See supra* Part I.

188. *See* C. Dent Bostick, *Land Title Registration: An English Solution to an American Problem*, 63 *IND. L.J.* 55, 61–62 (1987).

detailed map of Blackacre and inform her, say, that John owns a fee simple there and no one else owns any rights therein.

Now assume that, based on this information, Jane purchases Blackacre from John. Later, it turns out that the database had misplaced Blackacre's boundary. John only owned half of Blackacre: the other half actually forms part of neighboring Greenacre, which David owns. Many individuals would perhaps assume that because the mistake was not Jane's, but rather embedded in a database she must rely on, Jane should be shielded.

In other words, a purchaser of land likely expects the formal system to satisfy two demands: standardized information and assurances of reliability.<sup>189</sup> These elements appear necessary for a market in lands.<sup>190</sup> If people do not know what they are buying, they would hesitate before buying, which would deter transactions.<sup>191</sup> If they were to have access to that information, but could not trust it, they would still hesitate, and transactions would still be deterred. Because a working market is necessary for assets' efficient allocation, and because land is an asset of limited quantity whose inefficient allocation would be exceptionally costly for society, the legal system strives to provide market actors with these two prerequisites for a willingness to transact in land.

In the common-law world, this function is performed through the Torrens registration system.<sup>192</sup> In a Torrens system, a central location—often, the county office—will hold a registry containing information on all area lands. In that registry, each lot has a unique number referencing the land as it appears on a plan.<sup>193</sup> The plan details the lot's boundaries. It also lists the names of the owners and of holders of any other interests.<sup>194</sup> A transfer of the lot is achieved only through changing that registration (to indicate the name of the new owner or the new boundaries).<sup>195</sup> In this manner the Torrens registration system proffers standardized information about landholding.

It also assures reliability—actors' second demand for entering a market. Because in the Torrens system a land transfer is only completed through registration, registered title is indefeasible.<sup>196</sup> That is, an interest registered cannot be challenged.<sup>197</sup> While, as in any other human-managed system,

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189. See Douglas Baird & Thomas Jackson, *Information, Uncertainty, and the Transfer of Property*, 13 J. LEGAL STUD. 299, 304–06 (1984) (explaining that information provided by a registry is necessary for freedom to transfer property).

190. See *id.* at 305–06.

191. See, e.g., Abraham Bell & Gideon Parchomovsky, *Of Property and Information*, 116 COLUM. L. REV. 237, 241 (2016) (“[T]he value of title to property rights vitally depends on the degree to which it is known by people in the world . . .”).

192. See Barry Goldner, *The Torrens System of Title Registration: A New Proposal for Effective Implementation*, 29 UCLA L. REV. 661, 662 & n.6 (1982). The Torrens system is named for the South Australia premier who introduced it in 1858. *Id.* at 662 n.6.

193. *Id.* at 677–79, 677 n.86.

194. *Id.*

195. *Id.* at 679–80.

196. *Id.* at 676.

197. *Id.* at 677–79, 677 n.86.

mistakes may occur, the state guarantees the Torrens registry's accuracy.<sup>198</sup> If the registry contains a mistake in the description of the land or its owner the purchaser relying on the registry in good faith still holds good title.<sup>199</sup> Although the registered owner, John, from which the purchaser, Jane, bought the land only owned half the land, Jane will keep the land she bought as described in the registry. The true original owner of the other half of the land, David, who would consequently lose his interest, will receive monetary compensation from a state-managed assurance fund, which is funded through registration fees.<sup>200</sup>

The Torrens registration system thus furnishes land purchasers with the two elements they demand. First, it is a standardized system providing readily available accurate information (nowadays, it can be accessed online). Second, it is a highly effective insurance system, promising the purchaser that the land as they see it in the registry will be what they receive. In case of mistake, the purchaser will lose nothing: they will not even have to settle for monetary compensation. They will keep the land as originally described.

### *B. The American Formal System for Land Management: A Record*

The Torrens registration system simplifies land transactions and is thus aligned with popular intuitions. Yet it is not the system American states adhere to.<sup>201</sup> Instead, American law relies on a recording system.

The differences between the Torrens registration system and the recording system flow from the disparate manners for concluding land deals in each. As noted, in a Torrens system, a land transfer is completed through registration. Conversely, in a recording system, the transaction is not completed by changing details in some central database.<sup>202</sup> Rather, the transaction is completed by the grant of a deed from the owner.<sup>203</sup> That deed, in turn, need not be reported to a central authority or made public in any other

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198. *Id.* at 678–80.

199. *Id.* at 693.

200. *Id.* at 680–81.

201. For an overview of the historic debates, as well as the U.S. experience with different registration systems, see BLAIR C. SHICK & IRVING H. PLOTKIN, *TORRENS IN THE UNITED STATES* 1–23 (1978). Nine states still allow for a registry but do not mandate registration. *See* COLO. REV. STAT. § 38-36-101 (2021); GA. CODE ANN. § 44-2-40 (2021); HAW. REV. STAT. § 501-1 (2021); MASS. GEN. LAWS ANN. ch. 185, § 1 (2021); MINN. STAT. § 508.01 (2021); N.Y. REAL PROP. LAW § 370 (McKinney 2021); N.C. GEN. STAT. § 43-1 (2021); OHIO REV. CODE ANN. § 5309.01 (West 2021); WASH. REV. CODE ANN. § 65.12.005 (2021). In most of these states, the system is used only sporadically. The Torrens system is used to a substantial extent in only four states: Hawaii (statewide), Massachusetts (statewide), Minnesota (select counties), and Ohio (select counties). *See* John L. McCormack, *Torrens and Recording: Land Title Assurance in the Computer Age*, 18 WM. MITCHELL L. REV. 61, 73 (1992).

202. Unless a specific statute requires that a deed be recorded to take effect. *See, e.g.*, MD. CODE ANN., REAL PROP. § 3-101 (LexisNexis 2021). Slightly more prevalent is mandatory recording of only certain specific interests, such as mortgages. *See* ARK. CODE ANN. § 18-40-102 (2021); 21 PA. CONS. STAT. § 621 (2021).

203. *See* 4 TIFFANY REAL PROPERTY § 1055, Westlaw (database updated Sept. 2020) (“The grantor, it is said, divests himself of the title by the delivery of the deed and the acceptance is the act by which the grantee is invested with the title . . .”).

way to take effect.<sup>204</sup> A purchaser can keep her deed in her bedroom and the land will remain hers.<sup>205</sup> The system does, however, provide the purchaser with an incentive to make the transfer public.<sup>206</sup> If a purchaser does not record her deed, a later purchaser of the same land from the original seller—who happens to be a swindler—could trump the earlier purchaser’s rights.<sup>207</sup> To protect her rights by putting such potential future buyers on notice of her purchase, a purchaser thus has an incentive to file her deed with the recorder of deeds<sup>208</sup>—normally, the county office.<sup>209</sup> Thanks to this legal incentive, deeds are almost universally recorded.<sup>210</sup>

But the resulting record is just that: a compilation of all deeds filed in the county.<sup>211</sup> The record merely provides evidence of deals, rather than actually embodying them (as it does in a Torrens system).<sup>212</sup> Even as a record of deals, it is quite deficient.<sup>213</sup> Inconveniently, the record does not organize the pieces of evidence—the deeds—by lot but indexes them by names of sellers and purchasers.<sup>214</sup> Moreover, because the deeds are merely stored for future observers’ use, they are not subject to any review for validity.<sup>215</sup> When a new deed for a purchase of Blackacre is filed, it might not correspond

204. *See* *Standard Fire Ins. Co. v. Berrett*, 910 A.2d 1072, 1080 n.4 (Md. 2006) (stating that an unrecorded deed is valid between the grantor and grantee and also as to third persons with actual notice).

205. *Homeowners Fin. Co. v. Stuart*, No. CV-186010887, 2019 WL 2573805, at \*3 (Conn. Super. Ct. Apr. 2, 2019) (stating that the recording system “does not act to divest a bona fide owner of its ownership status”).

206. One state, Arizona, provides the grantor, rather than the grantee, with an incentive to record. Under Arizona law, the grantor must record within sixty days, and if she fails to do so, she might have to indemnify the grantee if an action arises where the title is at issue. *See* ARIZ. REV. STAT. ANN. § 33-411.01 (2021).

207. *See* 1 PATTON & PALOMAR ON LAND TITLES § 4, Westlaw (database updated Nov. 2020) (noting that all states now have recording acts that aim to incentivize prompt recordation by according priority of right to the purchaser who records first).

208. *See* Ralph W. Aigler, *The Operation of the Recording Acts*, 22 MICH. L. REV. 405, 415 (1924) (“[T]he person claiming under the instrument in question by his failure to observe the direction of the statute confers upon the party who executed the instrument . . . a sort of statutory power to displace the interest vested by the execution of the instrument.”).

209. *See* Bostick, *supra* note 188, at 68.

210. *See* BENITO ARRUNADA, INSTITUTIONAL FOUNDATIONS OF IMPERSONAL EXCHANGE 55 (2012).

211. *See* 1 PATTON & PALOMAR ON LAND TITLES, *supra* note 207, § 2.

212. 3 *id.* § 671 (“We speak of land titles in the United States as ‘record titles’ because statutes in each state provide for the recordation of muniments of title in public records that may be searched for evidence of who holds title to each parcel of land. Yet, the title examiner should not take this to mean that the status of title to a parcel of land may be ascertained solely from an examination of those public records. . . . [T]he recording statutes . . . merely afford[] an additional method of giving constructive notice of one’s rights.” (footnotes omitted)). Some states do accept the record as primary evidence with no requirement that the original deed be produced—but there too, the record remains a tool for merely providing evidence, even if primary rather than secondary. *See* PAUL E. BASYE, CLEARING LAND TITLES § 13 (2d ed. 1970).

213. *See* Muth & Cox, *supra* note 100, at 15–16.

214. Only a few states index by tract. *See* Note, *The Tract and Grantor-Grantee Indices*, 47 IOWA L. REV. 481, 486–87 (1962).

215. *See* Walter E. Barnett, *Marketable Title Acts—Panacea or Pandemonium?*, 53 CORNELL L. REV. 45, 45 (1967).

to an earlier deed selling Blackacre.<sup>216</sup> The earlier deed could contain different boundaries.<sup>217</sup> Mistakes in descriptions, as well as typographical errors, are rather routine.<sup>218</sup> There need not even be common standards for descriptions and boundaries<sup>219</sup>—so much so that sometimes a deed’s description might not even produce a bounded tract.<sup>220</sup> Consequently, rather often, interpreting boundaries can be a tall task even for courts.<sup>221</sup> Additionally, and inevitably, the identity of the person listed in the deed as its current owner might be mistaken: an earlier deed giving rights to another individual might have been misplaced, misfiled, or gone unfiled.

