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Land: If You Don't Use It, You Lose It:
Why Adverse Possession of Government Property is Necessary

Section I

Introduction

It is often believed that land owned by the government cannot be acquired through adverse possession. This is a fallacy however because although government land is typically immune from adverse possession vacant or underused land is not always afforded sovereign immunity. This paper takes the point of view that it is not enough that only land owned by municipalities are subject to adverse possession. All developed governmental land should be subject to adverse possession. Many argue that it is important for a governmental entity to be immune from adverse possession due to how much land it owns, how expensive it would be to monitor the land, and how it would make it difficult for the government to buy land for the purpose of land speculation. Allowing adverse possession of developed government property would force the government to improve the maintenance of its property and lead to better utilization of property across the nation. Furthermore, it is imperative that the United States protects the scarce amount of wild and undeveloped land left in the nation through creating stricter requirements to adversely possess undeveloped land.

The particular issue discussed in this paper is that the time has come to strip the United States government and state governments of sovereign immunity from the adverse possession of developed land while making it more difficult to adversely possess undeveloped lands. The reason I chose to focus on the adverse possession of government

property as well as the need to protect wild and undeveloped lands is that there is unused developed property that needs to be put back into circulation. There is a desire to utilize the land efficiently and to make the most of property but this desire cannot be allowed to come at the expense of the scarce amount of undeveloped land in this country.

This paper will address various topics regarding the adverse possession of government property in the following order: Section II will discuss the background of adverse possession, Section III will discuss why the government should not be immune from adverse possession, Section IV will discuss the arguments supporting governmental immunity from adverse possession with rebuttals to those arguments, and Section V will discuss the need to protect and preserve the scarce amount of wild and undeveloped land in the United States.

Section II

Adverse Possession

Adverse possession is a doctrine that allows trespassers to transform from possessor to true owner of privately owned property if the owner fails to expel the trespassers before the end of the statutory period usually before the statute of limitations. In order to adversely possess the trespasser is required by the statute to use the property as if it were its own for a specific amount of time. Once the required amount of time has passed under the statute of limitations the doctrine of adverse possession prevents the original owner from bringing lawsuits in an attempt to recover the land while also creating a new title for the trespasser.

The common law requires that the trespasser’s possession must be “actual, open, continuous, notorious, exclusive, and under color or claim of right.”¹ Different state statutes may require more from the adverse possessor, such as a requirement to have paid all state and local property taxes during the period of trespassing, while others require the land to be “protected by a substantial inclosure” or “cultivated or improved” in the usual way.² Of the universal elements of adverse possession, the first element requires that there is actual possession of physical property and that the trespasser utilizes the land in a way that a reasonable owner would.³ The open and notorious element requires the trespasser’s possession to be so blatant that it could be detected upon inspection of the property and that upon inspection a reasonable owner would be aware of the trespassers use of his land.⁴ The exclusive possession element requires that the trespasser have sole possession of the land and not be the land with the titleholder or the general public; however, this element is loosely enforced throughout courts.⁵ The fourth element is the requirement that the possession be adverse, meaning that it must be under color or claim of right; however, many courts require that the trespasser use the land and acts as if she were the true owner without the permission of the title holder.⁶ The last element is that the use by the adverse possessor must be continuous and without interruption throughout the time set forth in the statute of limitations.⁷ A landowner is allowed to bring a claim

¹ See *Mackinac Island Dev. Co., Ltd. v. Burton Abstract & Title Co.*, 504, 349 N.W.2d 191, 195 (Mich. App. 1984).

² See MINN. STAT. ANN. S 541.02 (West 1998); Mont. Code Ann. S 70-19-411 (1995); NEV. REV. STAT. ANN. S 11.150 (Michie 1996); UTAH CODE ANN. S 78-12-12 (1992); N.Y. Real Prop. Acts. Law S 512, 522 (McKinney 1979).

³ See JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 436 (2000).

⁴ See SPRANKLING, *supra* note 3, at 438.

⁵ *Id.* at 440.

⁶ *Id.* at 442; at 441-44.

⁷ *Id.* at 444-45.

for ejectment, a civil action to recover the possession of or title to land, at any time until the statute of limitations for adverse possession is exceeded.⁸ If a trespasser meets all of the elements required for adverse possession, they obtain title in fee, which grants the possessor title of the land from the rightful owner. After the statutory period runs and the adverse possessor takes claim, the prior landowner is not allowed to bring claims for any remedies.⁹

Adverse possession's roots date all the way back to early Roman and Feudal Law.¹⁰ The doctrine developed throughout England around 1275 to prevent the waste of land granted to the people by the king.¹¹ The doctrine of adverse possession was originally created to prevent costly legal disputes over property while forcing owners to monitor their property and to utilize their property.¹² With adverse possession came about sovereign immunity against adverse possession as a way of protecting the king, who was too busy working for the benefit of his subjects to care for and protect his land.¹³ This sovereign immunity against the statutes of adverse possession is termed "nullum tempus occurrit regi," meaning "time does not run against the king."¹⁴ This English doctrine was adopted by all states in America and was adopted by all states as a way to cure title disputes it established a twenty-year statute of limitations before adversely possessing the property.¹⁵ The desire to develop as much land as possible of

⁸ See SPRANKLING, *supra* note 3, at 438.

