

# The Labor Theory Of Property Does Not Mandate Easements

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## The Labor Theory Of Property Does Not Mandate Easements

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Blockian proviso, property rights, easements by necessity, labor, forestalling.

### ABSTRACT

Some libertarian theorists advocate for recognizing easements by necessity. In specific circumstances they would guarantee the right of passage through the land that is already owned. One popular argument in favor of such easements concerns a situation where landowners' exercise of their property rights prevents others from entering non homesteaded areas and taking them into ownership. The argument holds that a firstcomer who mixed labor with some parcel that blocks access to unowned land de facto owns that land as well. It is argued that such a property right is self-contradictory because the only legitimate method of original appropriation is labor mixing and the firstcomer actually acquires the virgin land without doing so. Easements of necessity are then postulated as a means to rectify this alleged contradiction. In the present paper this argument in favor of easements is examined and refuted.

### Introduction

Certain theoretical controversies are subject to vigorous discussions among libertarian scholars. One such debate concerns *forestalling*, that is a situation where landowners exercise their property rights in a way that prevents others from using some resources or accessing some places. The point of contention is whether those other individuals have the right to pass undisturbed through landowner's parcel for the purpose of homesteading unowned land, entering their own estate, leaving it, or accessing movable property left somewhere. The problem may appear to be of little importance in most contemporary societies where political authorities tend to grant such rights in order to fulfil various public policy objectives.<sup>1</sup> However justifying them in a stateless society that is governed solely by private property rights according to libertarian principles is a uniquely challenging endeavor. After all, in the absence of monopolistic central authority that would (at least nominally) guarantee safety, self-defense becomes the responsibility of individual landowners and their representatives. Crossing borders of someone else's property then becomes a particularly meaningful act, that may potentially bring serious consequences. This distinguishes a libertarian society from other orders, limiting the applicability of institutions or precedents developed in statist contexts.

In this paper I shall investigate a frequently discussed case of *forestalled homesteading*. This is a situation where some piece of land remains unappropriated, but the access to it is blocked by another already owned parcel. If there is no possibility of digging tunnels, building bridges, helicopter flights and other means of traveling over or under that parcel, then its owner indirectly controls the access to the unowned virgin area. Such a situation is interpreted in various ways by libertarian scholars. Some of them consider it acceptable. This is reflected by the words of Kinsella (2007):

I see no special status of the unowned property; it's just property someone would like to go homestead. If they can't reach it, it's not the fault of those who have this resource surrounded.

Other theorists feel uncomfortable with the possibility of forestalling. Long (2007) maintains that "one cannot legitimately use one's own property to interfere with the liberty and property of others". Block (2004) states that libertarian homesteading theory "abhors" land which cannot be claimed. Block (2008) describes exceptions from "the ideal of homesteading every square inch of territory" as a "horror" and a "veritable contradiction". Block (2010b) complains about "untoward advantage", while Block and Butt (2016) declare that the "state of non-ownership" is "anathema to the libertarian ideal that all of the earth's surface should come under private ownership". Moreover, Dominiak (2017a, 2019, 2021) insists that the system of property rights which admits forestalling is selfcontradictory, and that easements must be recognized in order to make it coherent.

The following investigation focuses on one argument in favor of easements that has gained certain popularity. It seems to be first raised by Block (2010b) and restated by Block and Butt (2016). Its latest formulation is presented by Dominiak (2019). In short, the argument exploits the inconsistency between the requirement that every appropriation must be carried out by labor-mixing, and the alleged appropriation of virgin terrain by a forestalling individual who does not labor on it. In what follows the merits of this argument are evaluated. The study is structured as follows. In the second section Dominiak's argument is briefly presented. In the third section some preliminary remarks are offered. The fourth section distinguishes between individual and joint forestalling and demonstrates that

the latter is not problematic. In the fifth section three necessary preconditions of individual forestalling are identified. In the following five sections the possibilities of rendering them unfulfilled are investigated. It turns out that these preconditions may be neutralised, which implies that forestalling situation is not equivalent to owning the virgin land. This undermines Dominiak's argument. The last section summarizes the findings.

