Fordham Law Review

Volume 64 | Issue 2 Article 7

1995

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Cover Page Footnote

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THE CHANGING ROLE OF PRIVATE LAND RESTRICTIONS: REFORMING SERVITUDE LAW

*Michael J.D. Sweeney**

INTRODUCTION

In 1938, Ms. Holland purchased an estate, Blackacre, in Sullivan County, New York. The Electric Company owned an adjacent estate, Whiteacre. When Mr. McGregor, the original owner of both Whiteacre and Blackacre, sold Whiteacre, he did so subject to a restriction that Whiteacre would be used only as a hydroelectric generating plant. McGregor recited the restriction in the recorded Whiteacre deed. Neither Holland nor the Electric Company were parties to the original covenant restricting the use of Whiteacre, but both parties purchased their estates with knowledge that the restriction existed.

In 1940, condemnation of the riparian rights of both estates by the City of New York made use of Whiteacre as a hydroelectric plant impossible. The Electric Company sued for declaratory relief,[1] to have the restriction removed because it could not use the land as a hydroelectric plant nor could it use the land for anything else because of the restriction in the deed. The Electric Company claimed the restriction had become unreasonable in light of recent developments because it rendered the company's property worthless. Holland claimed that the land she owned, Blackacre, benefited from the restriction. She purchased Blackacre in large part because the restriction was in place and would prevent development of the land adjacent to hers, thus maintaining a rural environment. Holland felt that removing the restriction would devalue her land and violate an agreement concerning the properties she and the Electric Company purchased.

Under these circumstances a court could decide that the conditions surrounding the servitude had changed substantially since its creation and the changes justified its removal. A court could deny any damages to Holland and allow the Electric Company to retain title to the land free of the restriction.[2]

What happens to Holland's right to enjoy her land in a rural setting? Why would the solution be all or nothing? Such Solomonic resolutions are the norm in the realm of servitude law. Servitudes are

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1. An estate restricted from certain land uses by a servitude may sue in equity for relief from the servitude or a declaration as to the enforceability of the servitude if the servitude is of no actual and substantial benefit to the parties involved. *See* Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1315 (N.Y. 1981); Restatement of Property § 564 (1944) [hereinafter Restatement].

2. *See, e.g., Orange & Rockland Utils.*, 418 N.E.2d at 1310 (finding, under similar circumstances, that the servitude was obsolete and therefore should not be enforced).

private restrictions on another's land.[3] When conflicting interests develop between successors in interest to servitudes, courts must decide whose interests will prevail or find an equitable compromise.

This Note traces the history of servitude law, discusses problems with its current state, and suggests modifications to create a clear, effective body of law. Part I traces the history of servitudes from their English origins through present day U.S. servitude law. Part II discusses problems arising under the current law and its inability to meet the needs of today's economic and social environment. Part III proposes a combination of reforms to create a unified, clear body of servitude law that addresses the purposes and problems of servitudes in today's environment. This Note concludes that a unified servitude law that narrows the role of established doctrines, implements statutory time limits on servitudes, and expands the remedies available for termination and modification would provide a clear body of law that successfully addresses both public policy and market concerns.

I. HISTORY OF SERVITUDES

Much of servitude law originated in the mid-nineteenth century in England and the United States as a contract-based means to circumvent onerous property-based conveyancing rules.[4] Early in the twentieth century, due to a view of servitudes as restraints on alienation, U.S. courts and the *Restatement of the Law of Property* opted to define servitudes in property terms and created a number of doctrines to limit their use.[5] Although the use of servitudes has vastly expanded and American society now views them as necessary and valuable tools, modern servitude law still carries many of the vestiges reflecting distaste for private land restrictions.[6] This part discusses the origins of servitude law, the shift from contract to property principles as the basis of servitude law, and the current state of servitude law.

3. *See* Black's Law Dictionary 1370 (6th ed. 1990); James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 Wis. L. Rev. 1, 9 ("Promissory servitudes are often described as solutions to conflicts between 'incompatible land uses.' ").

4. *See infra* notes 34-39 and accompanying text.

5. *See infra* part I.B.

6. *See infra* notes 111-14 and accompanying text.

A. *Origins of Servitudes*

Property law recognizes three types of real servitudes:[7] easements,[8] restrictive covenants,[9] and equitable servitudes.[10] Each of these types of obligations can pass from the owner of an estate[11] to subsequent purchasers, a concept known as "running with the land."[12] The first of these servitudes recognized in common law was the easement, which traces its origins back to Roman law.[13]

1. Easements

By the early 1800s, English courts recognized easements as affirmative rights to enter and use the land of another.[14] No general theory of easements existed, however.[15] Prior to the mid-nineteenth century, England recognized only affirmative easements[16] and with few exceptions did not allow private restrictions on the use of another's land.[17]

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7. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 Cornell L. Rev. 883, 883 (1988).

8. An easement is a right enforceable against the land of another. Charles M. Haar & Lance Liebman, Property and Law 912 (2d ed. 1985). It provides one party, the owner of the easement, with the right to either use the other party's land in a prescribed manner (an affirmative easement) or to limit the use of that estate (a negative easement). *See* Restatement, *supra* note 1, pt. III introductory note, at 3148-52.

9. A restrictive covenant that runs with the land is an exception to the rule against assigning choses of action. "Running with the land" is a concept developed in common law to extend the ability to assign liability of an agreement from an original party to a subsequent purchaser of the estate. Because the concept is an exception, it has developed certain highly technical limitations to its use. For example, at common law, parties to a restrictive covenant must meet horizontal and vertical privity requirements and the agreement itself must "touch and concern" the land. *See* Restatement, *supra* note 1, pt. III introductory note, at 3150-61; Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1313 (N.Y. 1981).

10. An equitable servitude is a promise concerning the use of land. While equitable servitudes do not meet the strict requirements of restrictive covenants, courts use their broader discretion in equity to enforce the promise. Haar & Liebman, *supra* note 8, at 958; *see, e.g.*, Tulk v. Moxhay, 41 Eng. Rep. 1143 (Ch. 1848) (enforcing a promise concerning the land even though it was not in the proper form to be a restrictive covenant).

11. The term "estate" includes all freehold estates, including fee simples and life estates. Jon W. Bruce et al., Modern Property Law: Cases and Materials 282-300 (1984). Servitudes act as limitations on this right to possess and enjoy the land. Black's Law Dictionary 1370 (6th ed. 1990).

12. Charles E. Clark, Real Covenants And Other Interests Which "Run With Land" 2-3 (2d ed. 1947); *see also supra* note 9.

13. *See* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. Cal. L. Rev. 1177, 1185 n.36 (1982).

14. Jesse Dukeminier & James E. Krier, Property 790-91 (3d ed. 1993); Winokur, *supra* note 3, at 12.

15. Reichman, *supra* note 13, at 1185.

16. An affirmative easement is the right to use a servient estate in some way that would otherwise be unlawful. This is distinguished from a negative easement that prohibits the owner of an estate to use her land in a certain way. Black's Law Dictionary 60 (6th ed. 1990).

17. English property law included only four exceptions to the limitation on private restrictions. The exceptions, called "negative easements," included obstruction of

This limitation reflected the two social policy concerns regarding servitudes that continue to influence current law: notice of restrictions to subsequent purchasers of land and potential restrictions on alienability.[18]

In the mid-nineteenth century, lack of notice to purchasers of land posed a real danger with respect to private restrictions on land use. England lacked an effective system of recording land titles,[19] and purchasers had limited ways of obtaining notice of land restrictions.[20] Purchasers could view the land, at which point affirmative burdens would tend to be apparent, or they could question the neighbors and seller. For instance, a prospective buyer of land could detect with relative ease an affirmative easement for the right of way over the estate by observing the lay of the land and the activity upon it. By contrast, most restrictions on the land were not detectable by viewing.[21] For example, a negative easement or restrictive covenant such as a prohibition on certain types of farming would not be detectable by simple observation. Nonetheless, under the easement theory, a servitude bound a subsequent purchaser, regardless of notice, once she purchased the land.[22] In an effort to prevent the inequity of binding people who were unaware of their liability and avoid the litigation that would inevitably ensue, English courts strictly construed formal requirements for the running of servitudes of any sort.[23] These technical requirements were discretionary[24] and allowed courts to invalidate servitudes when they felt a party did not receive fair notice.

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light or air, removal of building support, and blockage of an artificial stream. In addition, some covenants were allowed in leases. Winokur, *supra* note 3, at 12.