In sum, a record of deeds is very different from a registry. A recording system, unlike a registration system, does not provide a snapshot of the layout of, and rights in, all lots; rather, at best, it provides an archive of all transactions made in the lot, as the transacting parties in each such deal chose to define the lot.

Now consider again Jane’s situation as she seeks to purchase Blackacre from its purported owner, John. When Jane approaches the record, she must research the history of all transactions in Blackacre, examining all the deeds to it, to verify that John has a good interest (i.e., she must know that John acquired the land from an individual who actually owned it, and that that individual had done the same, and so on, back in time). To further verify that the interest she is obtaining from John is indeed the interest she thinks it is, she must also verify that no discrepancies exist between all those deeds in their descriptions of Blackacre. If such discrepancies exist—a not unlikely eventuality, given that some deeds might have been drafted decades, if not centuries, earlier<sup>222</sup>—the record, as a mere compilation of deeds, does not settle them.<sup>223</sup> It follows that if a mistake is found in the deed on which Jane relies when purchasing Blackacre from John (say, the deed originally transferring Blackacre to John mistakenly described it as including portions of Greenacre), Jane loses the land she thought she had purchased. Because an owner cannot convey more than what he owns, and the record does not embody what John owned—it only provides evidence for what he owned—

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216. See Cherek, *supra* note 167, at 286.

217. See, e.g., *Macallister v. DeStefano*, 463 N.E.2d 346, 349–50 (Mass. App. Ct. 1984).

218. Cherek, *supra* note 167, at 286.

219. See Charles Szypszak, *Real Estate Records, the Captive Public, and Opportunities for the Public Good*, 43 GONZ. L. REV. 5, 33 (2007) (noting the need “for a more precise and consistent method of describing real estate parcels”).

220. See, e.g., *Macallister*, 463 N.E.2d at 347 (“[T]here is no dispute that were the first course description in these deeds literally followed, there would be no closure of the description of the parcel.”).

221. See, e.g., *Greenan v. Lobban*, 717 A.2d 989, 990 (N.H. 1998) (construing a deed referencing a boundary “on the shore” of a lake); see also 23 AM. JUR. 2D *Deeds* §§ 247–69 (2007) (referencing numerous cases involving deed interpretation).

222. See *Scott v. Anderson-Tully Co.*, 154 So. 3d 910, 913–15 (Miss. Ct. App. 2015) (explaining that since the contested land was originally surveyed in 1805, there was little information for the parties to use when tracing that survey and thus concluding that neither party could describe the disputed tract with accuracy or certainty).

223. See *Merrill*, *supra* note 2, at 1128 (noting that recorded deeds may contain defects or omissions and that surveying errors might result in misplaced boundary markers).

if John did not own those portions of Blackacre, he could not have sold them to Jane. Jane's reliance on the record's description of John's rights could be meaningless. David, neighboring Greenacre's owner, could claim half of Blackacre, land Jane thought she purchased based on an old faulty deed.

In and of itself, therefore, the recording system provides Jane with neither the standardized information nor the assurance of reliability she demands before freely transacting in land. The boundaries of the land the record contains can be inconsistent, and they are never conclusive. Standing alone, a recording system is painfully unsatisfactory. With that realization, an answer to the puzzle that materialized at Part I's conclusion—why adverse possession is needed to complement or quiet the formal title system—is within reach.

*C. The Tools Rendering the American Formal System Workable: Adverse Possession and Title Insurance*

How does the American recording regime satisfy the purchaser's two demands—standardized information and reliability assurances—vital for transacting in land? Because, unlike the Torrens registry, the recording system itself is lacking, tools external to it must supply these elements. Adverse possession, as this section explains, is one of those tools—responsible mostly for the first element: standardizing information. But adverse possession, as will also be seen, is an incomplete replacement for the Torrens system. Adverse possession is an imperfect mechanism for standardizing information and it furnishes very little assurance of reliability. Another tool supplements it in facilitating land transactions in a recording regime: private title insurance.<sup>224</sup>

Adverse possession can only be justified, as Part I concluded, if it proffers a better alternative to the formal boundaries system. Because adverse possession is a rather unruly standard, that premise could hold if the formal system were extremely dysfunctional. Adverse possession could only be appealing if the information the formal system provided about rights were even less accurate than the murky predictions individuals can make respecting future adverse possession rulings. As just seen in the preceding section, those are exactly the circumstances presented by our land transacting system. In a recording regime, the formal system does not even purport to provide accurate information. A recording regime is, in this regard, the opposite of a registration regime. A registry provides standardized, accurate boundary information. Therefore, in Torrens systems, adverse possession is normally disallowed.<sup>225</sup> But that, again, is not the American system.

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224. See generally 1 PATTON & PALOMAR ON LAND TITLES, *supra* note 207, § 41 (discussing the alternative methods for protecting against title defects).

225. See, e.g., 735 ILL. COMP. STAT. 5/13-111 (2021); MASS. GEN. LAWS ch. 185, § 53 (2021) (“No title to registered land . . . shall be acquired by prescription or adverse possession.”); N.C. GEN. STAT. ANN. § 43-21 (2021) (“No title to nor right or interest in registered land in derogation of that of the registered owner shall be acquired by prescription or adverse possession.”).

As highlighted throughout this Article, adverse possession's most striking attribute is its emphatic rejection—indeed, overruling—of formal property lines. As can now be understood though, that attribute is hardly troubling or surprising. To the contrary, it is salutary and necessary.<sup>226</sup> In our nonregistry system, the rule the formal boundaries represent, which the adverse possession standard seemingly undermines, is not much of a rule to begin with. Even referring to it as a rule is misleading. Giving voice to this insight, the U.S. Supreme Court recently refused to adopt lot lines as the sole factor determining compensation when government confiscates land. “Lot lines have varying degrees of formality across the States, so it is difficult to make them a standard measure . . . .”<sup>227</sup> In a sense, American law does not recognize true map lines. While they exist in a Torrens system, in a recording system they do not, as the record offers no binding, central property maps. All that the American system makes available to purchasers are descriptions that parties drew in their deeds—descriptions that need not be consistent or accurate.<sup>228</sup>

In such a legal universe, full reliance on the formal lines is impossible. Contradictions between deeds describing the same land are inevitable, and an earlier deed can be so ancient as to contain undecipherable boundary descriptions.<sup>229</sup> A purchaser desiring to know what she is buying based on the formal system could survey the land, but given the formal system's inherent flaws, that survey would sometimes do her no good.<sup>230</sup> Adverse possession enables the purchaser to sidestep the problem and simply rely on the land's boundaries as currently occupied—that is, as the purchaser observes them.<sup>231</sup> Adverse possession is, therefore, the requisite informal alternative to the formal system, which by definition cannot supply the purchaser with one of her two demands for engaging the market: standardized information.

Adverse possession does little, however, to answer the purchaser's second demand—assurance of that information's reliability. Adverse possession does assure a purchaser that if she buys the land in reliance on mistaken information, and then occupies it in a manner meeting certain conditions for

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226. See CALLAHAN, *supra* note 41, at 99 (acknowledging that if the United States were to adopt a Torrens system, “adverse possession would be not only unnecessary but undesirable”).

227. *Murr v. Wisconsin*, 137 S. Ct. 1933, 1948 (2017).

228. See, e.g., *In re Zahradka*, 472 N.W.2d 153, 156 (Minn. Ct. App. 1991) (settling an ownership dispute resulting from deeds to adjoining lands, both of which included the contested area and where one of the descriptions was ambiguous); *Martin v. Amerman*, 133 S.W.3d 262, 264 (Tex. 2004) (discussing an ownership dispute over a thirty-foot strip of land between two neighbors, who had conflicting surveys and where their disagreement appeared to have centered on identification of a one-and-a-half-inch pipe noted in previous surveys as the proper corner location).

229. An early writer identified the problem of boundaries in the eastern states, which were originally fixed in reliance on arbitrary outlines, such as “trees or other natural monuments.” See H. W. Chaplin, *Record Title to Land*, 6 HARV. L. REV. 302, 305 (1893).

230. *Merrill*, *supra* note 2, at 1128.

231. See, e.g., *Howard v. Kunto*, 477 P.2d 210, 215 (Wash. Ct. App. 1970) (awarding, through adverse possession, land occupied by previous possessors, where all deeds, going back forty years, mistakenly described the land as fifty feet to the east).



a long period of time, her right will not be contested based on that original mistake. But with the need to hold the land unchallenged for a lengthy period of time, and with so many requirements to be ascertained before immunity from suit is granted under adverse possession, this is a rather weak assurance.

If the purchaser eventually meets the doctrine's conditions, adverse possession will shield her, but until then it does not vouch for the information the purchaser receives when buying the land. The doctrine, as seen, does not simply transform reality on the ground into binding legal reality: it does not automatically deem the actual boundary the formal one. Although it conveniently transforms the current situation into the legal situation, it first demands that several conditions be met. Thanks to adverse possession, the fence the potential purchaser can physically see is deemed the land's legal boundary, irrespective of the formal line—but only if the fence has been there, continuously, for the statutorily mandated period of time, was not permitted, and maybe more.<sup>232</sup> A purchaser will encounter much difficulty in predicting whether the fence has met these criteria. A purchaser is not assured, therefore, that the boundary she sees will be the one afforded her postpurchase. No assurance is provided that a court will not later hold that the boundary she saw must shift because some requirements for a successful adverse possession claim failed.

Additionally, by basing legal boundaries on circumstances on the ground, adverse possession introduces new uncertainties into the transacting process. Because it might render a possessor the owner, a purchaser buying from the owner might later find out that some of the owner's land has actually shifted to a possessor of whom she was unaware.<sup>233</sup> Adverse possession, therefore, through the very scheme it sets for providing buyers with information about the land, increases those purchasers' accompanying need for assurance.

Because neither the record nor adverse possession meaningfully do so, another, more effective, tool is needed to satisfy purchasers' demand for assurance (which the Torrens system answers abroad). That tool emerged in America in the late nineteenth century—around the time the Torrens system was spreading elsewhere. It was private title insurance.<sup>234</sup>

Generally, insurance is the market's answer to situations where an individual would rather not bear a risk. Individuals would rather not contend with the chance that their houses burn down, so they buy fire insurance; they would rather not carry the costs if their cars are stolen, so they buy car insurance. In these and many other cases, individuals pay another entity—an insurance company—a premium in advance, and if the feared eventuality occurs—their houses burn down, their cars are stolen—the insurance

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232. See *supra* notes 53–54 and accompanying text.

233. See CALLAHAN, *supra* note 41, at 100–02 (noting that adverse possession actually leaves buyers with less assurance when they are contemplating a transaction, as it can only raise doubts respecting the owner's title).