⁹ *Id.*

¹⁰ *Id.*

¹¹ See Brian Gardiner, Comment, *Squatters' Rights and Adverse Possession: A Search for Equitable Application of Property Laws*, 8 IND. INT'L & COMP. L. REV. 119, 125-26 (1997).

¹² *Id.* at 126-27.

¹³ See *Devins v. Borough of Bogota*, 592 A.2d 199, 202 (N.J. 1991).

¹⁴ See *Devins v. Bogota*, 592 A.2d at 202.

¹⁵ See SPRANKLING, *supra* note 3, at 437; Gardiner, *supra* note 11, at 129.

land in America has since led to a decrease of the statute of limitations in many states to as few as five years; however, some statutes of limitations have remained as long as forty years.¹⁶ Like England before it, the United States also adopted a version of “*nullum tempus occurrit regi*” and adapted the sovereign immunity to apply to land of government entities since our government does not have a king.¹⁷

There is not a uniformity of adverse possession laws in the United States; rather each state has their own adverse possession laws.¹⁸ The New Jersey court system displayed the confusion and chaos of adverse possession laws across the nation.¹⁹ New Jersey had been applying the adverse possession laws incorrectly for over fifty years.²⁰ The court in *J & M Land Co. v. First Nat. Bank* held that New Jersey courts had been incorrectly applying a twenty-year statute of limitations for the entry of a judgment for adverse possession for the past fifty years.²¹ The pertinent statute in the New Jersey, N.J.S.A. 2A:14-30 provided that:

Thirty years actual possession of any real estate excepting woodlands or uncultivated tracts, and 60 years’ actual possession of woodlands or uncultivated tracts, uninterruptedly continued by occupancy, descent, conveyance, or otherwise, shall, in whatever way or manner such possession might have commenced or have been continued, vest a full and complete right and title in every actual possessor or occupier of such real

¹⁶ See William G. Ackerman & Shane T. Johnson, Comment, *Outlaws of the Past: A Western Perspective on Prescription and Adverse Possession*, 31 LAND & WATER L. REV. 79, 111-12 (1996).

¹⁷ See *Devins v. Bogota*, 592 A.2d at 202.

¹⁸ See *J & M Land Co. v. First Union Nat. Bank*, 166 N.J. 493, 500, 766 A.2d 1110, 1113 (2001).

¹⁹ *Id.*

²⁰ *Id.*

²¹ *Id.* at 1126.

estate, woodlands or uncultivated tracts, and shall be a good and sufficient bar to all claims that may be made or actions commenced by any person whatsoever for the recovery of any such real estate, woodlands or uncultivated tracts.²²

Therefore, the New Jersey court system displayed how confusing the lack of national uniformity for adverse possession laws can be.²³ New Jersey applied the wrong statute of limitations for the entry of a judgment for adverse possession, a twenty year period instead of the correct thirty and sixty year period, for over fifty years before correcting the oversight.²⁴

Municipal land is not always granted immunity from adverse possession.²⁵ In jurisdictions where municipal land is not immune against adverse possession, there are limitations as to how the land can be adversely possessed.²⁶ The first way in which jurisdictions limit the adverse possession of municipal land is by requiring that the land be used for public use.²⁷ Some of these jurisdictions deny adverse possession claims against municipal land if the municipality can prove that the land will be used for a public use, such as a school, street, highway or hospital.²⁸ Other jurisdictions put the burden of proof on the adverse possessor to prove both that the land was not currently being utilized for public use and that the municipality did not have plans to utilize the land for public

²² See *J & M Land Co. v. First Union Nat. Bank*, 166 A. 2d at 1113.

²³ *Id.*

²⁴ *Id.*

²⁵ See Carl C. Risch, *Encouraging the Responsible Use of Land by Municipalities: The Erosion of Nullum Tempus Occurrit Regi and the Use of Adverse Possession Against Municipal Land Owners*, 99 DICK. L. REV. 197, 200 n.24 (1994).

²⁶ *Id.* at 200-09.

²⁷ *Id.*

²⁸ *Id.*

use in the future.²⁹ The second way in which jurisdictions limit the adverse possession of municipal land is by requiring that the land be held in a proprietary versus a governmental capacity, attempting to protect the land utilized for governmental purposes.³⁰

In sum, property owned by the federal government or by state governments is not subject to adverse possession and most municipalities that are subject to adverse possession find a way to circumvent adverse possession through amending their statutes and requirements.³¹ No developed land owned by the government should be immune to adverse possession for the reasons listed in Section III.

Section III

Why the Government Should Not Be Immune From Adverse Possession

Allowing adverse possession of developed land owned by the government incentivizes the government to use land productively and helps to ensure that government land is put to a valuable use while also ensuring that the developed property throughout our nation is utilized in a beneficial manner.³² There are many theories that will be discussed in this argument that support a general justification of adverse possession of

²⁹ See Risch, *supra* note 25, at 215.