### The No-Property-Without-Labor Argument

Dominiak's reasoning presumes the *labor theory of property*. Proponents of this theory maintain that human labor is the source of property rights. Dominiak insists on a very strict version of this theory which holds that scarce physical objects are appropriated *only by laboring on them* and that no other ways of initial appropriation are possible. He introduces the argument as follows:

Imagine that person B homesteads a virgin piece of land in such a way that he leaves a parcel of it unappropriated and that other people can only access it by traversing B's property. If person C subsequently wants to homestead the unowned parcel, may B preclude C from traversing B's property and, thereby, from homesteading the parcel? This question seems to pose a vexing problem for the libertarian theory of justice in first acquisition according to which the process of homesteading vests the owner of the homesteaded land with the absolute right to exclude others from his property. For, if such an absolute right were granted in the case currently under consideration, then another right, also, would necessarily be recognized. It would be B's right to control the unappropriated parcel, specifically, to exclude potential homesteaders from the unowned land. However, the unappropriated land is by definition a land to which no one has yet acquired any rights. Hence, the recognition of B's right to control the unowned parcel would contradict the assumption that the parcel has been left unappropriated. To avoid the contradiction, B's right to exclude C from the homesteaded land cannot be absolute and C's easement over B's land must be recognized for the purpose of homesteading the unowned parcel.<sup>2</sup>

Dominiak further explains that by mixing labor with a parcel the firstcomer B takes that parcel into ownership.

But at the same time B is also at liberty to use, abuse or enjoy the landlocked virgin land and fruits thereof. More importantly, B can exclude others from it by not agreeing to their passage through the homesteaded parcel. In Dominiak's eyes this satisfies the definition of a property right, that is "an exclusive right to control a scarce resource". He declares that B thereby acquires an actual property right in the virgin plot of land without mixing labor with it. This contradicts the presumption that the original appropriation may only be carried out through labor-mixing. In order to eliminate the contradiction, Dominiak proposes to recognize easements by necessity. He describes them as follows:

An easement by necessity is a right to traverse another person's estate in order to access some other land, that is recognized by the law due to the fact that passing through the other party's property is the only way to gain such an access. It therefore does not require a contract or a custom to establish itself but is implied in specific circumstances and spatial relations between parcels of land.

Dominiak maintains that this extenuation of landowners' property rights in favor of travelers is necessary for the contradiction to be avoided. He insists that their rights are restricted "only to a minimal degree", because the proposed easement is to be valid only when there is no other possibility of getting to the desired destination and it is to be extinguished as soon as an alternative access possibility appears.<sup>3</sup>

### Preliminary Remarks

The argument is built on the contradiction of the following two propositions:

P1. Initial appropriation may only be carried out by laboring on the object in question

P2. The forestalling individual becomes an actual owner of the virgin untouched land without laboring on it.

Dominiak sees the conflict between them as a rationale to introduce easements. He believes that such a move would avert the contradiction, because with easements there would be no virgin parcels controlled by those who did not mix labor with them. This reasoning may be undermined by showing that either one of the two contradictory propositions is false in the absence of easements.

The proposition P1 instantly draws attention. The labor theory of property is not universally accepted in the literature. Several libertarian scholars consider original appropriation by actions other than labor. In particular, some of them declare that unowned objects are appropriated by being first to take them into possession or to use them.<sup>4</sup> Under the possessory theory the role of labor subtly changes. Instead of being a necessary condition of appropriation it becomes a sufficient condition: laboring on an unowned object is a way of demonstrating first possession, but it is not the only possible way. Consequently, it may be argued that in many cases forestalling is just a form of “embordering” or taking possession (Kinsella 2024, p. 22) and hence it counts as legitimate appropriation. Notwithstanding these controversies I shall refrain from questioning P1. Instead, I shall demonstrate that in the absence of easements P2 is false.

### Individual And Joint Forestalling

Forestalling may be performed unilaterally, or in cooperation with others. Individual forestalling is possible when the virgin land is enveloped completely by a single parcel homesteaded by a landowner B or when all passable roads to the virgin land cross that parcel. Property rights in the parcel let B unilaterally prevent any latecomer from reaching the virgin area. But it may also happen that the virgin area adjoins several plots owned by multiple individuals  $B_1, B_2, B_3, \dots B_N$ , so that accessing it requires traversing at least one of these plots. An example of such a situation for  $N=4$  is shown in Figure 1. Latecomers cannot appropriate the virgin land when none of the landowners agrees to their passage. This is also recognized as a forestalling. Dominiak (2017a) argues that such a situation requires introducing easements, to avoid contradictions just like individual forestalling does.