234. In 1874, Pennsylvania passed the first statute authorizing the incorporation of title insurance companies. The first company was incorporated the following year. For the history of title insurance, see BARLOW BURKE, *LAW OF TITLE INSURANCE* § 1.01 (3d ed. Supp. 2021).

company covers the loss.<sup>235</sup> Individuals thus, for a price, shift the risk of loss to the insurance company.<sup>236</sup>

Title insurance was developed to perform the same function. When she buys land, the purchaser pays the insurance company a fee. In exchange, if at a later date a mistake is discovered in the original land description and the buyer must give up parts of the land, the insurance company pays the disappointed purchaser compensation reflecting the loss.<sup>237</sup> In this way, title insurance assures a buyer contemplating purchasing land that her investment will not be lost if that land's description turns out to be inaccurate. Given how crucial that assurance is, title insurance is now a part of every land deal.<sup>238</sup> As one court put it: "It is a matter of common knowledge and experience that in the usual situation, title insurance is indispensable to the occurrence of the real estate sale: a seller would be unable to sell his property at its reasonable value if no title company was willing to insure title."<sup>239</sup>

Operating in tandem with the record, adverse possession and title insurance thus fulfill, in our system, a registry's twin functions: making available legible information about land and providing assurance against mistakes. It is important to note, however, that the two mechanisms deliver on these functions only partially as compared to the Torrens registration system. Adverse possession offers legible information about boundaries—but that information is never fully accurate. Title insurance assures the purchaser that if the information is mistaken, she will not lose her investment—but she will still lose the land (having to settle for monetary compensation) and she is not protected against title defects that emerge postpurchase (for example, from a later neighbor's intrusion materializing into an adverse possession claim).<sup>240</sup>

#### *D. The Explanation for the American System: Social Interest*

Adverse possession has an important function in our property regime. The doctrine aids in replacing a registration system with a record system. The question then becomes why the law deems the record system a worthwhile replacement for that more straightforward and fully effective system. The obvious appeal of any partial solution is the alleged savings it offers as compared to a more complete solution to the relevant problem.<sup>241</sup> That is how the American choice to adhere to a recording system rather than the

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235. See Quintin Johnstone, *Title Insurance*, 66 YALE L.J. 492, 492 & n.1 (1957).

236. See PETER L. BERNSTEIN, *AGAINST THE GODS: THE REMARKABLE STORY OF RISK* 93 (1996).

237. The insurance company will also defend the purchaser in any pertinent legal proceedings. See Johnstone, *supra* note 235, at 500.

238. See Zane O. Gresham, *The Residential Real Estate Transfer Process: A Functional Critique*, 23 EMORY L.J. 421, 453 (1974).

239. *Schwartz v. Commonwealth Land Title Ins. Co.*, 374 F. Supp. 564, 574 (E.D. Pa.), *order supplemented by* 384 F. Supp. 302 (E.D. Pa. 1974).

240. Nor is she protected from any other risk the specific policy she acquires excludes from coverage.

241. See Baird & Jackson, *supra* note 189, at 305, 311 (arguing that since setting up and maintaining registries is costly, it may not be beneficial to establish registries in all cases).

optimal registration system is often justified.<sup>242</sup> As this section establishes, that justification should also be read as the explanation for the law's insistence on maintaining adverse possession, whose existence is tied to that of the recording system.

In Part II.A, the registration system was offered as an intuitive fix for an inevitable problem. It was presented as the most effective system for managing the market for land. That impression is skewed, however: the review focused on a registry's benefits without sufficiently accounting for its price. A registration system can be a rather costly affair, and therein lies its major drawback—and the replacement's attraction.

Intuitive as the registration system appears, putting it in place is an extremely complicated endeavor.<sup>243</sup> The reason is the guaranteed standing of the snapshot of rights the registry contains. If a mistake is found in that snapshot, the state, as noted, must indemnify the owner. Perhaps more importantly, such a mistake will force the true owner to part with her interest in the land. For if, when the state first introduces the registry, John is mistakenly registered as an owner of parts of Greenacre that in fact belong to David, then that land now legally belongs to John. David will have to content himself with monetary compensation from the state. This elevated status of the registry as legally conclusive once put in place mandates that it be produced only following a highly meticulous process. Because once registered, rights cannot be dislodged (and those rights not registered disappear), in establishing the registry, all potential rights and claims to the land must be investigated.<sup>244</sup>

In the United States, furthermore, that process probably cannot be fully administrative.<sup>245</sup> Courts have held that constitutional separation of powers principles mandate judicial involvement in the investigation of rights to land.<sup>246</sup> Because the power to determine title is reserved to the judiciary, an administrative agency cannot act alone.<sup>247</sup> For every line drawn and interest determined in the registration process, interested parties must have recourse to the courts.<sup>248</sup> Needless to say, this requirement slows down a registry's

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242. See RICHARD R. POWELL, N.Y.L. SOC'Y, REGISTRATION OF THE TITLE TO LAND IN THE STATE OF NEW YORK 73 (1938).

243. See Goldner, *supra* note 192, at 687.

244. See *id.*

245. See *id.* ("A judicial proceeding is required under the fourteenth amendment's due process clause, which protects an individual's property rights.")

246. See, e.g., *People ex rel. Kern v. Chase*, 46 N.E. 454, 459 (Ill. 1896); *State ex rel. Att'y Gen. v. Guilbert*, 47 N.E. 551, 558–59 (Ohio 1897).

247. Torrens statutes that states adopted after the first rulings instituted judicial proceedings. See WILLIAM C. NIBLACK, AN ANALYSIS OF THE TORRENS SYSTEM OF CONVEYANCING LAND § 27 (1912). Such schemes were upheld as constitutional. See generally *People ex rel. Deneen v. Simon*, 52 N.E. 910 (Ill. 1898). Later challenges to the system, alleging due process violations, failed as courts held that constructive notice to those who might be affected—through, for example, newspaper ads—suffices. See, e.g., *State ex rel. Douglas v. Westfall*, 89 N.W. 175, 177–78 (Minn. 1902); *Drake v. Fraser*, 179 N.W. 393, 395 (Neb. 1920).

248. See Goldner, *supra* note 192, at 686.

production.<sup>249</sup> It also renders the process expensive: a court system (or added burdens on the existing system), alongside lawyers arguing cases, must be funded.<sup>250</sup>

A registration system thus involves high start-up costs. These costs then enable the system, once established, to operate very cheaply.<sup>251</sup> After the registry is in place, an actor contemplating a deal in land need only consult the registry to see who owns interests therein.<sup>252</sup> No further verification is necessary. The costs of transacting parties' operating convenience are covered earlier by the state establishing the registry.

The choice to forgo a registry spares the state those costs. The recording system, accompanied by adverse possession, is costly for transacting parties: adverse possession introduces the constant threat of litigation and, regardless, anyone transacting in land must pay a title insurance company. However, it is a very cheap system to establish. All it calls on the state to do is establish an office where parties can record deeds.

In the choice between a system with high setup costs and low operating costs (a registry), and one with the opposite (a record), American states opted for the latter. American law can be understood to have preserved a role for adverse possession because it prefers the second of the two systems of funding land transaction costs.<sup>253</sup> The American regime assumes that the ongoing operational costs adverse possession and insurance present are lower than the setup costs associated with a registry. Furthermore, by embracing this funding route, the financial burden is shifted from the state to private actors.

In the early twentieth century a few states toyed with the introduction of a registration system, but after brief experiments, they apparently concluded that, on the whole, the recording system's operating costs are a bearable price to pay to avoid a registry's high up-front costs.<sup>254</sup> As a way of funding land deals' transaction costs, the American regime assumes today that retaining the recording system is cheaper than having a more dependable formal system—even if the recording system comes with the added cost of adverse possession. But is this assumption sensible?

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249. The time required for completing the initial registration of one sole parcel was once assessed to be between two months and a year. Ted J. Fflis, *Land Transfer Improvement: The Basic Facts and Two Hypotheses for Reform*, 38 U. COLO. L. REV. 431, 473–74 (1966).

250. See 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. ENV'T L.J. 1, 21 (2004).

251. See *supra* Part II.A.

252. 1 PATTON & PALOMAR ON LAND TITLES, *supra* note 207, § 2.

253. See Sterk, *supra* note 32, at 1288 (arguing that property rules are about regulating search costs in an efficient manner).

254. See Bostick, *supra* note 188, at 73 (“At their zenith, [in the] early [twentieth] century, some twenty states and one or two territories had adopted some version of registration. Many of those states have since repealed the statutes.” (footnote omitted)).

*E. The Explanation for the American System: Private Interest*

The descriptively compelling justification for adverse possession uncovered in the preceding section is not necessarily also normatively compelling. That justification centers, as seen, on a cost assessment: on the belief that the recording system that adverse possession accompanies is cheaper than the alternative mechanism for managing boundaries, a Torrens system. Is that a fair assessment? This section will explain why the answer probably is no. It will further explain that adverse possession's persistence in our legal system owes less to the relative magnitude of its costs (compared to those of a registry) and more to the identity of the actors bearing those costs. In the competition over legal reform, those who benefit from the recording system, which necessitates adverse possession, form the more effective interest group as compared to those the system and the doctrine disadvantage.

The examination of adverse possession's efficacy centers on the alternative registry system's costs. The initial costs of adopting such a system are presented as insurmountable.<sup>255</sup> On paper, there is much supporting that projection. The actual evidence, however, indicates otherwise. The allegedly financially out of reach Torrens system has been spreading throughout the world consistently.<sup>256</sup> So much so that the American insistence on retaining a recording system and the accompanying adverse possession doctrine is now clearly the minority position. Common-law systems elsewhere have almost uniformly shifted to the Torrens system. All Australian states and territories,<sup>257</sup> almost all Canadian provinces,<sup>258</sup> New Zealand,<sup>259</sup> Ireland,<sup>260</sup> Scotland,<sup>261</sup> Israel,<sup>262</sup> and Singapore,<sup>263</sup> now rely on registration systems. Even England, birthplace of the old system on which the American regime is grounded,<sup>264</sup> started its shift toward a registration system back in 1925.<sup>265</sup> As they switched to a Torrens

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255. See SHICK & PLOTKIN, *supra* note 201, at 51–56, 69–70; F. V. Balch, *Land Transfer—A Different Point of View*, 6 HARV. L. REV. 410, 414 (1893); Fiflis, *supra* note 249, at 431–32; Goldner, *supra* note 192, at 687; Dale A. Whitman, *Transferring North Carolina Real Estate* (pt. 2), 49 N.C. L. REV. 593, 612 (1971).

256. See generally ARRUÑADA, *supra* note 210.

257. Shane Simmons, *An Overview of Adverse Possession in Australia Within the Framework of the Torrens System of Land Registration and Comment on a Related Court Case*, 2009 PROC. SURVEYING & SPATIAL SCIS. INST. BIENNIAL INT'L CONF. 175, 175.

258. Newfoundland and Prince Edward Island are the exceptions. See generally GREG TAYLOR, *THE LAW OF THE LAND: THE ADVENT OF THE TORRENS SYSTEM IN CANADA* (2008).