³⁰ *Id.*

³¹ *Id.*

³² See SPRANKLING, *supra* note 3, at 831-33; Thomas J. Miceli & C.F. Sirmons, *An Economic Theory of Adverse Possession*, 15 INT'L REV. L. ECON. 161, 164 (1995).

developed government property, mainly the “efficient land use” theory, the “personhood model,” the Hegelian Theory, and the Locke’s “labor theory”.³³

The justification for sovereign immunity of the government “nullum tempus occurrit regi” has run its course in America.³⁴ This notion should no longer apply to governmental adverse possession in our nation and should be abandoned as it has in criminal law, tort law, and contract law.³⁵ Abolishing the government’s sovereign immunity against the adverse possession of its land would force the government to either use and take advantage of the land it possesses or at the very least monitor and maintain its property.³⁶

It is nearly impossible for United States citizens to know when their government is acting in a lazy and lackadaisical manner that is hurting the general public.³⁷ Allowing adverse possession of government property would showcase and highlight the government’s failure to utilize its land efficiently or to sufficiently monitor its land.³⁸ If the general public of this nation knew that the government was failing to minimally monitor its land it would put pressure on the government to utilize its land efficiently.³⁹ As stated, since there is a statute of limitations no shorter than five years for any state and

³³ See Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2436 (2001); Oliver Wendell Holmes, *The Path of Law*, 10 HARV. L. REV. 457, 476-77 (1987); Justin Hughes, *The Philosophy of Intellectual Property*, 77 GEO. L.J. 287, 333 (1988); JOHN LOCKE, *THE SECOND TREATISE OF GOVERNMENT* § 27 (J.W. Gough ed., Oxford 1976) (1679).

³⁴ See Andrew Shepard, *Adverse Possession, Private-Zoning Waiver & Desuetude: Abandonment & Recapture of Property and Liberty Interests*, 44 U. MICH. J.L. REFORM 557, 559 (2011).

³⁵ See *United States v. Hoar*, 26 F. Cas. 329, 330 (C.C. Mass. 1821); *Developments in the Law: Statutes of Limitations*, 63 HARV. L. REV. 1177, 1252 (1950).

³⁶ See SHEPARD, *supra* note 34, at 559.

³⁷ See e.g. Johnathan R. Macey, *Cynicism and Trust in Politics and Constitutional Theory*, 87 CORNELL L. REV. 280, 290 (2002).

³⁸ See SHEPARD, *supra* note 34, at 280.

³⁹ *Id.*

as long as 60 years in some states, this monitoring of land by the government would not be as burdensome or expensive as many fear.⁴⁰ In fact, this monitoring would be relatively cheap and would encourage municipalities, states, and the federal government to use their land in an advantageous manner for its citizens.⁴¹ Government land that is put to a valuable use has direct benefits to society because it would bring about nature preserves, post offices, fire departments, schools, and parks.⁴² This proper utilization of the land creates a public policy argument in support of the adverse possession of developed government land.⁴³ The court in *Devins v. Borough of Bogota* recognized the benefit of putting pressure on the government to use their property productively through adverse possession.⁴⁴ In *Devins* the Borough of Bogota owned property that the plaintiff-appellants had paved and been using as a parking lot for more than the requisite twenty years needed for the entry of a judgment for adverse possession.⁴⁵ The issue in *Devins* was whether the land owned by the Borough of Bogota, municipal land, was subject to adverse possession.⁴⁶ The court in ruled that municipal land neither dedicated nor used for a public purpose is subject to acquisition by adverse possession.⁴⁷ The court in *Devins* stated:

Underlying our belief (that municipally owned land not dedicated or used for a public purpose should be subject to adverse possession) is the perception that we are not imposing an undue burden on municipalities by

⁴⁰ *Id.*

⁴¹ See Walter Quentin Impert, *Whose Land Is It Anyway?: It's Time to Reconsider Sovereign Immunity from Adverse Possession*, 49 UCLA L. REV. 447, 452-453 (2001).

⁴² *Id.*

⁴³ *Id.*

⁴⁴ See *Devins v. Bogota*, 592 A.2d at 203.

⁴⁵ *Id.* at 200.

⁴⁶ *Id.*

⁴⁷ *Id.*

expecting them to discover within the relevant period of limitations what property they own and who possesses it. That expectation will encourage municipalities to make efficient use of their property... Conversely, we are reluctant to adopt a policy that would encourage municipalities not to use, dedicate, or even identify their property.⁴⁸

This demonstrates that the court believed the benefits of the government using its land productively outweigh the burden of costs associated with allowing the adverse possession of government property.⁴⁹

Allowing adverse possession of government property would have many beneficial economic effects.⁵⁰ Forcing property owners, including the government, to utilize or monitor their land to avoid adverse possession would ensure that property owners could not be wholly absent.⁵¹ This would make negotiation over the land more likely; and allowing the land to be adversely possessed would force the property owner to assert her right to exclude, which could include receiving offers to purchase the land, creating a market for that land.⁵² Moreover, adverse possession gives the adverse possessor title to the property, meaning that the possessor will be free to use the land as she likes.⁵³ Adverse possession forever bars the original property owner from bringing suit for title against the adverse possessor, which allows the adverse possessor to avoid any litigation and be free to sell the property.⁵⁴ Accordingly, allowing adverse possession of developed

⁴⁸ See SHEPARD, *supra* note 34, at 280.

⁴⁹ See Paula R. Latovick, *Adverse Possession of Municipal Land: It's Time to Protect this Valuable Asset*, 31 U. MICH. J.L. REFORM 475, 482-83 (1998).

⁵⁰ See Thomas Merrill, *Property Rules, Liability Rules, and Adverse Possession*, 79 NW. U. L. REV. 1122, 1130 (1984).