18. *See* Keppell v. Bailey, 39 Eng. Rep. 1042 (Ch. 1834) (requiring that privity of estate exist between covenanting parties in order for a servitude to run with the land); Gerald Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 Tex. L. Rev. 533, 542-43 (1988) (noting that the rationale for limiting the use of restrictive covenants is protecting alienability of property interests); Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 Cornell L. Rev. 928, 934 n.25 (1988) (stating that the original function of privity was to give notice to subsequent purchasers of property interests) [hereinafter French, *Structural Simplification*].

19. Despite earlier efforts, England did not develop an effective public registration system for interests in land until 1925. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. Cal. L. Rev. 1261, 1283 n.114 (1982) [hereinafter French, *Ancient Strands*]; *see* Jesse Dukeminier & James E. Krier, Property 962 (1981) [hereinafter Dukeminier and Krier, *1981*].

20. *See* French, *Ancient Strands*, *supra* note 19, at 1284.

21. *See id.* at 1283.

22. Dukeminier & Krier, *1981*, *supra* note 19, at 962.

23. *See* Keppell v. Bailey, 39 Eng. Rep. 1042, 1049 (Ch. 1834) (requiring a landlord-tenant relationship to meet the privity requirement for covenants concerning the land and expressing disdain for the idea that landowners could burden their land in any way).

24. *See* Dukeminier & Krier, *1981*, *supra* note 19, at 964.

Until the mid-nineteenth century, the United States followed the English philosophy of strictly limiting private restrictions on land.[25] Because the United States had not yet developed a reliable system of recording deeds, and U.S. servitude law mirrored English law, U.S. courts had the same concerns and problems as their English counterparts.

Both English and U.S. law discouraged the use of servitudes, viewing them as unreasonable restrictions on the alienability of land.[26] Courts and commentators criticized restrictions that ran with the land as hindering alienability[27] because such restrictions could prevent parties from buying or selling land.[28] Purchasers were understandably wary of potential limitations on the uses of land, particularly when they had no reliable way of detecting such restrictions. While parties could remove servitudes,[29] the transaction costs[30] to effect removal often prevented the sale.[31] In addition, the efficient allocation of land was an important socioeconomic goal in mid-nineteenth century England and the United States. Because notice deficiencies and alienability restrictions threatened this goal,[32] courts frowned upon private land restrictions.[33]

2. Development of Restrictive Covenants and Equitable Servitudes

In the late-nineteenth century, as the industrial revolution displaced agrarian society, suburban communities began to form on the outside of large industrial cities and people sought ways to protect the peaceful environment surrounding their homes.[34] The rigidity of the existing land conveyancing rules limited landowners' ability to preserve

25. *See, e.g.*, Morse v. Aldrich, 36 Mass. (1 Pick.) 449, 453-54 (1837) (stating the early-nineteenth-century common law rule that for a covenant to run with the land the relation of lessor and lessee, or grantor and grantee, must exist between the parties).

26. *See* Proprietors of the Church in Brattle Square v. Moses Grant, 69 Mass. (1 Gray) 142, 148 (1855) (stating the legal policy in favor of alienable property which "aims to secure the free and unembarrassed disposition of real property"); Clark, *supra* note 12, at 71-72 (recognizing the Anglo-American legal view which "frown[s] upon" restraints on alienability).

27. Korngold, *supra* note 18, at 543.

28. *Id.* at 543-44.

29. Servitudes can be terminated by merger, when the dominant and servient estate become one, or by release, when the parties to the servitude agree to terminate it. Richard R. Powell & Patrick J. Rohan, Powell on Real Property 735-36 (abr. ed. 1968) [hereinafter Powell & Rohan].

30. Transaction costs are the costs of transferring a legal or property right. Richard A. Posner, Economic Analysis of the Law § 3.1, at 35 (4th ed. 1992).

31. *See* Clark, *supra* note 12, at 71-72.

32. Dukeminier & Krier, *1981*, *supra* note 19, at 959-67.

33. Winokur, *supra* note 3, at 12-13; *see, e.g.*, Keppell v. Bailey, 39 Eng. Rep. 1042, 1049 (Ch. 1834) (creating strict technical requirements as a method of limiting private land restrictions from binding subsequent purchasers).

34. Russell R. Reno, *The Enforcement of Equitable Servitudes In Land: Part I*, 28 Va. L. Rev. 951, 970 (1942).

the character of their communities. For example, a landowner had no way to ensure that a new neighbor did not move in and build a factory next door to her home. English and U.S. courts responded by developing equitable servitudes and restrictive covenants[35] as methods of private zoning that would permit landowners to restrict the use of land to favored activities.[36]

The U.S. judiciary developed restrictive covenants, which are binding promises concerning the land.[37] Courts justified these private restrictions by reasoning that the promises were contracts and thus not subject to the conveyancing restrictions.[38] By introducing restrictive covenants into the realm of contract law, the courts could enforce the agreements without offending property principles.[39]

In response to the demand for legal mechanisms to create private land restrictions, English courts first recognized equitable servitudes in 1848.[40] Equitable servitudes provided for private land restrictions much like restrictive covenants under U.S. law.[41] While English courts did recognize restrictive covenants, they did not permit the burden on the servient estate to run with the land. Therefore, under the theory of restrictive covenants, English courts would not enforce a restrictive covenant that burdened an estate.[42] The courts created equi-

35. Equitable servitudes, covenants running with the land, and restrictive covenants developed in response to old restrictive land conveyancing rules. Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 Minn. L. Rev. 167, 169 (1970) [hereinafter L. Berger].

36. The growth of industrial centers and suburban developments created a demand for a legal machinery that would protect investments in these developments. Courts allow servitudes to supplement zoning and other governmental regulation. Reno, *supra* note 34, at 970; Winokur, *supra* note 3, at 13-15.

37. *See* Morse v. Aldrich, 36 Mass. (1 Pick.) 449, 452-53 (1837) (freeing restrictive covenants from common law rules of land conveyancing because the covenants are supported by consideration).

38. *See id.* at 453 (finding that the conveyance principles of common law do not apply to restrictive covenants running with the land and stating that when a covenant runs with the land, "he who holds the land, whether by descent . . . or by his express assignment, shall be bound by the covenant").

39. Covenants running with the land are created in contract and create rights *in personam*, against contracting parties, rather than the traditional property rights which are *in rem*, or against the world. Reno, *supra* note 34, at 961.

40. Tulk v. Moxhay, 41 Eng. Rep. 1143 (Ch. 1848); *see* Winokur, *supra* note 3, at 13.

41. While English courts allowed benefits to run with the land, they would not allow a burden to run under the theory of restrictive covenants. In some instances this approach allowed land purchasers with notice of an agreement to avoid their obligations by using a defense of no formal notice. To avoid this injustice, English courts created equitable servitudes, a device that enforces, in equity rather than at law, promises concerning the land made by the owner against anyone who purchased the land with notice. Reno, *supra* note 34, at 971.

42. English courts could find that covenants ran with the land when the issue was a benefit to an estate. English common law, however, would not allow a burden upon an estate to run with the land except as between landlord and tenant. Walter Strachan, *Covenants Annexed to Rentcharges*, 40 Law Q. Rev. 344, 345-47 (1924).

table servitudes in an effort to avoid the inequity of allowing subsequent purchasers of land to shirk the responsibilities created by agreements they had freely accepted. This concept allowed English courts to enforce promises concerning land that did not meet the more exacting requirements of restrictive covenants.[43]

The courts that created equitable servitudes based them on competing theories.[44] The first basis was contractual, and the purchaser with notice was equitably bound to keep her word. The second basis was founded in property theory, and the promise attached to the land and bound purchasers with notice.[45] Either way the result was the same. A purchaser of land would not be permitted to use the land in a manner inconsistent with an obligation the seller had accepted if the purchaser had notice of the agreement.[46] Thus, in the mid-nineteenth century, English and U.S. courts enforced both restrictive covenants and equitable servitudes, based, at least partially, on contract theory, as a means to impose private restrictions on land while avoiding the strict conveyancing rules of property law.

B. *The Shift Towards Property Principles*

While notice and restrictions on alienability continued to be the paramount concerns of English courts regarding servitudes, in the United States, notice was a diminishing concern. From the beginning of European settlement in the United States, a public recording system for land ownership and conveyances existed.[47] A primary purpose of the recording system was to provide notice of restrictions to subsequent land purchasers.[48] After the Civil War, reliance on the

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43. *Tulk*, 41 Eng. Rep. at 1144-45.

44. *Id.*

45. *Id.* An illustration of the difference between the contract and property theories is whether the law would enforce a servitude against an adverse possessor. Under contract theory the servitude would not survive because no privity exists between the adverse possessor and the parties to the agreement. Under property theory the servitude should survive because it attaches to the land itself and a privity relationship between the adverse possessor and the parties to the agreement is not necessary. Reno, *supra* note 34, at 973-79.