259. *The Land Transfer System*, LAND INFO. N.Z., <https://www.linz.govt.nz/land/land-registration/land-transfer-system> [<https://perma.cc/VN7E-LBLY>] (last visited Apr. 14, 2021).

260. *Land Registry Services*, PROP. REGISTRATION AUTH., <https://www.prai.ie/land-registry-services> [<https://perma.cc/LF67-JJGC>] (last visited Apr. 14, 2021).

261. Land Registration etc. (Scotland) Act 2012, (ASP 5) § 1.

262. Land Law, 5729–1969, LSI 23 283 (1968–69) (Isr.).

263. Land Titles Act (Cap. 157, 1959 rev. ed.) s 5 (Sing.).

264. 1 PATTON & PALOMAR ON LAND TITLES, *supra* note 207, § 3.

265. Most prominently the 1925 law defined registration itself as conferring the title, not the deed, as before. Land Registration Act 1925, 15 & 16 Geo. 5 c. 21, § 69 (Eng.) (repealed). Thus, no transfer occurs before a transaction is registered. *Id.* § 19(1).

registration system, most of these jurisdictions jettisoned adverse possession<sup>266</sup> or at least rendered it peripheral and ineffective.<sup>267</sup> Some specifically prohibited adverse possession in boundary disputes.<sup>268</sup> England, from where the doctrine hails,<sup>269</sup> effectively abandoned adverse possession in the Land Registration Act of 2002<sup>270</sup> that perfected its registration system.<sup>271</sup>

This comparative finding vindicates this Article's argument that adverse possession's role is to police boundaries in the absence of a reliable formal boundary system.<sup>272</sup> In addition, the marked global trend casts serious doubt on the claim that a registry is inherently, and dramatically, more expensive than continued reliance on adverse possession. Apparently, many other jurisdictions whose property law systems are not alien to ours found the costs of introducing a Torrens system bearable and justified. Struck by this reality, one commentator noted:

It is a baffling fact that the United States is rapidly becoming virtually the only country in the world whose land title system is not founded upon Torrens-type principles . . . . [I]t [is] incredible that a system which seems to work quite well almost everywhere else cannot be satisfactorily adapted to the United States.<sup>273</sup>

Scholarly consensus among American writers thus insists that a Torrens system is dramatically more effective than the current American system.<sup>274</sup>

266. *Real Property Act 1900* (NSW) s 45D (Austl.) (barring adverse possession in registered land); Land Law, 5729–1969 (no adverse possession); Sarah E. Hamill, *Common Law Property Theory and Jurisprudence in Canada*, 40 *QUEEN'S L.J.* 679, 690 (2015) (reporting that all Canadian common-law provinces except Alberta have abolished adverse possession). See generally Fiona Burns, *Adverse Possession and Title-by-Registration Systems in Australia and England*, 35 *MELB. U. L. REV.* 773 (2011) (discussing the doctrine's evolution in Australia).

267. *New Zealand Land Transfer Act 2017*, ss 162, 164 (N.Z.) (stating that an adverse possession claim will be denied if the registered owner, once alerted by the registrar to whom the possessor must apply, objects); *Land Registration etc. (Scotland) Act 2012*, (ASP 5), sch. 4 (same in Scotland); Burns, *supra* note 266, at 802 (same in South Australia).

268. While some have adverse possession procedures, these jurisdictions limit them to claims for whole lots. See *Land Title Act 1994* (Qld.) s 98(1)(a)–(b) (Austl.); *Land Titles Act 1980* (Tas.) s 138Y (Austl.); *Land Transfer Act 2007*, s 164 (N.Z.).

269. 3 *AMERICAN LAW OF PROPERTY: A TREATISE ON THE LAW OF PROPERTY IN THE UNITED STATES* § 15.1 (A. James Casner ed., 1952) (“The sole historical basis of title by adverse possession is the development of statutes of limitations on actions for the recovery of land in England . . .”).

270. 2002, c.9 (U.K.).

271. The law mandates alerting the owner to an adverse possession claim, and that owner can then veto the claim.

272. See Lisa M. Austin, *Property and the Rule of Law*, 20 *LEGAL THEORY* 79, 94–95 (2014) (noting that jurisdictions that adopt a Torrens system usually abolish adverse possession).

273. Barnett, *supra* note 215, at 93–94.

274. See, e.g., Baret, *supra* note 250, at 15–16; Bostick, *supra* note 188, at 57; Walter Fairchild & William Springer, *A Criticism of Professor Richard R. Powell's Book Entitled Registration of Title to Land in the State of New York*, 24 *CORNELL L.Q.* 557, 557–58 (1938–39) (book review); John T. Hassam, *Land Transfer Reform. The Australian System*, 4 *HARV. L. REV.* 271, 274, 278–79 (1891); Joseph T. Janczyk, *An Economic Analysis of the Land Title Systems for Transferring Real Property*, 6 *J. LEGAL STUD.* 213, 220–26 (1977); Myres S.

Commentators reckon that American exceptionalism in the land registration realm cannot be attributed to any exceptionally high costs American constitutional strictures (for example, mandating judicial oversight of the initial registration process) might generate because those can be, and have been, controlled.<sup>275</sup>

American exceptionalism owes to a different, nonlegal, feature of the system. The American land boundary management system has resisted global trends because it has given rise to a powerful party that holds a uniquely strong economic interest in the costs the current system generates—a party that has successfully assured that the United States remains an outlier in the common-law world. That party is the title insurance industry.

As Part II.C noted, two mechanisms treat the costs that the recording system inevitably effects: adverse possession and title insurance.<sup>276</sup> In a Torrens registration system, the need for adverse possession, as already noted, disappears, but so does the need for title insurance.<sup>277</sup> Because the registry itself insures a purchaser, few if any seek title insurance.<sup>278</sup> As registered title is indefeasible, its purchaser does not demand any sort of private insurance.<sup>279</sup> Though a useless product in a jurisdiction with a registry, title insurance is an indispensable one in a recording system jurisdiction.<sup>280</sup> Therefore, the insurance industry is highly invested in—nay, dependent on—maintaining the recording system. Predictably, it has repeatedly opposed the introduction of a Torrens system.<sup>281</sup> Most recently, in 2018, the industry spent \$400,000 on a lobbying campaign and successfully pressed the New York legislature to delay the implementation of a measure already passed to curb some of its practices.<sup>282</sup> Even a measure so minor it “hardly qualifie[d] as a reform measure” could not surmount the

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McDougal & John W. Brabner-Smith, *Land Title Transfer: A Regression*, 48 *YALE L.J.* 1125, 1151 (1939); Thomas J. Miceli & C. F. Sirmans, *The Economics of Land Transfer and Title Insurance*, 10 *J. REAL EST. FIN. & ECON.* 81, 87 (1995); Thomas J. Miceli et al., *Title Systems and Land Values*, 45 *J.L. & ECON.* 565, 578 (2002); Comment, *Yes Virginia—There Is a Torrens Act*, 9 *U. RICH. L. REV.* 301, 301 (1975).

275. See Barnet, *supra* note 250, at 5; Goldner, *supra* note 192, at 690.

276. See *supra* Part II.C.

277. Barnett, *supra* note 215, at 94.

278. The “certificate issued by the Registrar is not simply a certificate, but an absolute guaranty of title by the Government.” Hassam, *supra* note 274, at 275.

279. See John E. Cribbet, *Some Reflections on the Law of Land—a View from Scandinavia*, 62 *Nw. U. L. REV.* 277, 282 (1967) (noting that Scandinavian countries have a successful Torrens registry and thus no private insurance market).

280. See *supra* note 239 and accompanying text.

281. THOMAS W. MAPP, *TORRENS’ ELUSIVE TITLE: BASIC LEGAL PRINCIPLES OF AN EFFICIENT TORRENS’ SYSTEM* 3 (1978); Barnet, *supra* note 250, at 13–14; Barnett, *supra* note 215, at 94; Frederick B. McCall, *The Torrens System—After Thirty-Five Years*, 10 *N.C. L. REV.* 329, 349–50 (1931) (offering the existence of insurance companies as a possible explanation for the Torrens system’s failure in North Carolina).

282. Shane Goldmacher, *New York’s Hidden Home Buyer Closing Costs: Luxury Boxes and Mint Mojitos*, *N.Y. TIMES* (Jan. 29, 2018), <https://www.nytimes.com/2018/01/29/nyregion/title-insurance-new-york.html> [<https://perma.cc/GWJ6-CL3E>].

title insurance industry's lobbying.<sup>283</sup> Unsurprisingly, an actually transformative reform—a move to a registry—has consistently proven unimaginable.<sup>284</sup>

The industry's success in advocating for the proposition that “a little title examination is a good thing,”<sup>285</sup> (a proposition that few would have predicted to curry much popular favor) is readily explicable in light of research into interest group dynamics. One of public choice theory's most fundamental insights is that small, intensely interested groups can overcome collective action hurdles that large, diffusely interested groups cannot.<sup>286</sup> In the competition for regulatory reforms, their lower information costs, lower organization costs, and lower free rider costs combine to advantage narrowly focused groups at the expense of larger groups.<sup>287</sup>

In debates over reforms of the boundaries management system, the title insurance industry is the quintessential intensely interested group. The market is dominated by four major companies forming a practical monopoly.<sup>288</sup> The risk that reform represents to these companies is enormous: if the recording system is abandoned, their business will collapse.<sup>289</sup> On the other side, the group standing to benefit from reform is the ultimate diffuse group—the general public.<sup>290</sup> All property owners carry the costs of the current recording system: every buyer must pay insurance premiums whenever purchasing land and must then live under the constant threat of adverse possession.<sup>291</sup> Because these costs are diffused among all members of the public though, no one entity or organization lobbies the legislature to abolish the recording system generating these costs.<sup>292</sup> Further exacerbating the problem, individuals are highly unlikely to even note these

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283. Jeff Andrews, Opinion, *Title Insurance Is a Scam and It's Time for a Government Takeover*, CURBED (Feb. 26, 2018), <https://www.curbed.com/2018/2/26/17017142/title-insurance-scam-government-takeover> [<https://perma.cc/5AUT-P4Z3>].

284. In Iowa, the one state where a public assurance system replaced private insurance, *see infra* notes 389–92 and accompanying text, regulators report that they must consistently fend off industry lobbying efforts to get the legislature to abolish the public system. Andrews, *supra* note 283.

285. Barnett, *supra* note 215, at 94.

286. MANCUR OLSON, *THE LOGIC OF COLLECTIVE ACTION: PUBLIC GOODS AND THE THEORY OF GROUPS* 22–33 (1971).

287. Paul J. Stancil, *Assessing Interest Groups: A Playing Field Approach*, 29 *CARDOZO L. REV.* 1273, 1277 (2008).

288. These companies are: Chicago Title, Fidelity National Title, Commonwealth Land Title, and First American Title.

289. Johnstone, *supra* note 235, at 513 (asserting that title insurance companies oppose the Torrens registration system because it threatens their “economic lives”).