Let us begin the investigation with a closer look at multiple forestalling. Landowners may prevent appropriation of the virgin area by latecomers. But does it mean that anyone owns the virgin land? At this point we need to recall that property rights are by definition *erga omnes* rights. They are supposed to be valid against everyone. For that to be true, the purported owner of the virgin land must be able to exclude *everyone else* from it. However, all parcel owners are able to reach the virgin land from their own plots. Each of them can start laboring on this land and homestead it. Each of them may also be overtaken by others. In this spatial configuration none of them is in a position to exclude everyone else without further labor mixing and consequently none of them enjoys an *erga omnes* right. Hence we have to conclude that none of these individuals owns the virgin land yet.<sup>5</sup> This means that in the multiple forestaller

case the proposition P2 is false. Consequently there is no contradiction between P1 and P2 that would require recognizing easements. If Dominiak’s argument is correct at all, then it is only valid when the access to a virgin land depends on a single individual. For this reason I shall ignore the case of multiple forestallers, and focus on a single forestalling landowner B.

### Does Individual Forestalling Extend Ownership?

At a first glance, the individual forestalling situation appears to exhaust the marks of a property right to the landlocked virgin land. Dominiak’s view of ownership as “the exclusive right to control a scarce resource” seems to perfectly reflect the position of the forestaller. However, before drawing hasty conclusions, let us note that there are other situations that seem to fit this bill as well. When some landlord (say L) rents an apartment to a tenant (say T) then T temporarily enjoys an exclusive right to control that apartment. But T is not the owner. The apartment is still L’s property. Various other individuals including borrowers, custodians, security guards and postmen may also legitimately exclude others from some objects. For all of them the constellation of rights and other factual circumstances that legitimizes the exclusion is *transitory*. It may dissolve after some prescribed time (e.g. when apartment rental contract expires) or when some prescribed condition is satisfied (e.g. when security guards are dismissed, the shipment is delivered, jewels are removed from a deposit box, or the actual owner of a given object is identified). None of these roles amounts to ownership. Keeping that in mind, we shall reexamine the situation where B forestalls C from homesteading the virgin land. There are reasons to think that it is also transitory.

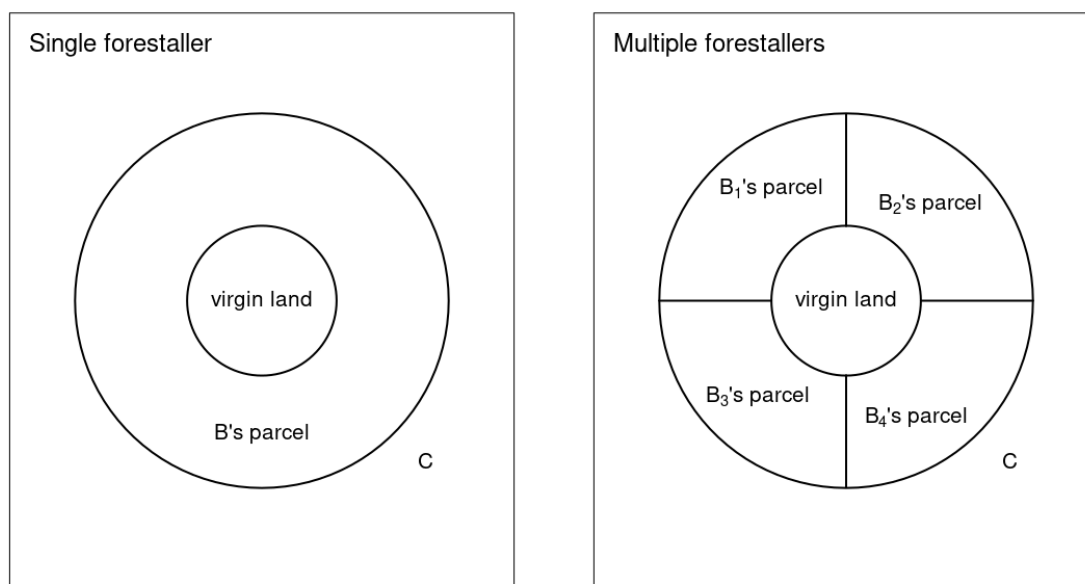
Essentially, B’s ability to prevent C from homesteading the virgin land depends on actual legal, technical and spatial conditions, that imply C’s inability to enter that land. Specifically, it depends on:

- (a) B’s plot blocking access to the virgin area
- (b) unavailability of tunnels, bridges, helicopters and the like
- (c) C being on the wrong side of B’s plot.