46. *Tulk*, 41 Eng. Rep. at 1143.

> A covenant between vendor and purchaser, on the sale of land, that the purchaser and his assigns shall use or abstain from using the land in a particular way, will be enforced in equity against all subsequent purchasers with notice, independently of the question whether it be one which runs with the land so as to be binding upon subsequent purchasers at law.

Id.

47. 6A Richard W. Powell & Patrick J. Rohan, Powell on Real Property ¶ 904[1](b) (1994) [hereinafter Powell]; Paul E. Basye, *Trends and Progress—The Marketable Title Acts*, 47 Iowa L. Rev. 261, 261 (1962) (citing a 1640 recording act of the Massachusetts Bay Colony).

48. Corwin W. Johnson, *Purpose and Scope of Recording Statutes*, 47 Iowa L. Rev. 231, 231 (1962).

public recording system became the norm and the system proved effective.[49]

As a reliable system of recording land titles developed, it provided notice to all land purchasers.[50] Because the recordation of an interest in land constitutes notice to the world as a whole, the prospective land purchaser has the burden of checking the record for the particular estate.[51] Every state in the United States has an effective recording system which addresses the concern over notice.[52] Yet, despite the development of these systems, U.S. courts retained many of the vestiges of the English doctrines designed to "protect purchasers against invisible servitudes."[53]

The real concern remaining in the United States as it entered into the twentieth century was not notice, but the social policy underlying restrictions on the use of land.[54] Two schools of thought regarding servitudes emerged. The first believed that allowing private land restrictions that would bind subsequent purchasers restricted alienability and the free use of land and therefore was socially undesirable.[55] The second viewed these restrictions as a type of private zoning that tended to increase the value of land.[56] Commentators criticized or embraced servitudes according to their view of social policy.[57]

By the twentieth century, U.S. courts' attitudes towards servitudes began to diverge, reflecting these disparate views.[58] In many jurisdictions, courts modified conveyancing rules and treated servitudes as

49. Dukeminier & Krier, *1981*, *supra* note 19, at 965.

50. All recordation statutes share one vital feature: proper recording is deemed to provide notice and binds all subsequent takers. Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. Cal. L. Rev. 1353, 1356-57 (1982) [hereinafter Epstein, *Notice*].

51. *See, e.g.*, N.Y. Real Prop. Law § 291 (McKinney 1989 & Supp. 1995); Quinn v. County of Nassau, 215 N.Y.S.2d 305 (Sup. Ct. 1961) (holding that the law charges a landowner with notice, even in the absence of actual knowledge, and binds the landowner to a servitude where the original parties properly recorded it).

52. French, *Ancient Strands*, *supra* note 19, at 1284.

53. *Id.* at 1283.

54. *See* Powell & Rohan, *supra* note 29, at 716-17.

55. One of the leading proponents of this view was Oliver S. Rundell, the Reporter for the *Restatement of Property*. *See* Oliver S. Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 Yale L.J. 312 (1944).

56. 5 Powell, *supra* note 47, ¶ 674 (1987). Judge Clark was a champion of this view. Clark, *supra* note 12, at 133-34.

57. Powell & Rohan, *supra* note 29, at 719 (noting that a commentator's position supporting formalistic restrictions on servitudes generally reflects a view of servitudes as potentially undesirable while a position which facilitates the creation and devolution of servitudes indicates a view of servitudes as socially useful).

58. In the early twentieth century, the debate between Charles E. Clark, a Second Circuit judge, and Professor Oliver Rundell epitomized the "free choice/coercion dichotomy." Alexander, *supra* note 7, at 903-04.

property interests rather than creatures of contract.[59] This change in outlook led to doctrinal limitations on the enforcement of servitudes, such as privity of estate[60] and the touch and concern doctrine.[61] Like the mid-nineteenth century judicial disfavor of private land restrictions, these limitations reflected concerns about the alienability of land.[62] The doctrines were not, however, clear tests for validity or enforceability. Rather, they represented a framework within which courts could apply policy based not on theory but on the perceived social desirability of the outcome.[63] As a result, the application of the doctrines varied greatly from one U.S. jurisdiction to the next and even within jurisdictions.[64]

The confusion created by the varying restrictions[65] on the different forms of servitudes led to an evolution in property law that, by the early 1900s, made restrictive covenants, equitable servitudes, and easements largely interchangeable.[66] The former distinctions among the types of servitudes deteriorated as courts applied both equitable and legal principles to each.[67] Courts often defined a restriction as

59. Reichman, *supra* note 13, at 1185-86. *See, e.g.*, Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 796 (N.Y. 1938) (discussing the distinction between personal and real covenants).

60. *See infra* notes 84-92 and accompanying text.

61. Reichman, *supra* note 13, at 1185-86 (noting that at the turn of the twentieth century, courts began to view restrictive covenants and equitable servitudes, originally conceived of as contract devices, as property interests and began to subject them to property requirements); *see infra* notes 93-99; *see, e.g., Neponsit Property Owners' Ass'n*, 15 N.E.2d at 795 (requiring intent, touch and concern, and privity for a restrictive covenant to run with the land).

62. *See, e.g.*, Nicholson v. 300 Broadway Realty Corp., 164 N.E.2d 832, 834 (N.Y. 1959) (stating that the touch and concern doctrine is designed to prevent burdensome encumbrances on title).

63. Reno, *supra* note 34, at 978; Reichman, *supra* note 13, at 1232-33 (finding that by applying servitude restrictions courts are exercising discretion in fixing the boundaries of servitudes).

64. *See supra* note 87 and accompanying text; *see, e.g.*, Powell & Rohan, *supra* note 29, at 714 ("This basic question of social philosophy lies back of this whole topic [(restrictions on promises running with the land)], although the decisions seldom reveal the fact."). *Compare* Mont. Code Ann. § 70-17-203 (1993) (providing that covenants made for the direct benefit of an estate run with the land regardless of the touch and concern doctrine) *with* Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1313 (N.Y. 1981) ("Whether a covenant restricting real property . . . runs with the land depends on . . . whether the covenant touches and concerns the land . . . .").

65. French, *Structural Simplification*, *supra* note 18, at 928 (quoting various descriptions of servitude law such as: "the most complex and archaic body of American property law remaining in the twentieth century," "an unspeakable quagmire," and a "confounding intellectual experience[ ]").

66. Margot Rau, Note, *Covenants Running With the Land: Viable Doctrine or Common-Law Relic?*, 7 Hofstra L. Rev. 139, 178-80 (1978) (finding, through an extensive survey of case law, that American courts use the rules of the various servitudes interchangeably).

67. Courts have misapplied the doctrine of restrictive covenants to cases involving easements, interpreted restrictive covenants as equitable servitudes, and, in one case, actually applied the law of restrictive covenants where there was no land with which the covenant could run. *Id.* at 152-53.

whichever type best supported the desired outcome.[68] The formal distinctions persisted but became practically meaningless.[69]

In the early twentieth century, the American Law Institute began work developing the *Restatement of the Law of Property* ("*Restatement*").[70] During the work on the *Restatement's* division on servitudes, the competing views of the policy behind private land restrictions collided.[71] Despite lively debate both in the committee and in academia,[72] the *Restatement* adopted a restrictive view of servitudes and advocated giving the courts more discretion to invalidate them.[73] Many of the doctrines limiting the use of private land restrictions remain in effect today.

C. *Current Common Law Servitude Restrictions*

Restrictions on servitudes determine whether or not a covenant will "run with the land;"[74] in other words, whether subsequent purchasers of land will be bound by agreements made by previous owners concerning the land will depend on whether the previous owners satisfied certain requirements.[75] The current limitations on the running of servitudes reflect the law's balancing of concerns regarding fair notice and free alienability of land against concerns about landowners' freedom of contract.[76]

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68. *See* Reichman, *supra* note 13, at 1250. For example, in an Ohio case where the parties had neglected to record an easement the court allowed the plaintiff to reform the deed to include the easement based on a finding that the easement ran with the land. While the result was certainly equitable, the court applied the rules of restrictive covenants to an easement. Rau, *supra* note 66, at 152-53 (citing Berardi v. Ohio Turnpike Comm'n, 205 N.E.2d 23 (Ohio Ct. App. 1965)).

69. Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. Davis L. Rev. 1213, 1223 (1988) (finding that current scholarship recognizes the conceptual identity and functional overlap of easements, restrictive covenants, and equitable servitudes) [hereinafter French, *Design Proposal*].

70. Restatement, *supra* note 1.

71. Judge Clark and Professor Rundell were both involved in the American Law Institute's *Restatement of the Law of Property* project. *See* Powell & Rohan, *supra* note 29, at 716. Judge Clark believed private restrictions were generally socially desirable while Professor Rundell felt running restrictions impeded alienability and should be limited. *See* Clark, *supra* note 12, at 133-34; Rundell, *supra* note 55 at 315.