290. *See* Gresham, *supra* note 238, at 471 (“The residential real estate transfer system in many respects is inefficient and oppressive of the consumer, whether seller or buyer. Both systemic flaws may be traced to the ignorance and disorganization of consumers and the collusive practices of the institutional actors which in some contexts do not appear to operate according to the traditional principles of free market competition.”).

291. Tenants also pay these costs. They are embodied in rents, as landlords pass all costs of ownership to tenants.

292. Marion W. Benfield Jr., *Wasted Days and Wasted Nights: Why the Land Acts Failed*, 20 *NOVA L. REV.* 1037, 1061 (1996) (“Buyers and sellers of real estate act in that capacity so rarely that they are not likely to develop views regarding the desirability of legal change.”).



costs that they bear. Home buying, the occasion when insurance is acquired, is a relatively infrequent experience for most individuals. Additionally, because title insurance premiums are about 1 percent of a property's sale price,<sup>293</sup> they are inconspicuous to buyers who, at the time of a deal's closing (when the insurance premium is paid), are confronted with a baffling array of line items.<sup>294</sup> The public is thus unlikely to appreciate the long-term benefits it will derive from a registry sparing it insurance costs.<sup>295</sup>

Likewise, the ongoing threat—and cost—of adverse possession goes unnoticed by owners, similarly weakening the political impetus for change.<sup>296</sup> Nonlawyers cannot be expected to be aware of a counterintuitive legal doctrine that lurks, mostly silently, in the background of the landholding regime. When adverse possession moves to the fore, the public does tend to demand reform.<sup>297</sup> In 2008, in two separate states, highly publicized successful adverse possession claims generated public outcry, which led legislatures to amend state laws and limit such claims.<sup>298</sup> These events denote the public's attitude toward the current adverse possession system's costs: the public might find them unacceptable, but it is simply unaware of them during regular times.<sup>299</sup>

This reality simplifies the insurance industry's lobbying task (especially as it finds lobbying allies in other interests, such as closing agents and lawyers, similarly benefitting from the complexity of concluding real estate transactions in a recording system). Legislators are easily made to balk at proposals to fund a Torrens system.<sup>300</sup> Faced with the prospects of raising

293. BURKE, *supra* note 234, § 1.01.

294. See Charles Szypszak, *Public Registries and Private Solutions: An Evolving American Real Estate Conveyance Regime*, 24 WHITTIER L. REV. 663, 684 (2003).

295. Goldner, *supra* note 192, at 688.

296. The typical dynamics permitting rent seeking prevail here. "The rationally casually ignorant voter is a very slender reed on which to build the foundations of democratic politics," because such a voter "is much more likely to be the recipient of the dispersed costs than of the concentrated benefits of the legislative process." GORDON TULLOCK, *Rent Seeking*, in THE RENT-SEEKING SOCIETY 11, 46 (Charles K. Rowley ed., 2005).

297. In a similar context, one author has found that in Louisiana, judges too—when faced with boundary disputes where a neighbor makes a prescriptive claim over another's land—feel unease about applying prescriptive doctrines that may misalign with community expectations. John A. Lovett, *Precarious Possession*, 77 LA. L. REV. 617, 690–91 (2017).

298. COLO. REV. STAT. § 38-41-101(3)(b)(II) (2021). For background, see Heath Urie, *Couple Will Appeal 'Adverse Possession' Ruling*, DAILY CAMERA ONLINE (Nov. 15, 2007), [https://la.utexas.edu/users/jmciver/357L/P3/BDC\\_Couple%20will%20appeal%20adverse%20possession%20ruling\\_111507.htm](https://la.utexas.edu/users/jmciver/357L/P3/BDC_Couple%20will%20appeal%20adverse%20possession%20ruling_111507.htm) [<https://perma.cc/25RR-J72U>]. See also N.Y. REAL PROP. ACTS. LAW § 501 (McKinney 2021); Adam Leitman Bailey & John M. Desiderio, *Adverse Possession Changes Make Results Less Certain*, N.Y.L.J. (Feb. 11, 2009), <https://www.law.com/newyorklawjournal/almID/1202428160650/?slreturn=20210209184134> [<https://perma.cc/GB3L-HYVE>].

299. Peter B. Maggs, *The Uniform Simplification of Land Transfers Act and the Politics and Economics of Law Reform*, 20 NOVA L. REV. 1091, 1091–92 (1996) (explaining that land reform's benefits will be diffuse and hard to communicate to the general public).

300. Unappreciative of registration's benefits, and left to their own devices, owners and purchasers opt not to pay for registration. Goldner, *supra* note 192, at 688. A true reform therefore requires making the registration system obligatory, and for that purpose, the state must participate in funding it. Barnett, *supra* note 250, at 26.

taxes—of which the public is always aware—to fund a solution for a problem the public ignores and from which an industry group benefits, states predictably embrace the status quo.<sup>301</sup> They retain the current recording regime as our system for managing land transactions. And adverse possession persists: a doctrine necessitated by a boundary management system that is socially wasteful but is a boon to a powerful industry.

### III. LEGAL REFORMS IN LIGHT OF THE NEED THAT ADVERSE POSSESSION ANSWERS

Part II explained both the need that adverse possession answers in our property system and that need's backdrop. It thereby established the practical justification for adverse possession—and questioned its normative justification. The specific task originally set for this Article has thus been completed. But the answer provided for the Article's theoretical question respecting adverse possession's logic can and should also impact the manner in which current law is structured. Two distinct groups of lawmakers should consider reforming the law in accordance with the theoretical findings: first, judges confronted with adverse possession's doctrinal details and, second, state legislators concerned with rendering the home buying process cheaper and fairer.

This part's first section addresses the former audience. It inspects key elements in the doctrine of adverse possession that have so far proved incoherent or open to debate and shows how adverse possession's true, and very concrete, goal, as identified in this Article, might better inform their analysis. This part's second section turns to legislative reform. It draws on this Article's conclusions respecting adverse possession's interplay with title insurance to suggest better ways of regulating that industry.

#### A. *Interpreting Adverse Possession's Tests*

Adverse possession lifts title from the owner and bestows it on the possessor. For this transfer to occur, a possessor must meet specific criteria. The normative goal behind the doctrine's overall effect—the reason for its choice to transfer land—should animate the specific criteria the doctrine demands satisfied before that effect kicks in. Accordingly, many of the writers attempting to explain adverse possession's logic also endeavor to account for the doctrine's requirements or argue for their reform. Because this Article suggested a different, and more realistic, explanation for the doctrine's continued existence, it is also better equipped to tackle some of the doctrine's specific elements that other accounts have struggled with. This section thus reviews three such elements: the hostility requirement, the notoriety requirement, and “color of title.”

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301. Goldner, *supra* note 192, at 709 (stressing the public's predictable opposition to the costs of reform).

### 1. Hostility

To win an adverse possession claim, a possessor must prove that her possession was actual, open, continuous for the statutory period, exclusive, and hostile.<sup>302</sup> Perhaps inevitably, it is the latter, the hostility (or adversity) element, that is key.<sup>303</sup> It is the one element appearing in the doctrine's name. Yet surprisingly, hostility is the element many of the doctrine's accounts struggle most in explaining.

In light of the hostility requirement, a possessor holding land with the owner's permission will not win title, no matter how lengthy her possession.<sup>304</sup> This result is baffling for some of the most popular explanations for adverse possession. Those who justify adverse possession as a tool to protect a possessor's reliance are pressed to explain the fact that a nonadverse possessor cannot rely on the doctrine.<sup>305</sup> If the doctrine's grounding is the desire to protect a person's attachment to land she occupies, permission—or lack thereof—to be on that land seems a wholly irrelevant consideration. Just as a trespasser allegedly forms, over time, a connection to a house or community, so does the licensee or tenant (i.e., a permitted possessor).<sup>306</sup> Protecting the former's interest but not the latter's appears irrational if the interest adverse possession protects is merely that in reliance, as these explanations for adverse possession contend.

Some of the efficiency-grounded justifications for adverse possession similarly stumble in taking count of the hostility requirement. If adverse possession's logic is to enable land's transfer to its most efficient user—who allegedly is not its owner but its occupier—it should not always matter whether that occupier is on the land without permission. Efficiency theories assume that an owner who ignores her land and thus fails to notice an occupier cares little about the land and is an ineffective user.<sup>307</sup> But an owner who grants permission to another to occupy her land for free or in exchange for a nominal fee can hardly be said to always care more about the land. If we assume that the former owner is sometimes an ineffective user (who should lose her land) we might just as well assume the same respecting the latter owner.<sup>308</sup>

The prevalent explanations for adverse possession reviewed above, drawing on interests in reliance or efficiency, accordingly do not do a particularly effective job in explaining the doctrine's defining element: its hostility requirement. The justification for adverse possession this Article develops can much more readily explain it. The traditional theories fail in

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302. See, e.g., *Apperson v. White*, 950 So. 2d 1113, 1116 (Miss. Ct. App. 2007).

303. 10 THOMPSON ON REAL PROPERTY, *supra* note 54, § 87.10 (“[N]o court has been found to repudiate the essentials of hostility.”).

304. *Id.*

305. See *supra* Part I.A.

306. See Singer, *supra* note 82, at 622–23 (explaining that the reliance interest is relevant in all property relationships).

307. See *supra* notes 105–06, 116–21 and accompanying text.

308. See Fennell, *supra* note 65, at 1066–67 (explaining that lack of permission or knowledge does not suffice to establish that the possessor is the more efficient user).

this task because a possessor's reliance on land, or propensity to put it to better use, are largely disconnected from the permission (or rather, lack of permission) awarded to her to enter the land. By contrast, the justification for adverse possession advanced in this Article is all about hostility, and hence the doctrinal requirement materializes as wholly natural.

As Part II established, in actuality, adverse possession is set in order to settle boundary disputes. Its *raison d'être* is, therefore, the dispute: the disagreement over a boundary's location. It follows that when such disagreement is absent, as when one party permitted the other's encroachment, no recourse to the doctrine is necessary—or justified. Property law has distinct, and separate, doctrines that can move the formal boundary between lots when the bordering owners have in the past agreed to diverge from that boundary.<sup>309</sup> Adverse possession is meant to address the case where no such agreement is present; indeed, as explained earlier, its concern is that often such agreements are unrealistic, if not impossible, given that formal boundaries in a record system are unclear.

This nature of adverse possession's function should also explain why the doctrine's hostility element does not, in the vast majority of states, include a subjective requirement.<sup>310</sup> A few states add to the objective no-permission test a subjective test, demanding that the entrant claiming land through adverse possession act in good faith.<sup>311</sup> That is, that the possessor thought the land was hers and simply committed a mistake. An even smaller number of states flip this subjective requirement: they demand that the possessor know she is intruding.<sup>312</sup> The courts adding either of these subjective demands—good faith or intentional dispossession—are clearly in the minority, however, and, given the insight into the doctrine's true role this Article provides, they should be.