⁵¹ *Id.*

⁵² *Id.*

⁵³ *Id.*

⁵⁴ *Id.*

government land creates alienability of the land, which in turn creates an economic market for that land.⁵⁵

There are also various public policy theories in favor of adverse possession against the immunity of government land, one of which is the “efficient land use” theory.⁵⁶ The “efficient land use” theory is based upon the fact that adverse possession promotes the efficient use of land.⁵⁷ The efficient land use theory rewards the trespasser for putting the land to good use.⁵⁸ This justification was more relevant during times where there was a lot of land across the nation and all states wanted to encourage the development of the land.⁵⁹ Although times have changed and land is less abundant there is still a lot of land that goes unused each year in the United States, much of which is owned by the government.⁶⁰ Furthermore, the efficient land use rationale theory of adverse possession acts to deter owners from buying large areas of land that they leave vacant and to punish owners who do not take advantage of their property rights via development.⁶¹ At the very least the efficient land use rationale encourages landowners to monitor and maintain their property, which could help to keep property in good condition and preserve land throughout this nation.⁶²

⁵⁵ See Merrill, *supra* note 50, at 1154.

⁵⁶ See Stake, *supra* note 33, at 2436

⁵⁷ *Id.*

⁵⁸ *Id.*

⁵⁹ See John G. Sprankling, *The Antiwilderness Bias in American Property Law*, 63 U. CHI. L. REV. 519, 539-40 (1996).

⁶⁰ *Id.*

⁶¹ See William C. Marra, *Adverse Possession, Takings, and the State*, 89 U. DET. MERCY L. REV. 1, 17 (2011).

⁶² See Stake, *supra* note 33, at 2436.

Another policy theory in support of adverse possession of developed government land is the “personhood model.”⁶³ This theory emphasizes that adverse possessors typically have a more personal attachment to the land than the actual owner because they have lived on and utilized the land throughout the entirety of the statute of limitations.⁶⁴ Due to this attachment the adverse possessor is more likely to use the property for beneficial purposes and make the most out of the land.⁶⁵ The true owner has essentially abandoned the land whereas the adverse possessor has spent the time and effort it is only appropriate to give the title of that land to the person with the strongest personal attachment to the land.⁶⁶ This is no different for government land. When one adversely trespasses openly and notoriously and has actual and exclusive possession of the property continuously for the statutory period, they become more attached to that land than the actual owner, whether that owner happens to be the government or a private citizen.⁶⁷

The Hegelian Theory, similar to the “efficient land use” theory and the “personhood model,” emphasizes that there is a relationship between a landowner and her property.⁶⁸ This theory stresses that a landowner expresses his freedom and will through owning his property and occupying the property.⁶⁹ The theme in this theory is that the property and the landowner are one entity, that they have a relationship which highlights

⁶³ See JESSE DUKEMINIER & JAMES E. KRIER, PROPERTY 139 (5th ed. 2002); JOHN P. DWYER & PETER S. MENELL, PROPERTY LAW AND POLICY: A COMPARATIVE INSTITUTIONAL PERSPECTIVE 76 & n.1 (David L. Shapiro et al. eds., 1998); Holmes, *supra* note 33, at 477; Margaret Jane Radine, *Time, Possession and Alienation*, 64 WASH. U. L.Q. 739, 748-49 (1986).

⁶⁴ See Holmes, *supra* note 33, at 476-77.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ See DUKEMINIER & KRIER, *supra* note 63, at 139.

⁶⁸ See Hughes, *supra* note 33, at 333.

⁶⁹ *Id.*

the landowners need to own and occupy property to exercise his free will and the property needs the landowner to utilize the property.⁷⁰

Additionally, John Locke's "labor theory" puts forth that a land's value is based solely on the labor that goes into that property and therefore he who puts the value into the land should own the object.⁷¹ Locke emphasized the importance of utilizing land and laboring over the land to truly bring the value out of the land, he stated "tis labour indeed that puts the difference on value on every thing."⁷² Thus, John Locke's "labor theory" accentuates that a laborer should gain rights to property when they labor over the property because they are essentially creating the value of the property.⁷³

The notion of allowing adverse possession of developed government property across the United States is supported by the "efficient land use" theory, the "personhood model" theory, the Hegelian theory, and Locke's "labor theory."⁷⁴ A very clear example that emphasizes all four of these theories took place when New York City failed to monitor 2,000 of its vacant buildings in the mid-1990s.⁷⁵ In these vacant buildings there were some 17,000 individual dwelling units, some had been vacant for decades.⁷⁶ New York City not only failed to monitor the vacant buildings that they owned throughout the city but they failed to even be aware that they owned many of these buildings.⁷⁷ In many

⁷⁰ See Hughes, *supra* note 33, at 333.

⁷¹ See LOCKE, *supra* note 33.

⁷² *Id.*

⁷³ *Id.*

⁷⁴ LOCKE, *supra* note 33; See Holmes, *supra* note 33, at 476-77; Hughes, *supra* note 33 at 333; Stake, *supra* note 33, at 2436.

⁷⁵ See Brian Gardiner, *Squatter's Rights and Adverse Possession: A Search for Equitable Applications of Property Law*, 8 IND. INT'L & COMP. L. REV. 119, 144 (1997) (reviewing development of adverse-possession doctrine in Britain).