72. *See supra* note 71.

73. Powell & Rohan, *supra* note 29, at 719 ("[T]he *Restatement* takes a position which implicitly rests upon the potential undesirability of devolving burdens on land.").

74. "A covenant is said to run with the land when either the liability to perform it or the right to take advantage of it passes to the assignee of that land." Black's Law Dictionary 1333 (6th ed. 1990).

75. *See, e.g.*, Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795 (N.Y. 1938) (finding that a covenant will run with the land and be enforceable against subsequent purchasers "only if the covenant complies with certain legal requirements").

76. Clark, *supra* note 12, at 72 ("It is not the novelty of an interest which makes it objectionable. Rather it is the comparative inutility of the interest as contrasted with its power to render titles unmarketable.").

To ensure that subsequent purchasers of land have notice of a servitude and to protect the alienability of land, courts require that a servitude meet three conditions in order to run with the land: the parties must intend the covenant to run, the requisite privity of estate[77] must exist between the parties, and the covenant must touch and concern the land.[78] While the test for intent is subjective, most U.S. courts presume an express covenant provision for running indicates intent.[79] Privity requirements and the touch and concern doctrine create conditions a servitude must meet in order to bind successors to an interest.[80] These requirements protect the interests of subsequent land purchasers who have no notice and limit restraints on the alienability of land.[81] Furthermore, rather than invalidate a servitude from the point when the estate transfers to a subsequent purchaser, courts may employ the changed conditions doctrine[82] to terminate the servitude when it becomes outdated or ceases to serve its intended function.[83]

Privity of estate, which is distinct from privity of contract,[84] describes a relationship between parties with an interest in an estate.[85] The law intended that a familiar relationship would ensure that parties had notice of any restrictions binding the land.[86] Enforcement of a servitude requires such a relationship. While privity requirements in the United States have a complicated and confused history,[87] many

77. Privity of estate is a mutual or successive property relationship between parties and their assigns. Black's Law Dictionary 1199 (6th ed. 1990).

78. 5 Powell, *supra* note 47, ¶ 673[1]; *see, e.g.*, Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1313 (N.Y. 1981) (holding that for a covenant to run with the land, the parties must have intended the covenant to run, privity of estate must have existed between the parties, and the covenant must touch and concern the land).

79. 5 Powell, *supra* note 47, ¶ 673[2][b].

80. French, *Ancient Strands*, *supra* note 19, at 1304.

81. Winokur, *supra* note 3, at 94 (noting that horizontal privity protected against hindering alienability of land); *see* Reichman, *supra* note 13, at 1233-34.

82. The changed conditions doctrine allows courts to refuse to enforce a servitude if conditions have changed since the making of the promise so much that a substantial degree of the benefits no longer survive. Restatement, *supra* note 1, § 564.

83. Timothy C. Shepard, Comment, *Termination of Servitudes: Expanding the Remedies for "Changed Conditions,"* 31 UCLA L. Rev. 226, 227 (1983) (defining the doctrine of changed conditions as nonenforcement of land use restrictions when the surrounding conditions render the restrictions obsolete); *see, e.g.*, N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979) (stating that land use restrictions created by servitude are not enforceable if the restriction is of no actual and substantial benefit to the persons seeking enforcement because conditions have changed since the creation of the servitude).

84. Privity of contract describes a connection in interest through the contract relation while privity of estate describes common interests in land burdened or benefitted by a covenant. Clark, *supra* note 12, at 112.

85. Rau, *supra* note 66, at 144.

86. Reichman, *supra* note 13, at 1220.

87. Privity requirements were quite strict in the nineteenth century and differed from jurisdiction to jurisdiction. Thus, some jurisdictions applied the strict English form that allowed covenants imposing affirmative burdens to run only when created in leases. Other jurisdictions followed the Massachusetts position that required a te-

courts now apply relaxed privity standards.[88] Currently, privity has two forms, horizontal and vertical.[89] Horizontal privity describes the relationship between the original covenanting parties and requires that they make the covenant in connection with the conveyance of a fee estate;[90] in other words, the covenant and conveyance must be made simultaneously.[91] The second aspect, vertical privity, requires that, in order for the covenant to be enforceable, the present owners mut be successors to the same estate as the original owners who benefited or were burdened by the covenant.[92] For example, if the previous owner of the dominant estate had a fee simple absolute, her successor must also take a fee simple interest; if her successor takes merely a life interest, the vertical privity requirement is unsatisfied.

Covenants must also "touch and concern" the land to bind subsequent purchasers.[93] A predominant characteristic of the application of the touch and concern rule is inconsistency.[94] A majority of courts, however, apply the Bigelow test:[95] if the covenantor's legal interest in the land is rendered less valuable, or the covenantee's legal interest more valuable, then the covenant will run with the land.[96] While the test is oblique,[97] the doctrine's function is clear: courts use the doc-

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nurial relationship such as a lease or easement to allow running. Still other jurisdictions used the American majority position which allowed a covenant to run if it was created in the conveyance of a fee simple estate. French, *Ancient Strands*, *supra* note 19, at 1292-94.

88. The New York Court of Appeals noted:

> Eventually the concept of privity of estate took on a different meaning and now the party seeking to enforce the covenant need show only that he held property descendant from the promisee which benefitted from the covenant and that the owner of the servient parcel acquired it with notice of the covenant.

Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1314 (N.Y. 1981); *see* 5 Powell, *supra* note 47, ¶ 673[2][c] (stating that many jurisdictions have relaxed the privity requirements).

89. 5 Powell, *supra* note 47, ¶ 673[2][c].

90. A fee estate is an estate of inheritance without condition, belonging to the owner, and alienable by him or transmissible to his heirs absolutely and simply. Black's Law Dictionary 615 (6th ed. 1990).

91. 5 Powell, *supra* note 47, ¶ 673[2][c]. The original purpose of the privity requirement was to provide some sort of special relationship between parties to bypass the rule against assigning the right to bring an action. Powell & Rohan, *supra* note 29, at 713.

92. 5 Powell, *supra* note 47, ¶ 673[2][c].

93. Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795 (N.Y. 1938).

94. Winokur, *supra* note 3, at 84-85.

95. 5 Powell, *supra* note 47, ¶ 673[2][a]. Professor Bigelow suggested the criteria that form the test. Harry A. Bigelow, *The Content of Covenants on Leases*, 12 Mich. L. Rev. 639 (1914).

96. Bigelow, *supra* note 95, at 645.

97. Commentators criticize Bigelow's touch and concern test for being circular in reasoning. *See* Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 Duke L.J. 925, 929; James Krier, Book Review, 122 U. Pa. L. Rev. 1664, 1678-79 (1974).

trine to prevent the attachment of personal obligations to land that may defeat efficient allocation and to control unreasonable affirmative burdens and externalities that arise from servitudes.[98] The doctrine is often used as an after-the-fact control device, allowing courts discretion to invalidate servitudes.[99]

Courts may also use the common law doctrine of changed conditions to terminate challenged servitudes that no longer substantially serve their intended purpose.[100] In applying the doctrine, courts must determine whether a party can possibly receive a substantial degree of the servitude's original benefit.[101] If so, courts are obliged to enforce the servitude.[102] If a substantial degree of the agreement's original benefit does not survive, the court may use the changed conditions doctrine to declare the servitude unenforceable.[103] The doctrine thus serves to void obsolete or unreasonable restrictions.[104]

Many of the current common law limitations on servitudes developed more than one hundred years ago[105] and were based on assumptions that are now obsolete or redundant.[106] In order to create an efficient servitude law, the value of these doctrines must be evaluated in light of current social and economic conditions.[107]

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98. Paula A. Franzese, *"Out of Touch": The Diminished Viability of the Touch and Concern Requirement in the Law of Servitudes*, 21 Seton Hall L. Rev. 235, 250 (1991); *see, e.g.*, Jackson Hole Racquet Club Resort v. Teton Pines Ltd. Partnership, 839 P.2d 951, 957 (Wyo. 1992) (finding that an exclusive rights provision in a lease did not touch and concern the land because it did not "purport to restrict in any way the use or development of the property . . . and does not burden the property itself, but rather restricts the contractual freedom of the present and future owners of the property . . . .").

99. French, *Structural Simplification*, *supra* note 18, at 939.

100. *See supra* notes 82-83 and accompanying text. Some jurisdictions have implemented changed conditions statutorily. *See* N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979); Mass. Ann. Laws ch. 184, § 27 (Law. Co-op. 1987).