Adverse possession's goal is to proffer a system for boundary management: a practical replacement for the formal system society refuses to optimize. To achieve that goal, neither party's mental state is relevant. Furthermore, because the doctrine's existence is premised on the realization that often boundaries in a recording system are indiscernible, the doctrine assumes that most boundary intrusions are, in a sense, in good faith. Boundary mistakes, an inevitable part of the American property system, necessitate the doctrine. That is why it would be wasteful, if not counterproductive, for the doctrine to insist that a possessor positively prove her good-faith mistake in each and every case. The lack of such a requirement—the fact that in most states the hostility requirement does not translate into a requirement of good faith on the intruder's part—has often been presented as the most objectionable, or unfair, element of adverse

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309. See SINGER, *supra* note 21, at 169–72.

310. *Id.* at 149.

311. *Id.*

312. *Id.*

possession.<sup>313</sup> Once the doctrine's actual role—solving inevitable boundary mistakes the system has opted to live with—is clarified, the counterintuitive nature of the hostility requirement is easier to accept.

## 2. Notoriety

This Article's account also aids in elucidating the logic of the other adverse possession requirement whose application is often held up as unfair: notoriety. A successful adverse possession claim requires that the claimant's possession be "open and notorious," meaning that it puts the owner on notice.<sup>314</sup> This requirement does not entail proof that the owner actually knew about the intrusion but merely that she could have known.<sup>315</sup> Therefore, an innocent owner, who was never aware that another person was on her land and thus never had the opportunity to act to remove the trespasser, could lose her land.<sup>316</sup> The same occurs with an owner who never knew that the intruded land was hers to begin with.<sup>317</sup>

This result is troubling because adverse possession has traditionally been understood as a tool for penalizing owners who sleep on their rights. The title owner should lose her land, those explanations hold, because she opted to not pay attention to her land, thereby allowing another to become attached to it, underutilizing the land, or disquieting title.<sup>318</sup> But if the owner did not actually know that her land was being intruded, she cannot that easily be said to have allowed these consequences; if she did not know the land was hers, she cannot even be said to have opted to not pay attention. That she should still be held responsible for those detrimental social consequences (another's reliance, underuse of land, or unquiet title) that the existing theories of adverse possession stress, with the attendant penalty of losing her land, is normatively unappealing.<sup>319</sup>

Equipped with this Article's new understanding of adverse possession's function, this startling result the doctrine can produce is much less troubling or even surprising. Adverse possession is not set up to penalize the owner. Thus, just as the intruder's mental state is irrelevant for the doctrine's hostility element, so is the owner's for the notoriety element.<sup>320</sup> Adverse possession is geared toward settling boundary disputes, whose presence and means of resolution have little to do with an owner actually knowing what she owns or where her neighbor's land is located. In fact, the doctrine is

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313. See generally R. H. Helmholz, *Adverse Possession and Subjective Intent*, 61 WASH. U. L.Q. 331 (1983).

314. 10 THOMPSON ON REAL PROPERTY, *supra* note 54, § 87.08.

315. *Alaska Nat'l Bank v. Linck*, 559 P.2d 1049, 1053 (Alaska 1977) ("The owner need not actually know about the presence of an adverse possessor . . .").

316. 16 POWELL ON REAL PROPERTY § 91.04 (2019).

317. See, e.g., *Lawrence v. Town of Concord*, 788 N.E.2d 546, 548 (Mass. 2003).

318. See *supra* notes 84–85, 106 and accompanying text.

319. For this reason, some courts add an acquiescence requirement, interpreted as actual knowledge, for prescriptive easement claims. See SINGER, *supra* note 21, at 203–04.

320. See, e.g., *Doyle v. Hicks*, 897 P.2d 420 (Wash. Ct. App. 1995) (explaining that the owner's thought process is irrelevant).

premised on the assumption that many times boundaries are, in a sense, unknowable in the American landscape: deeds conflict, old deeds have outdated descriptions, and so on.<sup>321</sup> Due to the way our boundary and land transfer system is structured, “actual” knowledge of the real boundary is at times impossible. Insisting that the owner actually know about an intrusion—through a strict interpretation of the notoriety requirement—would be irrational.

The unfortunate state of the formal boundary system that adverse possession addresses, as Part II showed, not only explains this doctrinally well-established reading of the notoriety requirement. It should also serve to inform courts as they deal with a subset of cases whose treatment under the requirement is contested. While doctrine clearly only holds that the owner should have known of an intrusion—even if she did not actually know—the question arises whether an owner should have known of an intrusion undetectable to the naked eye. If the neighbor’s wall, fence, or driveway trespasses onto the owner’s land to the extent of only a few inches or feet, an owner will be unable to note it unless she conducts a periodic survey.<sup>322</sup> In such situations, the owner could be viewed as not on notice because she could not have noted the intrusion by visiting the land. Alternatively, she could be viewed as on notice because she could have had a survey done noting the intrusion.<sup>323</sup>

New Jersey courts are probably the only ones that have explicitly adopted the former position.<sup>324</sup> They insist that “as a matter of law no presumption of knowledge [arises] from the prior minor and passive encroachments along the common boundary line.”<sup>325</sup> When “the fact of an intrusion is not clearly and self-evidently apparent to the naked eye but requires an on-site survey for certain disclosure . . . , such a presumption is fallacious and unjustified.”<sup>326</sup> Some other courts have reached similar conclusions in individual cases,<sup>327</sup> and some may limit the rights gained through imperceptible intrusions (for example, granting an easement for keeping intruding awnings but not title for the land below).<sup>328</sup> However, the majority

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321. See *supra* notes 217–21 and accompanying text.

322. See, e.g., *McCarty v. Sheets*, 423 N.E.2d 297, 298–99 (Ind. 1981) (involving a garage wall and eaves encroaching one to two feet); *Thomas v. Mrkonich*, 78 N.W.2d 386, 388 (Minn. 1956) (involving a stairway encroaching 4.5 inches); *De Rosa v. Spaziani*, 142 N.Y.S.2d 839, 841 (Sup. Ct. 1955) (“Th[e] encroachment runs at its base from 6 1/2 inches . . . to 8 1/2 inches . . . . [In addition,] the upper portion of the wall leans over . . . an additional 8 1/2 inches beyond the foundation. In addition . . . the plaintiff placed shingles upon said wall, which . . . extended the existing encroachment by about three-fourths of an inch.”).

323. See, e.g., *Reeves v. Metro. Tr. Co.*, 498 S.W.2d 2, 3 (Ark. 1973).

324. NEIGHBORING PROPERTY OWNERS § 6:4 (James Charles Smith ed.), Westlaw (database updated Nov. 2020).

325. *Stump v. Whibco*, 715 A.2d 1006, 1010 (N.J. Super. Ct. App. Div. 1998).

326. *Mannillo v. Gorski*, 255 A.2d 258, 263 (N.J. 1969).

327. See, e.g., *Morgan v. Jenson*, 181 N.W. 89, 91 (N.D. 1921) (holding that a bay window’s foundation intruding by “a few inches . . . certainly could not be said to be sufficient to attract the attention of, or be visible to, the owner of the record title . . .”).

328. *McCarty v. Sheets*, 423 N.E.2d 297, 301 (Ind. 1981) (holding that a garage’s miniscule encroachment sufficed for adverse possession, a similar intrusion by the lawn did not, and an

position is that an imperceptible intrusion does provide notice.<sup>329</sup> Courts hold that because the owner could have had a survey taken through which she would have noted the intrusion, the owner was on notice.<sup>330</sup>

In light of this Article's findings, this position is ill-advised. Because the presumption underlying adverse possession is that formal boundaries are sometimes unknowable, the majority approach materializes as incoherent. It calls on owners to conduct periodic surveys of their land to avoid loss through adverse possession.<sup>331</sup> Yet adverse possession's justification is that the American land system generally assumes that a survey is of little help in determining boundaries. As noted, at times, the formal lines cannot be identified through a survey. An old deed might rely on unscientific markers, deeds to neighboring lots could cover the same area, different deeds for the same lot could contain different descriptions.<sup>332</sup> In fact, our legal system does not ask the owner to survey her land even when she acquires it: she is expected to rely on reality as she sees it and on insurance.<sup>333</sup> Thus, requiring an owner to make periodic surveys of her land to verify that a neighbor is not intruding is inconsistent with the system's structure.<sup>334</sup> Intrusions into land that are undetectable to the naked eye should not count as putting the landowner on notice.

### 3. Color of Title

Aside from helping to understand and interpret adverse possession's hostility and notoriety requirements, this Article's new reading of the doctrine's role aids in grasping a specific category of cases for which adverse possession has developed a special rule seemingly undermining its normal requirements: "color of title." In most jurisdictions an adverse possession claim is strengthened if it is made under color of title. Possession is under color of title when it is based on a written instrument that while not truly

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intruding awning only generated a prescriptive easement); *Greene v. Jones*, 490 N.E.2d 776, 778 (Ind. Ct. App. 1986) (holding plowing, grading, and planting grass on a seven-foot strip was not conspicuous enough to suffice for a successful adverse possession claim).

329. *Scoville v. Burns*, 207 S.W.2d 756, 757 (Ky. Ct. App. 1948) (finding notorious a wall and steps encroaching by eleven inches); *Shinors v. Joslin*, 180 P. 574, 574 (Mont. 1919) (finding notorious "a triangular strip 4 1/2 inches wide at the base, and 18.7 feet in length, extending along the boundary line to its apex, over which the roof of defendant's residence projects; and . . . a strip 8 inches wide at one end, 2 inches wide at the other, and 67 feet long . . . by . . . [a] fence and coalshed"); *Lewis v. Idones*, 116 N.Y.S.2d 382, 383-84 (App. Div. 1952) (finding notorious a wall encroaching by 6.5 inches to 9.5 inches).

330. *Five Twelve Locust, Inc. v. Mednikow*, 270 S.W.2d 770, 777 (Mo. 1954) (explaining that since a survey could have detected the one-eighth-inch ground level intrusion, "the important and controlling fact" was that the building's "width and height were, of course, openly visible").

331. *Mannillo*, 255 A.2d at 264.

332. *See supra* notes 37-38, 217-21.

333. *See supra* Part II.C.