Forestalling is possible only when all the three conditions are jointly satisfied. At the moment any of them becomes false, B’s ability to exclude others from the virgin land instantly evaporates. In what follows I shall investigate the state of these conditions.



Figure 1. A single forestaller situation and four forestallers situation



## Spatial Conditions

Let us begin with the condition (a). In general, the homesteaded plot may hinder access to the virgin land in two ways. It may completely envelop it, or it may merely block all passable roads to it, while the features of unowned surrounding terrain (swamps, quicksand, vertical cliffs, and similar obstacles) prevent the passage. In the latter case, geographical features preventing access will usually be possible to remove or overcome. Swamps may be drained. Quicksand may be pumped out. Cliffs may be blown up. With enough effort and resources, geographical obstacles are usually passable. Such an undertaking may be unprofitable. It may also be unaffordable for most individuals. But someone with sufficient means might overcome them, get to the virgin area and homestead it, demonstrating that the alleged property right of the forestaller B is not a property right at all. In such cases P2 false. It does not contradict P1 and it does not justify easements to the incompletely encircled virgin area. Therefore, in what follows I will concentrate on the more solid case of complete envelopment.

## Technical Conditions

Let us now turn attention to the condition (b). Can the parcel homesteaded by B be circumvented by technical means? That depends on the size, location, geographic features of the virgin area and its surroundings, and most importantly on the current state of technological knowledge. For a bypass to be strictly impossible without violating B's rights one has to concoct very exotic scenarios such as a three-dimensional dome maliciously built by B over and under the virgin area (Block & Block 1996, Block 2008, Van Dun 2009). In

general, technological advancements progress with time, and when they become feasible, B cannot legitimately prevent others from reaching the virgin land. This means that B's ability to legally exclude others from it depends on the actions of third parties - inventors, designers and investors - who construct tunnel drilling machines, cranes, helicopters and other devices. Therefore, when developing suitable means of transport is possible, the exclusion is transitive and B has no property right to a landlocked virgin land. P2 does not contradict P1. Easements by necessity are not justified.

Now, a predictable objection to this finding would be that all technical means of bypassing B's homestead were defined out of the problem when it was stated by Block (2010b) and then by Dominiak (2019). While this is nominally true, the resort to such an escape route comes with a cost. If defended this way, a theory of easements will only apply in the absence of any cranes, drones and helicopters. Dominak and Block may be reminded of this radical limitation every time they try to bring their easement postulates to a world where suitable means of transport are available or can be developed.

Notwithstanding all the reservations concerning the conditions (a) and (b), in the following sections I shall explore the status of the condition (c).

## Getting From There To Here: Contract

Let us first consider a possibility that the two parties contractually agree on a permission to travel (which is simply an easement based on a voluntary contract). This is illustrated by the example 1:

EXAMPLE 1. B and C voluntarily sign a contract that authorizes C to cross the homesteaded parcel of B, in

exchange for some gratification.

In this example C legally acquires the right of passage through the homesteaded parcel. But the contract says nothing about C's entry into the virgin area, C's presence there, or C's rights to anything there. This exposes the gap between Dominiak's allegations and B's legal situation. If Dominiak's claims that B actually owns the virgin land were true, then this contract would not be sufficient to let C legally enter it. Another separate permission from B would be required to do so. However, having traversed B's homesteaded plot, C is perfectly free to enter the virgin land and settle there. This is because B has not mixed labor with that land and has no title to it. Any libertarian judge who shares Dominak's view that labor is the only legitimate way of appropriation would dismiss B's eventual complaints on precisely those grounds. This demonstrates that, contrary to Dominak's allegations, B is not the owner of the virgin land. Consequently P2 is false, it does not contradict P1 and Dominiak's justification of easements collapses. As a supplement let us also consider example 2.

EXAMPLE 2. C is going to deliver goods to B's residence. To make the delivery possible, B grants to C a short-term permission to move freely over all B's estate. C delivers the goods as ordered. But when the permission expires C remains in the virgin land.

In this example the contract is slightly different. The contractual deadline refers to all of B's territory. However the ultimate outcome is the same. B cannot complain that C remains in the virgin land because B has not mixed labor with it and hence B does not own it. P2 is false. The contradiction between P1 and P2 is a groundless mirage. It cannot justify easements.

It is important to note here, that a contractual easement does not need to actually be granted for Dominiak's argument to be invalid. The contract does not change the legal status of the virgin terrain. It simply demonstrates that the land is unowned from the beginning. Hence

a mere possibility that such a contract *could* be signed suffices to derail Dominiak's justification of easements.