⁷⁶ *Id.*

⁷⁷ *Id.*

areas these vacant buildings became the home of many vagrants and eventually also became home to drug dealers and vandals.⁷⁸ On the Lower East Side, however, a squatter community took over many of these buildings and the communities that the squatters took over “became thriving, freestanding communities of otherwise law-abiding citizens.... Those squatters often took buildings that were eyesores and public nuisances at best – and were often dire threats to public safety – and transformed them into clean, renovated, and functioning housing.”⁷⁹ This story is so germane because it shows how the lack of governmental monitoring negatively affect a neighborhood while also exposing the benefits adverse possession can bring to a similar neighborhood.⁸⁰

This anecdote displays the theory behind the “efficient land use” theory because the squatters who took over the buildings on the Lower East Side took decrepit vacant apartment buildings that were eyesores in their neighborhoods and turned them into beautiful, well-maintained apartment buildings.⁸¹ It further exhibits the theory behind the “personhood model” because it is apparent that the adverse possessors had more attachment to the property than the original titleholder did.⁸² Moreover, it supports the Hegelian Theory because it proves that those who occupy property form a bond and a relationship with the property that allows an individual to express her will and freedom.⁸³

⁷⁸ See Gregory M. Duhl, *Property and Custom: Allocating Space in Public Places*, 79 TEMP. L. REV. 199, 242 (2006) (noting mass abandonment of privately owned buildings in New York City in the 1970s and 1980s).

⁷⁹ See Eduardo Moisés Peñalver & Sonia K. Katyal, *Property Outlaws*, 155 U. PA. L. REV. 1095, 1123-25 (2007) (recounting New York and Philadelphia’s incompetence in dealing with these properties).

⁸⁰ See Peñalver & Katyal *supra* note 79, at 1123-1125.

⁸¹ See Duhl, *supra* note 78, at 242; Peñalver *supra* note 79, at 1123-1125; Stake, *supra* note 33, at 2436.

⁸² See Duhl, *supra* note 78, at 242; Holmes, *supra* note 33, at 476-77; Peñalver & Katyal *supra* note 79, at 1123-1125;

⁸³ See Hughes, *supra* note 33, at 333.

Lastly, it supports Locke's "labor theory" by allowing the squatters who put the labor into turning abandoned structures into making beautiful buildings in a thriving neighborhood to live their and enjoy the value of their labor. The adverse possessors, in this case the squatters, showed their affection and attachment and proved that those who are more attached to their land are more likely to put their land to beneficial use.⁸⁴ This example proves that there is an opportunity for many thriving communities to grow and flourish across the nation if squatters were able to adversely possess land that the government has abandoned and forgotten about.

In conclusion, abolishing the government's sovereign immunity from adverse possession would result in many beneficial effects on land across the nation. The next section, Section IV, will discuss the arguments for governmental immunity from adverse possession and counterarguments of why those arguments fail to prove that governmental immunity is necessary.

Section IV

Arguments For Governmental Immunity From Adverse Possession

The justifications for the government's immunity to adverse possession of its land do not outweigh the benefits. Many of the arguments in favor of sovereign immunity against adverse possession of government land fail to take into consideration the purpose and benefits associated with adverse possession. One argument in favor of governmental immunity is that government property should not be able to be adversely possessed

⁸⁴ See Duhl, *supra* note 78, at 242; Peñalver & Katyal *supra* note 79; *supra* note 79, at 1123-25; Holmes, *supra* note 33, at 476-77.

because the land is inalienable.⁸⁵ Not all government land is inalienable, however, and although there may be limitations on the ability of municipalities to sell the land, governing bodies and the legislature have the power to convey the land.⁸⁶ This argument further fails to distinguish the difference between governmental property and privately owned property.⁸⁷ Privately owned property in certain situations is also inalienable, such as a situation where a landowner rents the property to a third party with alienability restrictions, yet there is not adverse possession immunity in these situations.⁸⁸ Furthermore, simply because land is inalienable does not mean that the land is being used productively, the main justification for adverse possession.⁸⁹

Another justification for governmental immunity against adverse possession is that the unauthorized use of government property constitutes a nuisance and therefore adverse possessors of government property should be punished rather than rewarded. This argument does not take into consideration the fact that the land is being used beneficially and will likely benefit the community by making use out of land that has likely been abandoned and unkempt.⁹⁰ Adverse possession requires that the trespasser's possession must be open and notorious, meaning that if their presence was creating a nuisance or constituted a nuisance, it was not bothering the government nor the community enough for anyone to acknowledge or complain about their presence.⁹¹ Additionally, even if the use of the land was unlawful, the whole premise behind adverse

⁸⁵ See *Messersmith v. Mayor & Common Council of Riverdale*, 164 A.2d 523, 525 (Md. 1960); *Latovick*, *supra* note 49, at 495.

⁸⁶ See *Latovick*, *supra* note 49, at 483-84.

⁸⁷ See *Quentin*, *supra* note 41 at 453.

⁸⁸ See *McClelland v. Miller*, 28 OHIO ST. 488, 502 (1876); *Latovick*, *supra* note 49, at 484-85

⁸⁹ See *Quentin*, *supra* note 41, at 453.