101. In determining whether a substantial benefit exists, courts consider the size of the restricted area, the location of the changed conditions with respect to the restricted area, the type of changed conditions, conduct of the parties and predecessors, the intention of the original grantor, and the time remaining in the restriction. Shepard, *supra* note 83, at 236-37.

102. *See, e.g.*, Western Land Co. v. Truskolaski, 495 P.2d 624, 627 (Nev. 1972) (finding that as long as a substantial part of the covenant's benefit can still be accomplished a covenant must be enforced); Rick v. West, 228 N.Y.S.2d 195, 201 (Sup. Ct. 1962) (enforcing a servitude in equity because it "afford[ed] real benefit to the person seeking its enforcement").

103. Restatement, *supra* note 1, § 564; Korngold, *supra* note 18, at 557-58.

104. Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 Iowa L. Rev. 615, 652-53 (1985) [hereinafter Sterk, *Freedom from Freedom*].

105. For example, the privity requirements for restrictive covenants were developed in the sixteenth century. Spencer's Case, 77 Eng. Rep. 72 (K.B. 1583).

106. The recording system in the United States has made these doctrines' fair notice function obsolete. French, *Ancient Strands*, *supra* note 19, at 1284.

107. *Id.* at 1300-02.

II. Problems With Current Servitude Law

Real servitude law has evolved with changing social and economic conditions. Recent commentary reflects a shift away from the nineteenth-century view reflected in the *Restatement* that servitudes diminish land values.[108] The widespread use of servitudes[109] has persuaded courts and scholars that in many cases servitudes enhance land values.[110] Unfortunately, because current servitude law developed under the now rejected view that private restrictions on the use of land are socially undesirable,[111] servitude law is unnecessarily complicated. The development of doctrinally separate devices to accomplish similar and overlapping objectives indicates that the development was more historical than logical or essential.[112] Today, with U.S. society viewing servitudes as desirable, restrictive servitude law, developed in eras less receptive to servitudes, creates confusion.[113] Inconsistencies in the application and operation of servitude law make it increasingly apparent that the current law is in need of reform.[114] This section analyzes the problems arising from the doctrines of privity, touch and concern, and changed conditions.

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108. 5 Powell, *supra* note 47, ¶ 674.

109. Restatement (Third) of Property (Servitudes) at xix (Tentative Draft No. 1, 1989) [hereinafter Restatement T.D.1]; French, *Ancient Strands*, *supra* note 19, at 1318 ("Private land use arrangements are increasingly common and useful in the modern world.").

110. Courts have begun to question the public policy justification for strict construction of servitudes because they act as private zoning schemes, 5 Powell, *supra* note 47, ¶ 674, generally tending to maintain or enhance the value and alienability of the property involved. Winokur, *supra* note 3, at 15.

111. Winokur, *supra* note 3, at 14 ("Promissory servitudes restricting land use, earlier disdained in a property-dominated society as title encumbrances hindering alienability, came to enjoy recognition in the service of an expanded, modern market in which land-related contract obligations (alternatively conceived of as fractionated property rights) were recognized as transferable commodities."); *see also* French, *Ancient Strands*, *supra* note 19, at 1318 (commenting on the increased use of private land use arrangements in the modern world).

112. French, *Ancient Strands*, *supra* note 19, at 1264-65.

113. *See generally* Neponsit Property Owners' Ass'n. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795 (N.Y. 1938) (finding the touch and concern test too vague to be of much assistance); Clark, *supra* note 12, at 96 (stating that expressing any absolute tests as to what touches and concerns the land and what does not is impossible); 5 Powell, *supra* note 47, ¶ 673[2] n.113 (recognizing the confusion in many jurisdictions).

114. The *Southern California Law Review* 1982 Symposium issue focused on proposals for reforming servitude law. 55 S. Cal. L. Rev. 1177 (1982). Articles and Comments include French, *Ancient Strands*, *supra* note 19; Reichman, *supra* note 13; Curtis J. Berger, Comment, *Some Reflections on a Unified Law of Servitudes*, 55 S. Cal. L. Rev. 1323 (1982) [hereinafter C. Berger]; L. Berger, *supra* note 35; Allison Dunham, Comment, *Statutory Reformation of Land Obligations*, 55 S. Cal. L. Rev. 1345 (1982); Epstein, *Notice*, *supra* note 50; Bernard E. Jacob, Comment, *The Law of Definite Elements: Land in Exceptional Packages*, 55 S. Cal. L. Rev. 1369 (1982); Carol M. Rose, Comment, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. Cal. L. Rev. 1403 (1982); and Michael F.

A. *Privity*

Despite its practical obsolescence, the privity requirement remains a nominal restriction on servitude creation. This section discusses the requirement's original purpose and how developments in U.S. law have made it superfluous.

1. Horizontal Privity

Perhaps the most criticized aspect of servitude law is the requirement of horizontal privity, which demands a specific relationship between the original covenanting parties.[115] The fundamental concern underlying horizontal privity is fair notice of burdens that bind subsequent purchasers.[116] While notice was a significant concern in nineteenth-century England, the establishment of a workable and comprehensive recording system in the United States rendered horizontal privity obsolete.[117] The general consensus among courts and commentators is that no sound basis for horizontal privity remains.[118] Privity is designed to furnish a link between parties. Because the link already exists between the original parties by virtue of the promise, some commentators question whether horizontal privity ever served any purpose other than as a technical vehicle for reform.[119] Certainly, the requirement has outlived any purpose it once served.[120]

Unfortunately, horizontal privity requirements have not proven an effective tool for reform. Varying definitions among, and even within, jurisdictions[121] have led to confusion and ambiguity in its application.[122] This ambiguity makes it difficult for parties to a servitude to be sure exactly what the privity requirement is and whether or not

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Sturley, Comment, *The "Land Obligation": An English Proposal for Reform*, 55 S. Cal. L. Rev. 1417 (1982).

115. 5 Powell, *supra* note 47, ¶ 673[2][c].

116. *See* French, *Ancient Strands*, *supra* note 19, at 1292; *see supra* note 86 and accompanying text.

117. Olin L. Browder, *Running Covenants and Public Policy*, 77 Mich. L. Rev. 12, 16 (1979) (stating that American recording statutes make the horizontal privity requirement obsolete); Richard A. Epstein, *Covenants and Constitutions*, 73 Cornell L. Rev. 906, 909 (1988) ("[T]he recording system renders unnecessary many of the arcane features of the law of covenants that might have made sense in the prior age.") [hereinafter Epstein, *Covenants*].

118. French, *Design Proposal*, *supra* note 69, at 1222-23; L. Berger, *supra* note 35, at 195; Reichman, *supra* note 13, at 1219-20.

119. Clark, *supra* note 12, at 131-37; Reichman, *supra* note 13, at 1219-20.

120. French, *Design Proposal*, *supra* note 69, at 1223 ("No contemporary writers argue that technical roadblocks to servitude creation are appropriate . . . .").

121. 5 Powell, *supra* note 47, ¶ 673[2][c] n.113.

122. *See* Browder, *supra* note 118, at 23; French, *Ancient Strands*, *supra* note 19, at 1292-94. *Compare* Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793 (N.Y. 1938) (avoiding privity requirements altogether by enforcing a covenant as a lien) *with* Eagle Enter. v. Gross, 349 N.E.2d 816 (N.Y. 1976) (requiring horizontal privity) *and* Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310 (N.Y. 1981) (requiring vertical privity only).

they meet it.[123] For example, in the case of Holland and the Electric Company,[124] a requirement of horizontal privity puts an additional onus of investigation on Holland.[125] The burden may be particularly heavy because she cannot be sure how a court will interpret this requirement.[126] Uncertainty as to whether or not the covenant is enforceable may discourage Holland from purchasing the estate.[127] Both Holland and the Electric Company had notice of the restriction on the servient estate through the recording system. Horizontal privity adds nothing to the question of notice or intent that is not provided by the recordation.[128]

Horizontal privity requirements can also raise transaction costs as parties resort to straw transfers[129] and other innovations to circumvent the privity requirements.[130] These legal acrobatics increase both the time and expense of transferring land and inhibit its efficient use.[131] The exact number of jurisdictions currently requiring horizontal privity is unknown because of a lack of consistency in court applications.[132] Because of the establishment of an effective recording system to provide notice, however, most legal scholars and many jurisdictions agree that horizontal privity is obsolete.[133]

2. Vertical Privity

Despite the *Restatement's* justification of vertical privity as a method to keep the running of burdens within narrow limits,[134] the vertical privity requirement is also a major deficiency of servitude

123. Shepard, *supra* note 83, at 242 (stating that by demanding form at the expense of substance, the law cannot provide adequate guidance for landowners).

124. *See supra* p. 661.