## Getting From There To Here: Unintended Trespass

In addition to contractual scenarios illustrated by examples 1-2, it is also possible that C gets to the virgin area without any contract, simply violating B's property rights in the homesteaded parcel. The violation may be unintended or deliberate. Let us start with examples 3-4 illustrating some accidental traversings.

EXAMPLE 3. Lost in a blizzard C unintentionally passes through the homesteaded area to the virgin land, without being disturbed by B who does not notice anything due to poor visibility.

EXAMPLE 4. C is mistakenly recognized by B's guards as B's employee, relative, or friend and invited to enter the homesteaded area. Somewhat surprised, C enters it. Before anyone discovers the mistake, C has already wandered to the virgin land.

In these examples C has no permission to traverse B's parcel. Hence B's property right is violated. In the first case the violation may perhaps be considered C's fault. In the second, it results from a negligence committed by a third party. No damage is inflicted on the homesteaded parcel. It remains open to a discussion, whether C will be punished for the violation in these situations.<sup>6</sup> Even if so, C will likely end up paying some minor fine. Regardless of eventual punishment, the final outcome is the same. There is nothing in the strict labor theory of property presumed by Dominiak that would require questioning C's presence in the virgin land or removing C from it. Therefore C may appropriate it, demonstrating again that B's alleged right to the virgin land was just a hollow rhetorical trick. In fact C does not even need to get there. The mere possibility that this could happen is sufficient to defeat Dominiak's argument.

<sup>1</sup> This may for example include encouraging the effective use of land (see e.g. *Kellogg v. Garcia* (2002) 102 Cal.App.4th 796; *Hewitt v Meaney* (1986) 181 Cal.App.3d 361., rulings in the United States of America).

<sup>2</sup> Unless otherwise stated, all the presented quotes refer to Dominiak (2019). However it should also be noted that the argument considered here is not the main one advanced in that paper. It supplements a more general theory of easements, which deserves separate treatment and will be dissected in another study.

<sup>3</sup> Occasionally, Dominiak refers to his argument as a defense of the *Blockian proviso*, referring to similar, but less precise postulates of Block (2010a), but I shall not use this term in order to avoid any ambiguities.

<sup>4</sup> See, e.g. Epstein (1979), Kinsella (2009:187), Slenzok (2024, p. 105). Even Dominiak (2017b) initially supported the first possession theory, only to adopt the labor theory later (Dominiak 2023). Meanwhile the views of Hoppe (2010, p. 23, 151; 2015, p. 107) tend to be interpreted as gradually deemphasizing labor - see Slenzok (2022; 2024, p. 103), and Juszczak (2023, p. 111).

<sup>5</sup> In the libertarian system there is no place for a collective entity that might be said to jointly "own" the virgin area. The group of forestallers resembles a cartel. By its very nature it is unstable, as the exclusion of latecomers depends on cooperation of all owners and each of them has an incentive to appropriate, or sell access to latecomers before others do so (Rothbard, 1962, pp. 636-702). Interestingly, the legitimacy of cartels is also explicitly admitted by Block (2010b).

## Getting from there to here: deliberate trespass

Let us now consider the possibility that C violates B's property rights consciously. This may happen in many ways as illustrated by examples 5-8.

EXAMPLE 5. C deliberately sneaks through the parcel homesteaded by B and passes to the virgin land unnoticed and undisturbed by B.

EXAMPLE 6. C passes to the virgin land by bribing or deceiving B's guards

EXAMPLE 7. C traverses B's property so quickly and suddenly that B fails to react

EXAMPLE 8. C uses explosives or lasers to blast a hole in the huge iron dome built by B around an unappropriated virgin planet and gets inside before B reacts.<sup>7</sup>

All these acts violate B's property rights. C may expect punishment if recognized as a perpetrator. The penalty may be harsher than in the case of unintended trespass. It will depend on the material damage caused and perhaps on other factors. However, if the libertarian judge respects the proportionality principle,<sup>8</sup> then it is still likely that C will end up merely paying some fine. It may also happen that C is not punished at all, if the passage is not detected, or no one recognizes C as the trespasser (in that case C may pretend to have settled in the virgin area before B's appropriation). In all these scenarios the ultimate outcome is the same. C gets to the virgin area and can settle there, disproving the claim that B owned it. P2 is false. Dominiak's argument fails.