334. *Mannillo*, 255 A.2d at 264 (noting that requiring the "true owner" to "obtain[] a survey each time the adjacent owner undertook any improvement at or near the boundary . . . would place an undue and inequitable burden upon the true owner").

conveying title, amounts to “an appearance of title.”<sup>335</sup> Color of title, therefore, is normally established through a defective deed<sup>336</sup>: a deed missing a signature,<sup>337</sup> a deed from only one among multiple owners,<sup>338</sup> a deed granted by someone not actually the owner,<sup>339</sup> an invalid tax deed,<sup>340</sup> or a deed from a foreclosure sale voidable because of irregularities.<sup>341</sup> In such cases the instrument purports and appears to grant title, but it fails to do so due to the legal defect.<sup>342</sup> The grantee thus is not, and cannot be, awarded formal title through the document. Still, that defective document might help her gain the land through adverse possession thanks to the color of title doctrine.

Armed with a defective document that supplies color of title, an adverse possession claimant need not prove the one element of the claim that is often the most challenging: actual possession of the whole land. She need only prove “constructive possession.”<sup>343</sup> With color of title, the claimant must only actually occupy one part of the tract covered by the defective document to be regarded as in possession of the whole tract.<sup>344</sup> This represents a major exception to the normal rule applicable to adverse possession claims, whereby the awarded interest’s contours are wholly based on realities on the ground.<sup>345</sup>

Color of title’s treatment also materializes as an exception to a successful adverse possession claim’s other core requirement: hostility. Because in a color of title scenario, the title owner at some point purported to transfer title to the possessor (through the faulty deed), how could she be said to have not permitted the possessor’s entry?<sup>346</sup> The person entering land, relying on a deed, even if faulty, explicitly received permission. Still, almost all courts find that possession under color of title is hostile.<sup>347</sup> Their explanations for this seeming contradiction are so overly technical that they become incoherent.<sup>348</sup> Commentators note that the rule should be viewed not in light of any internal logic but rather through its “practical utility” in enabling

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335. 16 POWELL ON REAL PROPERTY, *supra* note 316, § 91.08.

336. A void court decree suffices, too. *See Meinders v. Bd. of Educ.*, 344 P.2d 572, 573 (Okla. 1959).

337. *Romero v. Garcia*, 546 P.2d 66, 67 (N.M. 1976).

338. *Wallace v. McPherson*, 214 S.W.2d 50, 53 (Tenn. 1947).

339. *Lott v. Muldoon Rd. Baptist Church, Inc.*, 466 P.2d 815, 816, 818–19 (Alaska 1970).

340. *Green v. Dixon*, 727 So. 2d 781, 783 (Ala. 1998).

341. *Buckner v. Sewell*, 225 S.W.2d 525, 531 (Ark. 1949).

342. *Knight v. Boner*, 459 P.2d 205, 207–08 (Wyo. 1969).

343. 10 THOMPSON ON REAL PROPERTY, *supra* note 54, § 87.07.

344. *See Roe v. Doe ex rel. Tenn. Coal, Iron & Ry. Co.*, 50 So. 230, 231 (Ala. 1909).

345. 4 TIFFANY REAL PROPERTY, *supra* note 203, § 1155 (“As a general rule, one can acquire by adverse possession the title to so great an extent of land only as is covered by his acts of actual possession . . .”).

346. *See SINGER ET AL.*, *supra* note 1, at 299.

347. *Id.*

348. *See, e.g., Polanski v. Eagle Point*, 141 N.W.2d 281, 283 (Wis. 1966) (“Where it is admitted that the present possession is the result of a conveyance by a former owner, it is obvious that there will be no forcible entry. However, the occupation of property pursuant to a deed is presumptively and in fact an act adverse to and in derogation of the former owner’s title.”).



adverse possession claims in color of title cases.<sup>349</sup> They thereby perceive the special rule for color of title claims as impossible to square with adverse possession's normal hostility requirement. The law's promotion of claims under color of title thus flies in the face of adverse possession's two key requirements: that a claimant possess the contested land and do so adversely.

This perceived conflict between color of title and adverse possession's basic principles disappears once adverse possession's function is illuminated. The doctrine, as we saw, is meant to replace the central clearinghouse for land transfers—a registry—that American states have forgone. Elsewhere in the world, the central registry dictates and enforces a uniform system for transfers. That system assures transfers' standardization and reliability. Part II.C showed that in the United States, adverse possession treats one infirmity the lack of such enforced uniformity generates: the unreliable boundaries deeds may establish.<sup>350</sup> But the harms generated by the absence of a central registry assuring that all transfers abide by clear rules are not limited to faulty boundaries. With no central policing agency, other potential defects in documents transferring land are fated: missing signatures, unfollowed procedures, etc.

Just as the typical application of the adverse possession doctrine treats the problem of defective boundaries in deeds, the color of title rule aims to address these other defects.<sup>351</sup> The color of title doctrine actually requires for its application that boundaries in the defective deed be clear.<sup>352</sup> The color of title doctrine thereby specifically targets other, non-boundary-related cases where our transfer system fails: mainly those where technical mistakes cloud an apparent owner's right to convey the land.

Because the color of title rule does not specifically tackle the problem of faulty boundaries but rather tackles other problems our flawed transfer system generates, it need not rely on the tools for ascertaining boundaries employed in the normal adverse possession case—which, as noted, is all about faulty boundaries. Namely, it need not resort to the reality on the ground (actual possession) and insist on the existence of a real dispute (hostility). While these elements can provide guidance for settling boundary disputes that the imperfections of the deed recording system creates, they are irrelevant for other disputes to which those imperfections give rise. For treating disputes pertaining to nonboundary defects in deeds that are the charge of the color of title rule, no need exists to resort to these tests.

Thus, despite the fact that its specific doctrinal requirements appear misaligned with those of the typical adverse possession claim (namely, its wholesale relaxation of the possession and hostility requirements), color of title's animating logic and the function it performs are part and parcel of the overall doctrine. Like regular claims of adverse possession, color of title

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349. 3 AM. JUR. 2D *Adverse Possession* § 181 (2021).

350. See *supra* Part II.C.

351. *Gloyd v. Franck*, 154 S.W. 744, 746 (Mo. 1912) (“Ordinarily color of title does not apply in boundary disputes.”).

352. 4 TIFFANY REAL PROPERTY, *supra* note 203, § 1155.

claims fix problems in our registry-less land transfer system. They just treat a factually different type of problem and thus employ different tests.

### *B. Regulating Title Insurance Companies*

The normative need a doctrine answers must inform the manner in which it is applied—and hence the preceding section suggested explanations for, and adjustments to, judicial interpretations of adverse possession’s elements.<sup>353</sup> But because the specific need the doctrine of adverse possession answers, as identified in Part II, is generated and maintained by a specific market actor, the findings should also affect that actor’s regulation. Adverse possession serves as a public subsidy to the title insurance industry, and thus, grounds could be found for governmental regulation of that industry. This section will sketch the framework for such regulation. It will explain why the title insurance industry should be viewed as a public utility and which elements of public utilities’ regulatory framework should be imported to the regulation of this specific industry. It will also review existing examples of state regulation of title insurance.

The grounds for regulating the title insurance industry lie in the characteristics of its business model that render it a vital monopoly. Title insurance is the backbone of the American system for land transactions. States have opted to forgo a public system for land transactions, instituting instead a system that is in essence private.<sup>354</sup> This private option heavily relies on (arguably, necessitates) the title insurance product. Furthermore, in practice, even if an individual buyer were willing to transact without insurance, she could not, because lenders require insurance.<sup>355</sup> Title insurance companies thus provide a service on which all those transacting in land depend. As a treatise concludes, “the title insurance company’s office frequently is the nucleus for the entire real property transaction.”<sup>356</sup>

The number of such service providers that can exist is limited. To provide the service, a title insurance company compiles its own version of the public records, called a “title plant,” which efficiently organizes information about all lands in the state.<sup>357</sup> The resultant plants are vast and highly accurate title databases, which often surpass in completeness and quality the governmental records.<sup>358</sup> Once created, these are cheap to maintain and produce a very high return: each consecutive policy issued requires no additional research beyond that done for the earlier sale of the lot, and yet for each sale the new buyer pays a full premium.<sup>359</sup> Theoretically, if the same lot is sold daily, full payment can be charged to each daily buyer, although no additional work—

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353. *See supra* Part III.B.

354. *See supra* Parts II.B–C.

355. Melynda Dovel Wilcox, *Home Buyers Beware*, KIPLINGER’S, Oct. 2001, at 97.

356. 1 TITLE INSURANCE LAW § 1:3 (Joyce Palomar ed., 2020).

357. McCaffree Fin. Corp. v. Nunnink, 847 P.2d 1321, 1323 (Kan. Ct. App. 1993).

358. 14 POWELL ON REAL PROPERTY, *supra* note 335, § 83.01.

359. Barnet, *supra* note 250, at 13–14.

beyond the original research of the lot that went into the firm's database—is necessary.<sup>360</sup>

Contrast this profitable standing of an existing title firm to a new one's predicament. A new entrant into the title insurance market would be hard pressed to create its own plant: before issuing one policy, it will have to spend enormous resources investigating each lot. Consequently, it will have to charge potential buyers high premiums, while the existing firms can lower their fees (because they now need to invest very little in research preceding the policy's issuance). The barriers confronting new entrants to the title insurance market are, therefore, very high.<sup>361</sup>

The result is that the market is highly concentrated in a few firms. Four large players accounted for 87.7 percent of total industry revenue in 2018.<sup>362</sup> The Federal Trade Commission (FTC) has in the past charged these companies for price-fixing.<sup>363</sup> Even after that complaint, the companies have not been competing on price.<sup>364</sup> Explaining, at another time, its objection to an industry merger, the FTC observed, “[t]here are no commercially reasonable substitutes for title plant services.”<sup>365</sup> The Iowa Supreme Court also noted, in a different context, the “oligopolistic nature of the industry.”<sup>366</sup>

Furthermore, it is unclear whether breaking up the title insurance oligopoly would be socially beneficial. The creation of multiple title plants all covering the same land is wasteful. Each must contain full and identical information (otherwise it will be useless to buyers) and thus any new insurance company will spend funds on duplicating work already done.<sup>367</sup> As is the case with other infrastructures—for example, the transportation infrastructure of railroads or the power infrastructure of electricity providers—having only one underlying infrastructure describing land boundaries is desirable. The title insurance plant is what is often referred to as a natural monopoly.<sup>368</sup>

The two traits of title insurance just reviewed—an industry vital for the public interest with the characteristics of a monopoly, perhaps a natural monopoly—render it analogous to the traditional industries American law

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360. Bostick, *supra* note 188, at 72.

361. *See, e.g.*, IBISWORLD, US SPECIALIZED INDUSTRY REPORTS: TITLE INSURANCE INDUSTRY IN THE US—MARKET RESEARCH REPORT (2020), <https://www.ibisworld.com/united-states/market-research-reports/title-insurance-industry> [<https://perma.cc/JJ82-U5GG>].

362. *Id.*

363. *See* FTC v. Ticor Title Ins. Co., 504 U.S. 621, 625 (1992).

364. *See* Wilcox, *supra* note 355.