125. Holland must ensure that she meets the horizontal privity required in the jurisdiction. Depending on the jurisdiction, this requirement could vary from requiring a strict English form to the American majority form. *See supra* note 87.

126. There is confusion in many jurisdictions as to what type of privity of estate, if any, is required for covenants to run. 5 Powell, *supra* note 47, ¶ 673[2][c] n.113; *see supra* note 87 (explaining varying privity requirements).

127. Vagueness as to the covenant's enforceability creates ambiguity as to the value of the estate. Needless ambiguity regarding estate value distorts the marketplace and deprives parties of the information they need to make informed decisions. This distortion can frustrate the estate's sale, thus restricting alienability and violating the very purpose of the privity requirement. *See* Epstein, *Notice*, *supra* note 50, at 1363 (stating that if a party is uncertain as to whether a servitude will survive, they will take "evasive action" which can include avoiding an estate transaction).

128. Browder, *supra* note 118, at 16-17.

129. A straw transfer is where A transfers the property to B who transfers it back to A with the desired covenant, thus meeting the privity requirement. Clark, *supra* note 12, at 117.

130. Restatement T.D.1, *supra* note 109, at xix.

131. *See* French, *Ancient Strands*, *supra* note 19, at 1292-93.

132. 5 Powell, *supra* note 47, ¶ 673[2][c].

133. *Id.*; French, *Structural Simplification*, *supra* note 18, at 934-35; Reichman, *supra* note 13, at 1220-21.

134. Restatement, *supra* note 1, § 535 cmt. a.

law.[135] Vertical privity requires that the successor to a covenant hold an estate of the same duration as the promisor held at the time of making the promise.[136] This requirement prevents a dominant estate from enforcing a covenant against a sublessor of a servient estate.[137] If the Electric Company, for example, had leased the land to a third party, vertical privity would prevent Holland from enforcing the servitude against the lessee.[138] Her only recourse would be against the Electric Company. The result is unfair because covenant beneficiaries have no control over transactions concerning the servient estate. Therefore, their rights should not be affected by the servient estate's owner transactions.[139]

Vertical privity is designed to furnish a link between the parties so that their rights and duties can pass to successive owners.[140] That link, however, is already provided in the U.S. recording system.[141] The notice of a recorded covenant, not the privity requirement, is the justification for binding subsequent purchasers to a covenant regarding the estate.[142] Vertical privity seems to be simply a vestige of the ancient English requirement of a link between the transferor and transferee,[143] made obsolete by an effective recording system. The requirement has no defensible public policy basis in the United States, where servitudes are not considered objectionable.[144] Not surprisingly, many modern courts avoid applying the vertical privity requirement.[145] Where they do, they have relaxed the requirement to the point that

135. Reichman, *supra* note 13, at 1249.

136. Restatement, *supra* note 1, § 535 cmt. a.

137. Because a lessee's estate ends at a specific time, it is not of the same durational value as the fee holder's estate. Thus, the lessee does not hold an estate of the same durational value as the promisor, the fee holder, held at the time of making the covenant. *See* French, *Ancient Strands*, *supra* note 19, at 1294-95.

138. The Electric Company's fee simple estate lasts as long as the Electric Company exists or until the company transfers it. The durational value is infinite. If the Electric Company leases the land, the lessee's estate is for a fixed period; the durational value of the two estates are not the same. Vertical privity would prevent Holland from enforcing the servitude against the lessee because the two estates, the Electric Company's and the lessee's, are not of the same durational value. *See id.*

139. Reichman, *supra* note 13, at 1250.

140. *See* Clark, *supra* note 12, at 116-17.

141. *Id.*

142. *Id.*

143. 5 Powell, *supra* note 47, ¶ 673[2][c].

144. Browder, *supra* note 118, at 26; *see also* L. Berger, *supra* note 35, at 190-93 (discussing the policy arguments for and against vertical privity).

145. Reichman, *supra* note 13, at 1250 ("Fortunately, the vertical privity rule is not often applied. By calling the land obligation an equitable servitude or negative easement, the rule is simply avoided.").

any recordable interest will suffice.[146] Additionally, many legal commentators suggest that vertical privity be abolished altogether.[147]

B. *Touch and Concern*

Scholars and judges criticize the touch and concern doctrine on many fronts: it frustrates the express intent of parties, it is vague and arbitrary, and it is redundant.[148] Despite criticism and efforts to abolish the doctrine,[149] it persists.[150] Perhaps the strongest criticism is that the doctrine is vague.[151] The body of case law applying the requirement illustrates the confusion in its interpretation.[152] Even the majority rule, the Bigelow test,[153] reflects the doctrine's obscurity.[154] The test states that if a covenant increases the legal interest of a dominant

146. *See, e.g.*, Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1314 (N.Y. 1981) (defining privity as requiring that "the party seeking to enforce the covenant need show only that he held property descendant from the promisee which benefited from the covenant and that the owner of the servient parcel acquired it with notice of the covenant").

147. *See* Rau, *supra* note 66, at 148-49 (suggesting the abolishment of vertical privity); Reichman, *supra* note 13, at 1249-52 (noting the arbitrary nature of vertical privity and advocating discontinuing its use).

148. Restatement (Third) of Property (Servitudes) § 3.2 cmt. b (Tentative Draft No. 2, 1991) [hereinafter Restatement T.D.2]; Davidson Bros. v. D. Katz & Sons, 579 A.2d 288, 295 (N.J. 1990) ("The time has come to cut the gordian knot that binds . . . jurisprudence regarding covenants running with the land. Rigid adherence to the 'touch and concern' test as a means of determining the enforceability of a restrictive covenant is not warranted.").

149. The proposed *Restatement (Third) of Property* would abolish the touch and concern doctrine. Restatement T.D.2, *supra* note 148, at § 3.2.

150. Restatement, *supra* note 1, § 537; *see, e.g.*, Chesapeake Ranch Club, Inc. v. C.R.C. United Members, Inc., 483 A.2d 1334, 1337-38 (Md. Ct. Spec. App. 1984) (finding that a covenant did not touch and concern the land and, therefore, did not run with the land); Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1313 (N.Y. 1981) (stating that a covenant must touch and concern the land to run with the land).

151. *Davidson Bros.*, 579 A.2d at 294-95 ("Reasonableness, not esoteric concepts of property law, should be the guiding inquiry into the validity of covenants at law."); Neponsit Property Owners' Ass'n. v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 795 (N.Y. 1938) ("In truth such a description or test so formulated is too vague to be of much assistance . . . ."); Clark, *supra* note 12, at 96 ("It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not.").

152. Restatement T.D.2, *supra* note 148, § 3.2 cmt. b; *see, e.g.*, Rossi v. Simms, 506 N.Y.S.2d 50, 52-53 (App. Div. 1986) (confusing the application of the touch and concern requirement with the distinction between burdens and benefits). *Compare Chesapeake Ranch Club, Inc.*, 483 A.2d at 1337-38 (finding that a covenant to pay membership dues for the use of social and recreational facilities did not run with the land while a covenant to pay for road maintenance did) *with* Four Seasons Homeowners Ass'n v. W.K. Sellers, 302 S.E.2d 848, 852 (N.C. Ct. App. 1983) (finding that a covenant to pay for maintenance and beautification of common areas does touch and concern the land).

153. 5 Powell, *supra* note 47, ¶ 673[2][a]. Professor Bigelow suggested the criteria that form the test. Bigelow, *supra* note 95.

154. Dukeminier & Krier, *1981*, *supra* note 19, at 1037 n.56 (discussing the apparent circular nature of the Bigelow test).

estate or diminishes the legal interest of a servient estate, it touches and concerns the land.[155] The test's circular reasoning is apparent: Of course an estate's legal interest or value will be affected if the court finds that a covenant runs with the land.[156] In effect, the doctrine is a judicial tool enabling courts to discretionally void servitudes.[157]

The touch and concern "concept is so difficult to pin down that it can rarely be used as a basis for predicting enforceability of a particular covenant."[158] This ambiguity leads to instability in the land market, which in turn creates higher front-end transaction costs as parties resort to other means to ensure that a servitude will survive, such as selling with a right of first refusal.[159] The uncertainty can also result in restrictions on alienability, because parties may decide not to sell rather than risk that their intent is not given effect.[160] Thus, the doctrine may prevent, rather than promote, the social goal of efficient allocation of land.[161]

A second criticism is that the doctrine frustrates the intent of the parties to a covenant.[162] By creating an artificial barrier to servitudes,

155. *Id.*; *see also Neponsit Property Owners' Ass'n*, 15 N.E.2d at 796 (noting that Bigelow's test is based on the effects of a covenant on an estate).