## Conclusions

Under the strict labor theory of property adopted by Dominiak, the firstcomer does not appropriate unowned land by merely blocking access to it. What

Dominiak interprets as a *de facto* property right is merely a transitional inability on the part of latecomers to reach that land. It stems from a superposition of three factors: spatial distribution of homesteaded parcels, limited technological capabilities and individuals being located in disadvantageous places. Latecomers may terminate such a state by altering any one of these conditions. They may do so by developing new technical means of travel, transforming the terrain, signing contracts regarding the owned parcel or committing trespasses. The forestalling firstcomer cannot remove others from the virgin land when they get there, regardless of whether their passage was legitimate or not. This demonstrates that forestalling does not extend property rights to the unowned area. Hence the alleged contradiction on which Dominiak builds his argument is not a contradiction at all. His case for recognizing easements falls apart.

Presented refutation applies to both movables and immovables. The fact that an ownerless physical object is more or less difficult to transfer does not affect the reasoning. However, the analysis is limited in scope. It only concerns the specific case of forestalled homesteading, putting aside other related problems which are also important for the libertarian theory. They include an eventual admissibility of traversing or occupying someone else's landed property for the purposes of defending, salvaging, recovering, accessing, or using one's own property, helping others in need, investigating possible crimes, preventing crimes or extracting restitution. It does not address the problem of hostile encirclement. Presented results may eventually turn out to be helpful in the investigation of these issues but their adaptability requires further careful study. Presented refutation is also limited in a different sense: it applies to just one of the arguments in favor of easements by necessity formulated by Dominiak (2019), following earlier writings of Block and Butt (2016) and Block (2010b). Its eventual extension against other arguments - and in particular against a general theory of easements advanced by Dominiak (2019) - exceeds the scope of this study, and needs to be dealt with separately.

<sup>6</sup>Contemporary statist legislation also tends to punish only conscious trespasses. See for example Kentucky Revised Statutes §§ 511.060, 511.070, 511.080.

<sup>7</sup>This last futuristic example addresses the case of a three-dimensional dome invoked by Block (2008) and Van Dun (2009).

<sup>8</sup>The principle is discussed by numerous authors including Rothbard (1998, p. 85), Kinsella (1996; 1997), Block (2011), Wójtowicz (2021), Dominiak & Wysocki (2023), Dominiak et al (2023).

<sup>9</sup>Does a narrow, steep, potholed path suffice or is the four-lane highway mandatory?

<sup>10</sup>Could the traveler choose the path freely? Should privacy, safety or other interests of the landowner be accounted for? If so, then how? To what extent can the landowner eventually interfere with the passage? Can he spray his parcel with water in freezing temperatures? How should eventual conflicts between travelers be resolved?

<sup>11</sup>Could it be closed for repairs, maintenance or other reasons? Should anyone be held responsible for the maintenance? Who sets up driving rules?

<sup>12</sup>In that respect, involuntary easements resemble intellectual property regulation - which Dominiak (2014) actually opposes - and mentioned conundrums are similar to the individuation problem (Attas 2008; Gamrot 2021, 2022, 2025).



Finally, it should be emphasized, that what Dominiak postulates are *involuntary* easements, supposed to be unconditionally recognized whenever forestalling situation materializes. But easements may also be voluntary. They may be agreed upon between parties on a purely contractual basis, and grounded in the freedom of contract. As such, they would not require any special justification. This eliminates theoretical difficulties which would inevitably haunt any attempt at refining Dominiak's vague postulates. Contractual easements do not require formulating additional theories to explain when exactly should the access be considered blocked,<sup>9</sup> what is the "just" scope of the easement,<sup>10</sup> or what is the "just" way of upkeep and managing the access path.<sup>11</sup> Such conundrums are irrelevant when interested parties freely negotiate conditions of the passage on the grounds of existing property in land and specify any relevant detail of the contract accounting for their own subjective preferences. In particular, contracts may safeguard important interests of landowners, such as privacy, security and compensation for nuisances or upkeep costs. But this flexible mechanism of balancing interests vanishes when Dominiak deprives landowners of their critical bargaining chip: property rights in the land they mixed labor with. If his postulates were adopted, then collisions of interests would have to be resolved by some courts or judges on the basis of complex external theories, yet to be formulated and justified.<sup>12</sup> Any such arrangement would lack key advantages of the pure property system: clarity, simplicity and flexibility. The rejection of Dominiak's failed argument is a step towards preserving these advantages.

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