⁹⁰ *Id.*

⁹¹ See *Mackinac Island Dev. Co.*, 349 N.W.2d at 195.

possession is based upon illegality; the use of the land must be adverse.⁹² If the owner permitted the possession and use of the land then the possessor cannot adversely possess and the doctrine of adverse possession would not exist, thus the nuisance argument fails.⁹³

Others believe that government land bought for the purpose of investment should not be allowed to be adversely possessed because the government buys that land to let it remain untouched and gain value.⁹⁴ The government typically buys land outside of upcoming cities or areas where the government foresees eventual growth in order to eventually develop or sell the land.⁹⁵ In this situation the government has the same duty as a private developer would to monitor their property and deter any adverse possessors.⁹⁶ Monitoring land bought for investment and development does not require constant monitoring or even monthly monitoring because adverse possession must be continuous and the statute of limitations for adverse possession typically runs over a few years.⁹⁷ In fact, with new technology the cost of monitoring land has plummeted over the last few decades.⁹⁸ The government can now monitor land in an economical manner via photograph, video, or through satellite use if necessary.⁹⁹ The threat of adverse possession would also incentivize the government to develop and use its land within a reasonable time after purchasing the property, not neglecting or failing to utilize this

⁹² See *Mackinac Island Dev. Co.*, 349 N.W.2d at 195.

⁹³ *Id.*

⁹⁴ See Howard Gensler, *Property Law as an Optimal Economic Foundation*, 35 WASHBURN L.J. 50, 55-56 (1995).

⁹⁵ *Id.* at 55.

⁹⁶ *Id.* at 32-43.

⁹⁷ See Quentin, *supra* note 41, at 459.

⁹⁸ See Stake, *supra* note 33, at 2422.

⁹⁹ *Id.*

country's scarce land and resources.¹⁰⁰ This is not to say that the undeveloped land in this nation must be utilized, in fact, it will be argued below that there must be environmental protection of undeveloped land.¹⁰¹ In sum, there would be little to no cost involved in the government checking on their investment land every so often to ensure that there is no threat of adverse possession so there is no reason why the government should be treated any different than a developer in terms of adverse possession of land bought for investment.¹⁰²

Many argue that the costs that would be associated with allowing governmental adverse possession warrant the immunity afforded to the government's property. When someone loses property due to adverse possession they do not receive compensation for the value of their land.¹⁰³ This could seemingly be a problem for the government if it were to lose large amounts of land without receiving compensation.¹⁰⁴ The problem with this argument is that the government does receive a compensation of sorts once the land is adversely possessed because the adverse possessor must pay the taxes associated with owning land.¹⁰⁵ Although the compensation from taxation is minimal, the government does not collect any taxes when long-term trespassers enjoy the exclusive use of government property without paying taxes on the land, essentially receiving the benefits of land ownership without paying taxes to the government.¹⁰⁶ The land that is typically adversely possessed is land that the government does not use and has not monitored

¹⁰⁰ See Gensler, *supra* note 94, at 32-43.

¹⁰¹ See Sprankling, *supra* note 59, at 573.

¹⁰² *Id.*

¹⁰³ See Latovick, *supra* note 49, at 488

¹⁰⁴ *Id.*

¹⁰⁵ See Raul Hernandez, *Officials Consider Selling City Properties*, VENTURA COUNTY STAR, Sept. 26, 2000, at B1.

¹⁰⁶ *Id.*

throughout the statute of limitations so it is safe to assume that the government did not greatly value the land and was not receiving benefits from owning it.¹⁰⁷ Although the property taxes are less than if the government had sold the property, the benefit they receive outweighs the benefit of allowing trespassers to use the property without granting any benefit to the government.¹⁰⁸ Furthermore, this could put pressure on the government to sell more of their land before it could be adversely possessed, which would give money back to the government and allow for the beneficial use of more land.¹⁰⁹ In conclusion, when land is adversely possessed the government receives land taxes paid by the adverse possessor, a benefit that the government does not receive when long-term trespassers use government property.

There are also property theories that support sovereign immunity of government property from adverse possession. The Hegelian theory of property suggests that property is an expression of the self and that property rights are important to keep property owners from constant conflict over their property in order to protect their self-actualization.¹¹⁰ The Hegelian Theory implies that property is an expression of will and part of the landowner's personality and that if the property is secure then the owner is free to pursue freedom and develop a stronger personality and will.¹¹¹ This theory looks to protect the relationship between a landowner and her property but also emphasizes that the relationship is fluid and that because a landowner must express the will to possess the land someone who fails to do so can "lose possession of property through

¹⁰⁷ See Latovick, *supra* note 49, at 488.

¹⁰⁸ *Id.*

¹⁰⁹ See Quentin, *supra* note 41, at 468.

¹¹⁰ See Hughes, *supra* note 33, at 333.

¹¹¹ *Id.*

prescription.”¹¹² On one hand the Hegelian Theory protects the rights of the original landowner, but on the other hand it stresses that an individual must occupy the land through “physically seizing it, imposing a form upon it, and marking it.” This theory expresses that marking property is similar to using property in that it expresses an individual’s will to utilize and enjoy the property.¹¹³ Thus, although the Hegelian Theory emphasizes the importance of the freedom a landowner achieves in owning property, the importance of a landowner’s property rights, and the importance of a landowners relationship with the property as an expression of will, it still stresses the need for someone who fails to use property to lose possession of that property through prescription.¹¹⁴ Therefore, the Hegelian Theory would seem to support the need for adverse possession against developed government property that is not utilized or maintained.¹¹⁵

There is also an argument to be made that sovereign immunity of government land from adverse possession is necessary to protect the wild and undeveloped land in the United States.¹¹⁶ This argument is not disputed and in fact should be taken even further to the point where all wild and undeveloped land must be more difficult to adversely possess than it currently is.¹¹⁷ This will be argued further below.

¹¹² See Hughes, *supra* note 33, at 333.