156. *See* Stake, *supra* note 97, at 929 (noting that commentators criticize Bigelow's touch and concern test as circular in reasoning). For example, a covenant not to compete may or may not effect the legal interest in an estate. If the court finds that it does not run with the land, it will not effect the legal interest; however, if the court finds that it does run with the land, it will effect the legal interest. *See, e.g.*, Shell Oil Co. v. Henry Ouellette & Sons, Co., 227 N.E.2d 509, 512 (Mass. 1967) (discussing whether a covenant not to compete touches and concerns an estate).

157. *See, e.g.*, Franzese, *supra* note 98, at 250 (noting that the touch and concern requirement was "largely a juristic answer" to the early public policy disfavoring servitudes).

158. French, *Structural Simplification*, *supra* note 18, at 939.

159. Epstein, *Notice*, *supra* note 50, at 1361-63. The ambiguity of the touch and concern doctrine forces parties to evaluate the requirement in each case and attempt to meet it. Parties often have to redraft and restructure transactions to avoid a future invalidation of the servitude, all at a dead weight cost because the doctrine serves no valid function. *Id.* at 1361; *see also* Restatement T.D.1, *supra* note 109, at xix-xx (advocating modification and termination controls on servitudes rather than creation restrictions such as the touch and concern requirement).

160. Epstein, *Notice*, *supra* note 50, at 1363.

161. The costs that the doctrine creates are dead weight costs because they do not produce a benefit and they distort the value of land. Restatement T.D.2, *supra* note 148, § 3.2 reporter's note ("More recently, the touch and concern doctrine has been attacked on the ground that it creates dead weight losses by increasing front end transaction costs . . . .").

162. Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. Chi. L. Rev. 681, 717 (1973); French, *Ancient Strands*, *supra* note 19, at 1306-10 (finding that the touch and concern doctrine endangers the intent of the parties to a servitude); Epstein, *Notice*, *supra* note 50, at 1360 ("Insistence upon the touch and concern requirement denies the original parties their contractual freedom . . . ."); *see* Davidson Bros. v. D. Katz & Sons, 579 A.2d 288, 295 (N.J. 1990) (finding the touch and concern doctrine to be too esoteric and opting instead to evaluate servitudes by reasonableness, the primary consideration of which is the parties' intent).

the touch and concern requirement prevents parties from carrying out their intentions.[163] Arbitrary prohibition of certain types of servitudes frustrates servitude law's primary function—ascertaining and giving effect to parties' intent.[164] Perhaps the best indication of dissatisfaction with the touch and concern doctrine is that many U.S. courts and reformers have chosen to abandon it,[165] turning instead to contract remedies such as unconscionability, estoppel and modification, or the changed conditions doctrine.[166]

C. *Changed Conditions*

Many courts turn to the doctrine of changed conditions to control servitudes.[167] This doctrine allows courts to terminate servitudes, rather than invalidate them, if conditions of the original promise have changed in a manner that makes a substantial degree of the intended benefits impossible to achieve.[168] Courts apply the doctrine as a way to correct a lack of foresight on the part of the original parties to the covenant.[169] The courts reason that if the circumstances surrounding the covenant have changed so much that the benefit is no longer realizable, the original intent of the parties is no longer served and the servitude should be terminated.[170] Although this doctrine enjoys support in many jurisdictions, both judicially and statutorily,[171] in practice

163. Franzese, *supra* note 98, at 242 (finding that the touch and concern requirement "displaces bargained-for duties and entitlements"); Epstein, *Notice*, *supra* note 50, at 1359 (noting that the touch and concern requirement acts as a barrier to the unambiguous intent of the parties).

164. The primary function of servitude law is to give effect to parties' intent, "not to force them into one transactional form rather than another." Restatement T.D.1, *supra* note 109, at xix.

165. Sterk, *Freedom From Freedom*, *supra* note 104, at 649 n.141 (stating that a survey of New York, New Jersey, and California cases between 1975 and 1985 indicates only one case in which a court used the touch and concern requirement to invalidate a restriction intended to run).

166. *See* Restatement T.D.1, *supra* note 109, at xix; Restatement T.D.2, *supra* note 148, § 3.2 cmt. b. *But see* Reichman, *supra* note 13, at 1232-33 (noting reasons for retaining the touch and concern requirement); Sterk, *Freedom From Freedom*, *supra* note 104, at 648 (stating that the touch and concern requirement eliminates many of the problems of a pure freedom of contract approach).

167. *See* French, *Design Proposal*, *supra* note 69, at 1220.

168. *See supra* notes 100-04 and accompanying text; Restatement, *supra* note 1, § 564; *see, e.g.*, N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979) (implementing changed conditions statutorily).

169. *See* Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 Cornell L. Rev. 956, 960-61 (1988) [hereinafter Sterk, *Foresight*] (discussing the general lack of foresight of contracting parties).

170. 2 American Law of Property § 9.22 (A. James Casner ed., 1952); *see, e.g.*, Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1314-15 (N.Y. 1981) (holding that if a covenant's benefit is not actually and substantially obtainable, the covenant should be extinguished).

171. N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979); Mass. Ann. Laws ch. 184, § 27 (Law. Co-op. 1987); *see, e.g.*, *Orange & Rockland Utils.*, 418 N.E.2d at 1314-15 (invalidating a covenant based on the changed conditions doctrine); Mountain Park

it can be an inefficient and arbitrary method of terminating servitudes.[172]

The changed conditions doctrine's inefficient and arbitrary implementation arises because the rule is vague.[173] The types of changes that suffice to trigger the doctrine are unclear.[174] For example, courts disagree as to whether a specific duration term in a covenant influences the application of changed conditions.[175] The doctrine also depends on the discretion of judges[176] who arbitrarily draw a line as to when benefits are no longer substantial enough to require the continuance of the servitude.[177] Because of the manipulability of the concept of "substantial" benefit, the changed conditions analysis often depends on the individual judge's view of justice.[178] The confusion surrounding the doctrine, along with the courts' discretion, creates unpredictability.[179] Because of this unpredictability, the doctrine offers little guidance to parties making a covenant[180] which, in turn, destabilizes the property market.[181] Thus, the changed conditions doctrine can defeat an underlying purpose of servitude law—the efficient use of land.[182]

Another problem with applying the changed conditions doctrine to terminate a servitude is that it may frustrate the intent of the parties to a covenant.[183] A recorded servitude is evidence of the original par-

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Homeowners Ass'n v. Tydings, 883 P.2d 1383, 1386 (Wash. 1994) (stating that changed conditions is an equitable defense that can preclude enforcement of a covenant).

172. *See* Epstein, *Notice*, *supra* note 50, at 1364-65; Clark, *supra* note 12, at 185-86; Winokur, *supra* note 3, at 38-40; Shepard, *supra* note 83, at 240, 242.

173. Shepard, *supra* note 83, at 242.

174. *Compare* Western Land Co. v. Truskolaski, 495 P.2d 624 (Nev. 1972) (applying changed conditions as frustration of purpose, and examining whether it is still possible to receive the benefits of the covenant) *with* Loeb v. Watkins, 240 A.2d 513 (Pa. 1968) (holding that a benefit to those seeking to enforce the covenant is unnecessary for enforcement) *and* Mass. Ann. Laws ch. 184, § 30 (Law. Co-op. 1987) (requiring the application of a test that balances the benefits and burdens of a covenant for changed conditions analysis).

175. *See* Winokur, *supra* note 3, at 40. *Compare* Norris v. Williams, 54 A.2d 331 (Md. 1947) (using changed conditions to terminate a servitude before its express expiration date) *with* Crissman v. Dedakis, 330 So. 2d 103 (Fla. Dist. Ct. App. 1976) (focusing on the importance of express termination dates).

176. Winokur, *supra* note 3, at 40.

177. *See, e.g.*, Redfern Lawns Civic Ass'n v. Currie Pontiac Co., 44 N.W.2d 8, 11 (Mich. 1950) (stating that "there must of necessity be a dividing line somewhere"); St. Lo Constr. Co. v. Koenigsberger, 174 F.2d 25, 28 (D.C. Cir. 1949) ("[I]f the restriction be lifted from this particular property, the next adjoining residential property would then be the recipient of the same harsh treatment."), *cert. denied*, 338 U.S. 821 (1949).

178. Clark, *supra* note 12, at 185.

179. *Id.*

180. Shepard, *supra* note 83, at 240-41.

181. Epstein, *Covenants*, *supra* note 117, at 913.

182. Rose, *supra* note 114, at 1416 ("[A] 'changed circumstance' doctrine may very well frustrate one of the underlying purposes of servitude law—to secure efficient land development.").