365. Complaint at 6, 9, *In re* LandAmerica Fin. Grp., Inc., 125 F.T.C. 906 (1998) (No. C-3808).

366. *Chi. Title Ins. Co. v. Huff*, 256 N.W.2d 17, 29 (Iowa 1977).

367. STAFF OF S. COMM. ON BANKING, HOUS. & URB. AFFS., 92D CONG., REP. ON MORTGAGE SETTLEMENT COSTS 29–30 (Comm. Print 1972) (arguing that excessive duplication of property records occurred between title companies leading to higher closing costs on homes).

368. *See* Douglas Gegax & Kenneth Nowotny, *Competition and the Electric Utility Industry: An Evaluation*, 10 YALE J. ON REGUL. 63, 67 (1993) (“A natural monopoly exists when a single firm can produce a desired level of output at lower total cost than any output combination of more than one firm.”).

views as “public utilities.”<sup>369</sup> Perhaps counterintuitively, title insurance is much more similar to electricity and telecom—and the original utility, railroads—than to other insurance products.<sup>370</sup> The reflexive move to treat title insurance as the law treats other insurance services is misguided: unlike the latter, the title insurance industry’s key characteristic is not its assumption of risk.<sup>371</sup> A fire or car insurance company, when issuing a policy to an individual, cannot do research to verify that the house will never burn or the car will never have an accident. The company takes on that risk. Conversely, the title insurance policy is only issued after the company has researched the land and verified the absence of any risk of mistake.<sup>372</sup> The company takes on very little, if any, risk (accordingly the policy, unlike normal insurance policies, is not priced to reflect the risk of payout—but as a fixed percentage of the purchase price). Perhaps consequently, the title insurance industry has to contend with very few claims for losses.<sup>373</sup> The Iowa court noted evidence indicating an industry loss ratio of 0 percent.<sup>374</sup> Accordingly, the focus of the industry’s public regulation, unlike the public regulation of other insurance industries, need not be verifying that title insurance does not assume unsustainable risks thereby threatening insurers’ solvency (and the attendant ability to pay out claims).<sup>375</sup> Rather, the focus must be on title insurance’s function as an indispensable market infrastructure, as in the case of the typical public utility.

Public utilities, traditionally, are regulated to assure that they provide the same quality service to all market actors.<sup>376</sup> The state dictates the service’s quality and mandates that the utility serve identically all potential clients. For title insurance companies, this would mean policing the risks a policy protects buyers against.<sup>377</sup> It could also entail barring the company from discriminating between buyers. For example, the company could be prohibited from providing better services to buyers who commit to work with a certain bank (whose financial interest the insurance company otherwise wishes to promote).<sup>378</sup>

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369. See, e.g., Jim Rossi & Morgan Ricks, *Foreword to Revisiting the Public Utility*, 35 YALE J. ON REGUL. 711, 711–12 (2018).

370. See Daniel Schwarcz, *Ending Public Utility Style Rate Regulation in Insurance*, 35 YALE J. ON REGUL. 941, 989 (2018) (arguing that title insurance is the only insurance product that could be regulated as a public utility).

371. Szypszak, *supra* note 294, at 688–89 (arguing that title insurance is more risk prevention than risk assumption).

372. Title insurance companies are often legally prohibited from issuing policies without conducting a title search. See, e.g., MO. REV. STAT. § 381.071 (2021).

373. While home and car insurance companies pay upwards of 80 percent of premium dollars on claims, title insurers only pay around 3 or 4 percent. Andrews, *supra* note 283.

374. *Chi. Title Ins. Co. v. Huff*, 256 N.W.2d 17, 27 (Iowa 1977).

375. See KENNETH J. MEIER, *THE POLITICAL ECONOMY OF REGULATION: THE CASE OF INSURANCE* 49–70 (1988) (explaining the goals of insurance regulation).

376. Schwarcz, *supra* note 370, at 943.

377. For why such policing is needed, see Bostick, *supra* note 188, at 72 (arguing that companies’ practice of exceptions “leads to substantial difficulties because the exceptions in policies often relate to those problems most likely to be encountered”).

378. Wilcox, *supra* note 355.

Beyond service provision regulation, an even more intrusive element of traditional public utility regulation is rate setting.<sup>379</sup> A utility, for example a power company, provides a vital service and lacks true competition, so the free market would allow it to charge almost any price. Because exorbitant pricing could debilitate other economic activities relying on the utility, the state limits the utility's prices to a reasonable return.<sup>380</sup> If title insurance is treated like a utility, a state entity should set title insurance's policy rates.

A handful of examples for title insurance companies' regulation along the suggested lines can already be found. Some aspects of the service provision are at times regulated. In almost all states, companies are subject to reporting obligations.<sup>381</sup> A majority of states review the quality of at least some of the processes preceding a title insurance policy's issuance (for example, the title search).<sup>382</sup> A small number of states limit title insurance companies' power to affiliate with mortgage companies, since these often refer a home buyer to a title insurance company.<sup>383</sup> Price regulation is rarer still. In most states, title insurance companies must report the rates they charge, and seventeen states subject rates to approval.<sup>384</sup> However, the typical approval standard is rather lax, focusing mostly on assuring that rates are not discriminatory.<sup>385</sup> Only Florida,<sup>386</sup> New Mexico,<sup>387</sup> and Texas<sup>388</sup> empower public bodies to promulgate title insurance rates.

The most radical measure for state control of the title insurance industry is adhered to in Iowa. Since 1947, Iowa law has prohibited title insurance.<sup>389</sup> Instead, a state entity has been established that issues a title guarantee policy offering land buyers the same coverage as private title insurance.<sup>390</sup> This public replacement of the private industry functions extremely well. The premiums the state charges for the guarantee are a fraction of the premiums private title insurance charges elsewhere,<sup>391</sup> and Iowa's title system is considered the country's most accurate.<sup>392</sup>

This Article's findings should serve to press a greater number of states to adopt the more active forms of title insurance regulation reviewed here. As established in Part II, the general public subsidizes title insurance companies,

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379. See Rossi, *supra* note 369, at 717.

380. See Schwarcz, *supra* note 370, at 950–51.

381. NAT'L ASS'N OF TITLE INS. COMM'RS TITLE INS. (C) TASK FORCE, SURVEY OF STATE INSURANCE LAWS REGARDING TITLE DATA AND TITLE MATTERS 2 (2015).

382. See *id.* at 8–9.

383. *Id.*

384. *Id.* at 12.

385. *Id.* at 13. The standard formula bars “inadequate or unfairly discriminatory . . . [or] excessive” rates. See, e.g., 40 PA. CONS. STAT. § 910-39(b) (2021). The resulting regulation is so permissive that companies charge less than allowed. See generally Goldmacher, *supra* note 282.

386. FLA. STAT. § 627.782 (2021).

387. N.M. CODE R. § 13.14.9.18 (LexisNexis 2021).

388. TEX. INS. CODE ANN. § 2703.151 (West 2021).

389. IOWA CODE § 515.48(10) (2021).

390. See *id.* § 16.4C.

391. Goldmacher, *supra* note 282.

392. Wilcox, *supra* note 355, at 98.

not only through the premiums it must pay but also through its subjugation to a suboptimal boundary management system with the attendant costs of adverse possession. Iowa's choice to replace the private industry with a public service is wholly justified. A service sustained through legal doctrines alone should not generate limitless fruits for a parasitic private industry.<sup>393</sup> Other states might find the Iowa route of abolishing private power in the field too radical, but they should at least consider controlling such power's expansion. The recording system that necessitates the doctrine of adverse possession aids title insurance companies in maintaining their stranglehold on the market for managing land transactions.<sup>394</sup> They should not be allowed to leverage this public subsidy to further strengthen their position in adjacent markets, such as the mortgages market. Limits on title insurance companies' affiliation with mortgage companies and other actors in the real estate market are thus clearly called for. Perhaps more urgently than any such structural reform, all states should proceed to follow the three that set title insurance rates. Arguments that reject rate regulation in this case are incoherent once we see the industry as a natural monopoly—one on which citizens must rely because of the absence of effective state laws for boundary determination.<sup>395</sup>

One could argue, given this Article's findings respecting adverse possession, that no form of title insurance industry regulation would be far-reaching enough. Reform must be more drastic. Already, some have argued that the true regulatory solution for our wasteful system of land management is switching to the Torrens system.<sup>396</sup> However, such sweeping reform is highly improbable.<sup>397</sup> Consequently, as a second-best solution, states should more effectively regulate the private industry replacing the registration system.

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393. Another reason owes to adverse possession's effects on title insurance's costs. The doctrine helps keep those costs down because it fixes old title defects. In its absence, there would be more defects, and coverage would be costlier. Thus, one author argues that thanks to adverse possession, insurance premiums are kept lower. Merrill, *supra* note 2, at 1129. However, as private monopolies, insurance companies have been able to maintain prices unconnected to costs. Hence, any reduction in insurance costs that adverse possession generates have probably not been passed on to the public.

394. An important target for regulation should be the relationship between insurers and intermediaries—agents and lenders—that steer clients to the insurance companies. Insurers woo intermediaries through perks, such as event tickets or gifts. These practices force the public, which pays for these perks through higher insurance premiums, to fund not only the insurers but also those intermediaries. See Goldmacher, *supra* note 282.

395. The argument made against price regulation of title insurance has been that the state thereby impedes competitive behavior. See Owen R. Phillips & Henry N. Butler, *The Law and Economics of Residential Real Estate Markets in Texas: Regulation and Antitrust Implications*, 36 BAYLOR L. REV. 623, 652 (1984). Because the title insurance market is inherently monopolistic, that claim is peculiar.

396. See *supra* note 274.

397. 3 PATTON & PALOMAR ON LAND TITLES, *supra* note 207, § 690 (“So, if, in theory and in practice outside of the United States, the Torrens system is more efficient than the recording system, is there a future for the Torrens system in the United States? . . . [T]he answer is that, unless the law changes dramatically, it is unlikely that more states will adopt a Torrens system . . .”).

## CONCLUSION

Most observers—whether lawyers, scholars, law students, or laypeople—consider adverse possession an anomaly and for good reason. As all realize, the doctrine contradicts both common intuitions of justice and core property law premises. Writers have been able to provide some justification for this anomaly, explaining in different ways why adverse possession is actually an inevitable product of property law theories and thus serves core legal principles. This Article questions that move. It shows that as an exception to the prevailing property regime, adverse possession is not truly in line with property law theories—and thus, as an anomaly, it is perhaps even more troubling than assumed before. The theories animating property law do not need adverse possession; the ineffective American system for managing boundaries, and the industry benefiting from its dysfunction, do. Economic interests, not philosophical principles, have constructed a land management system in the United States that necessitates the doctrine. We should understand, apply, and interpret adverse possession as such: a practical tool our imperfect land system needs as long as we insist, probably against our own best interests, on keeping that system imperfect.