¹¹³ *Id.*

¹¹⁴ *Id.*

¹¹⁵ *Id.*

¹¹⁶ See John G. Sprankling, *An Environmental Critique of Adverse Possession*, 79 CORNELL L. REV. 814, 851-57 (1994).

¹¹⁷ See *Ewing v. Burnett*, 36 U.S. (11 Pet.) 41, 49, 52-53 (1837); Sprankling, *supra* note 116, at 831-33.

Section V

The Need to Protect Wild and Undeveloped Land

The strongest justification for governmental immunity from adverse possession is that much of government property is held in an environmental capacity.¹¹⁸ Many believe that the concern for protecting the environment outweighs the desire to maximize the productive use of land.¹¹⁹ Although an adverse possessor uses vacant land productively, making the most out of land, land in its natural state is scarce and adverse possession of this land would diminish the amount of natural land.¹²⁰ There are many undeveloped areas that the government leaves in its natural state such as state parks, state forests, green belts, national parks and forests, and many nature preserves.¹²¹ Adverse possession must balance efficient land use with environmental concerns, and when one or the other leans too heavily against the other it is the role of the legislature and government to remedy this concern.¹²² Protecting those undeveloped areas does not go far enough, there must be stricter regulations when it comes to the requirements needed to adversely possess natural and undeveloped lands.¹²³

It is seen as a goal of many that undeveloped land in this nation must be protected through sovereign immunity to ensure that the scarce natural land remains intact and well preserved.¹²⁴ The problem is that it is much easier to adversely possess undeveloped

¹¹⁸ See Sprankling, *supra* note 116, at 857-58.

¹¹⁹ *Id.*

¹²⁰ See Latovick, *supra* note 49, at 494.

¹²¹ *Id.*

¹²² See Latovick, *supra* note 49, at 494; *Am. Trading Real Estate Props., Inc. v. Town of Trumbull*, 574 A.2d 796, 800-02 (Conn. 1990).

¹²³ See Sprankling, *supra* note 116, at 851, 854-56.

¹²⁴ See Risch, *supra* note 25, at 215.

lands than it is to adversely possess commercial, residential, or agricultural land.¹²⁵ In the nineteenth century the country was attempting to develop as much land as possible for economic purposes and therefore did not value forests, deserts, wetlands, swamps, and other undeveloped lands, something Sprankling termed the “development model.”¹²⁶ This lack of economic value based on natural land led to more lenient requirements needed to adversely possess undeveloped land.¹²⁷ Judges have awarded undeveloped land via adverse possession for possessors who have simply engaged in harvesting hay; gathering firewood; seasonal stock grazing; occasional cattle grazing; removal of leaf mold; limited clear cutting; picnicking; limited timber cutting; marking boundaries; erecting a fence; clearing roads; and hunting and hiking.¹²⁸ Theorists have justified adverse possession of this undeveloped land because it is impossible to build houses or farm on the land so it is impossible to improve the land in a beneficial manner.¹²⁹ Furthermore, due to the inaccessibility of many wild lands courts refuse to enforce the open and notorious aspect and constructive and actual knowledge aspect normally required for adverse possession.¹³⁰ The attempt to allow those who will utilize the

¹²⁵ See *Ewing v. Burnett*, 36 U.S. (11 Pet.) 41, 49, 52-53 (1837); DUKEMINIER & KRIER, *supra* note 63, at 139-40; Sprankling, *supra* note 116, at 831-33 (collecting cases).

¹²⁶ See Sprankling, *supra* note 59, at 840, 843-49.

¹²⁷ See *Ewing*, 36 U.S. at 41, 49; DUKEMINIER & KRIER, *supra* note 63, at 139-40; Sprankling, *supra* note 116, at 831-33 (collecting cases).

¹²⁸ See *Weiss v. Meyer*, 303 N.W.2d 765, 770 (Neb. 1981); *Evans v. Lux*, 201 N.Y.S. 161, 167 (N.Y. Sup. Ct. 1923); *Thompson v. Hayslip*, 600 N.E.2d 756, 759 (Ohio Ct. App. 1991); *Stowell v. Swift*, 576 A.2d 204, 205 (Me. 1990).

¹²⁹ See 16 POWELL ON REAL PROPERTY, § 91.01[2] (Michael Allan Wolf ed., Matthew Bender 2005).

¹³⁰ Alexandra B. Klass, *Adverse Possession and Conservation: Expanding Traditional Notions of Use and Possession*, 77 U. COLO. L. REV. 283, 293 (2006)

property to claim title to the property through adverse possession has led to too lenient requirements to adversely possess undeveloped land.¹³¹

The relaxed standards needed for the adverse possession of undeveloped land are problematic for many reasons. Professor John G. Sprankling described the “development model” and “anti-wilderness bias” that led to easier adverse possession of undeveloped land as anti-environmental and stated that it should not longer have a place in today’s world where we should be placing higher value on conserving our natural and undeveloped land.¹³² When asked in survey research Americans stated that they believed there should be stronger efforts made by our government to protect our natural land and that it is everyone’s obligation to do so and that everyone should have access to outdoor recreation areas.¹³³ Furthermore, Americans believed that more land should be designated for protection of historical landscapes, national parks, and for rare and endangered species.¹³⁴ In 2001 state and local ballot proposals displayed that voters wanted more natural land as 137 out of 196 proposals promoting natural were approved resulting in funding for \$1.7 million for natural land conservation and parks.¹³⁵ This desire to preserve and conserve land is contrary to the current leniency allowed to adverse possessors of undeveloped land and highlights why courts must refine the adverse possession requirements necessary to adversely possess this undeveloped land.¹³⁶

¹³¹ See Sprankling, *supra* note 116, at 843-49.

¹³² *Id.* at 816.

¹³³ See Julie Ann Gustanski, *Protecting the Land: Conservation Easements, Voluntary Actions, and Private Lands*, in PROTECTING THE LAND: CONSERVATION EASEMENTS PAST, PRESENT, AND FUTURE, 9, 19-20 (Julie Ann Gustanski & Roderick H. Squires eds., 2000).

¹³⁴ See Gustanski, *supra* note 133, at 13.

¹³⁵ See Adam E. Draper, *Conservation Easements: Now More Than Ever – Overcoming Obstacles to Protect Private Lands*, 34 ENVTL. L. 247, 253 n.51 (2003).

¹³⁶ See Sprankling, *supra* note 116, at 865-66.

Although there have been many conservation easements agreed to recently that protect millions of acres of wild lands and undeveloped land there are still millions of acres of wild lands that are not protected by conservation easements.¹³⁷ These easements protect wild and undeveloped land by granting a deed or conservation that guarantees the rights of the grantee to “protect natural, scenic, historic, agricultural, forest, or open space values” and prohibits uses including “subdivision and development, commercial uses, alteration of land surface, mineral development, timber harvesting, signs, utility lines, or interference with natural resources such as wetlands, ponds, streams, wildlife, and wildlife habit.”¹³⁸ The land not protected by such easements is still susceptible to adverse possession. Some courts have found creative ways to protect undeveloped land and more courts must adhere to these methods and find a way to protect and conserve this land.¹³⁹ These courts have found that use of undeveloped land is permissive and thus not adverse, that improvements and developments on wild lands is not open or notorious, and that the owners can not detect or prevent those using undeveloped land and thus it is deemed permissive.¹⁴⁰ These courts, still in the minority in terms of state law, impose a higher standard rather than a lower standard in order to adversely possess wild and undeveloped

¹³⁷ See *Finley v. Yuba County Water Dist.*, 160 Cal. Rptr. 423, 427 (Cal. Distr. Ct. App 1979); *Meyer v. Law*, 287 So. 2d 37, 41 (Fla. 1973).

¹³⁸ See Elizabeth Byers & Karin Marchetti Ponte, *THE CONSERVATION EASEMENT HANDBOOK* 14, 293-297 (2d ed. 2005).

¹³⁹ See *Rancour v. Golden Reward Mining Co.*, 694 N.W.2d 51, 54 (S.D. 2005); *Morse v. Kloss*, No. 00-CV-24, 2001 WL 1609339, at *4 (Wis. Ct. App. Dec. 18, 2001); *Day v. Hanson*, No. 98-1218, 1999 WL 216572, at *7 (Wis. Ct. App. Apr. 15, 1999); *Stupar v. Township of Presque Isle*, No. 96-0034, 1996 WL 635924, at *1 (Wis. Ct. App. Nov. 5, 1996).

¹⁴⁰ See *Rancour*, 694 N.W.2d 51, 54; *Morse*, No. 00-CV-24, 2001 WL 1609339, at *4; *Day*, No. 98-1218, 1999 WL 216572, at *7; *Stupar v. Township of Presque Isle*, No. 96-0034, 1996 WL 635924, at *1; *Porter v. Schaffer*, 728 A.2d 755, 774-75 (Md. Ct. Spec. App. 1999); *Moore v. Dudley*, 904 S.W.2d 496, 497 (Mo. Ct. App. 1995); *D'Angelo v. McNutt*; 868 A.2d 239, 243 (Me. 2005).

land.¹⁴¹ This raised standard or simply just not a lowered standard of adverse possession could go a long way in limiting the amount of undeveloped and natural land that is developed and protect a scarce resource in this nation.

Section VI

Conclusion

The purpose of this paper has been to discuss the fact that government's developed land should not be afforded sovereign immunity from adverse possession and that all undeveloped land should require the same elements as adverse possession of developed land in order to preserve and conserve as much natural property and wild lands as possible. As discussed in detail, there are many policy reasons for abolishing sovereign immunity from adverse possession for the government's developed land. The positive effects adverse possession has on private citizens could be equally as beneficial when applied to government land, it would promote the beneficial use of land while deterring property owners from letting their land stay vacant and idle. Additionally, undeveloped property and wild lands must be preserved as it becomes scarcer in America. As stated in this argument, adverse possession requirements are actually less strict for adverse possession of undeveloped land than they are for developed land and in order to preserve and conserve undeveloped land across the nation the adverse possession requirements must be the same for undeveloped land as it is for developed property. The developed land in the United States must be used in the most beneficial manner possible

¹⁴¹ See *Flowers v. Roberts*, 979 S.W.2d 465, 471 (Mo. Ct. App. 1998) (citing *Moore v. Dudley*, 904 S.W.2d 496, 498 (Mo. Ct. App. 1995); *Luttrell v. Stokes*, 77 S.W.3d 745, 749-50 (Mo.Ct.App. 2002) (citing *Whiteside v. Rottger*, 913 S.W.2d 114, 120 (Mo. Ct. App. 1995).

and the undeveloped land must be preserved and conserved, both of which can be accomplished by changing the rules of adverse possession.