183. Epstein, *Notice*, *supra* note 50, at 1364-65.

ties' intent.[184] Subsequent purchasers of estates bound by a servitude that runs with the land are bound by the intent embodied in the original agreement.[185] The original parties create servitudes at some expense to serve a mutual benefit extending over several generations and they could, if they so intended, include a termination trigger or a changed conditions clause.[186] A court invoking the changed conditions doctrine to terminate a covenant replaces the express writing of the parties with its own idea of the parties' intent, often without substantial evidence of that intent.[187]

Additionally, in jurisdictions that apply a balancing test,[188] courts may ignore intent and skew the result in favor of large landholders because the more valuable interest carries more weight.[189] For example, in *Orange & Rockland Utilities, Inc. v. Philwold Estates, Inc.*,[190] the court held that "The issue is not whether [the dominant estate] obtains *any* benefit from the existence of the restriction but whether in a balancing of equities it can be said to be, in the wording of the statute, 'of *no* actual and *substantial benefit.*' "[191] This type of test tends to make the decision whether to terminate a servitude depend upon a comparison of the values of the estates which creates a bias towards large property holders.[192]

A problem discrete from the ambiguity of the changed conditions doctrine is that it can act as a disincentive to settlement. Many courts interpret the doctrine as prohibiting damages,[193] reasoning that a servitude invalidated in equity does not exist anymore and has no

184. *Id.* at 1365.

185. *See* Epstein, *Covenants*, *supra* note 118. Professor Epstein analogizes servitudes to constitutions. He argues that "[t]he central problem with both is to find a way to bind a large number of persons to a common plan for their mutual good extending over several generations." *Id.* at 926.

186. *See* Epstein, *Notice*, *supra* note 50, at 1364-68.

187. *See id.* at 1365-66.

188. Some state statutes provide for a balancing of the interests between the dominant and servient estates in order to determine if conditions have changed sufficiently to warrant a termination of a servitude. *See, e.g.*, Mass. Ann. Laws ch. 184, § 30 (Law. Co-op. 1987) (providing for a balancing of interests in determining the effect of changed conditions).

189. Clark, *supra* note 12, at 185 ("[Balancing of the equities] tends to make the outcome depend on a comparison of the value of the interests of plaintiff and defendant, and thus effects a preference to large property holders before the law, which has distinct social disadvantages.").

190. 418 N.E.2d 1310 (N.Y. 1981).

191. *Id.* at 1315 (quoting N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979)).

192. *See supra* note 190.

193. 5 Powell, *supra* note 47, ¶ 679[2]. Courts disagree as to whether damages can be awarded when a servitude is unenforceable in equity. *Compare* Booker v. Old Dominion Land Co., 49 S.E.2d 314, 320 (Va. 1948) *and* St. Lo Constr. Co. v. Koenigsberger, 174 F.2d 25, 27 (D.C. Cir. 1949) (finding that damage awards are governed by the same criteria as equitable relief) *with* Cassidy v. Stuart V. Richards, Inc. 327 N.Y.S.2d 752, 755 (App. Div. 1971) (finding damage awards are available even when equitable relief is not).

residual interest meriting a damage award.[194] If a court finds that conditions have changed sufficiently to activate the doctrine, it will usually terminate the servitude;[195] if not, the court will issue an injunction enforcing the servitude.[196] Even though damages may be available,[197] courts rarely award them when a servitude is unenforceable at equity.[198] This interpretation creates an all-or-nothing remedy which can result in harsh and inefficient results in borderline cases.[199] In the example of Holland and the Electric Company,[200] if the court understood the changed conditions doctrine to disallow damages, it could not provide Holland with any compensation for the invalidation of her benefit, even though some very real interest existed. The extreme nature of the all-or-nothing remedy also reduces the incentive to settle. While parties who feel courts will award damages or impose a compromise have an incentive to settle and avoid litigation costs, parties who feel they may achieve complete victory will insist on litigation if their case is even marginally better than their opponent's.[201]

Despite the shortcomings of the changed conditions doctrine, some commentators justify its use as a way to rid the market of "holdouts."[202] The argument postulates that a holdout can force a servient estate to pay more than the market value of the servitude. If these demands are not met, the holdout threatens to let the servitude continue,[203] which will result in a restraint of the alienability of the land.[204] The changed conditions doctrine can circumvent the problem

194. *See St. Lo Constr. Co., Inc.*, 174 F.2d at 27 (finding that damages cannot be recovered on a covenant deemed unenforceable at equity because the validity and enforceability are intrinsically linked).

195. Shepard, *supra* note 83, at 243.

196. *Id.*; *see, e.g.*, Deak v. Heathcote Ass'n, 595 N.Y.S.2d 556 (App. Div. 1993) (affirming a lower court's enforcement of a servitude because the plaintiff failed to prove that the servitude was of no actual and substantial benefit due to changed conditions).

197. *See, e.g.*, N.Y. Real Prop. Acts. Law § 1951 (McKinney 1979) (providing for damages to a party who would otherwise be entitled to enforcement of a servitude when a court invalidates the servitude by applying the changed conditions doctrine).

198. Shepard, *supra* note 83, at 243.

199. *Id.* at 238-40.

200. *See supra* p. 661.

201. *See* Ellickson, *supra* note 162, at 717.

202. *See, e.g.*, Reichman, *supra* note 13, at 1233 (arguing that judicial termination of obsolete servitudes furthers efficiency by preventing beneficiaries of the servitude from extracting "blackmail" money from the party subject to the servitude).

203. Judge Posner explained the concept of a holdout:

> [I]f homeowners have a right to be free from pollution the factory that wishes to acquire the right to pollute must acquire it from every homeowner. If only one out of a thousand refuses to come to terms, the rights that the factory has purchased from the other 999 are worth nothing (why?) Because the holdout can extract an exorbitant price, . . . each homeowner has an incentive to delay coming to terms with the factory; the process of negotiation may therefore be endlessly protracted.

Posner, *supra* note 30, § 3.8, at 62-63.

204. *See* Reichman, *supra* note 13, at 1233.

by invalidating the servitude so the holdout no longer has an interest.[205] This justification, however, ignores the property right of the holdout.[206] Ownership, in the context of the fee simple, means a right to hold out.[207] If the court invalidates a property right without compensation, it raises the issue of private takings.[208]

III. SUGGESTIONS FOR REFORMING SERVITUDE LAW

Reformers offer a variety of solutions to the shortcomings of current servitude law. While certain proposals enjoy unanimous approval, the reform movements disagree as to what control courts should wield over private land use arrangements. This part first discusses unifying servitudes under a single body of law. It then examines the current trend toward abolishing formalistic creation restrictions such as privity requirements and the touch and concern doctrine.[209] Commentators agree that unifying servitude law and abolishing creation restrictions would create a clearer, more effective body of law.[210] Once servitude law reform eradicates the barriers to servitude creation, however, courts will still require a method to vindicate the public policy concerns of freedom of alienation and freedom of land use.[211] Thus, this part also suggests providing courts with the necessary authority to modify and terminate obsolete servitudes by narrowing the scope of the changed conditions doctrine, statutorily

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205. *See* French, *Ancient Strands*, *supra* note 19, at 1316-17.

206. Rose, *supra* note 114, at 1411-13.

207. Epstein, *Covenants*, *supra* note 117, at 920 (noting that although this right to holdout is not absolute, "the ability of private parties to 'take and pay' is sharply limited.").

208. *See* D. Benjamin Barros, *Defining "Property" in the Just Compensation Clause*, 63 Fordham L. Rev. 1853, 1874-78 (1995) (arguing that court actions that destroy property rights should be considered takings of private property); *see generally* Barton H. Thompson, Jr., *Judicial Takings*, 76 Va. L. Rev. 1449 (1990) (discussing the just compensation implications of court actions that destroy property rights).

209. Restrictions on the creation of servitudes generally fall into two categories, formalistic and substantive. Formalistic restrictions are the doctrines developed at common law to discourage servitudes. They include privity requirements and the touch and concern doctrines. Substantive restrictions are general theories of law that make certain servitudes illegal. For example, a covenant not to sell an estate to members of a particular racial group would violate the Constitution's equal protection provisions and courts would nullify it ab initio. *See* French, *Design Proposal*, *supra* note 69, at 1222, 1229-30.

210. Commentators have reached a consensus that formalistic restrictions on the creation of servitudes should not exist.

> No contemporary writers argue that technical roadblocks to servitude creation are appropriate, although most still believe that a need exists for some form of judicial or legislative control. Nearly all recent scholarship agrees that the law can be simplified by recognizing easements, covenants, and equitable servitudes as functionally overlapping devices that can be conceptualized under a single body of legal doctrine.

Id. at 1223.

211. *Id.* at 1220.

limiting servitude life, and expanding the remedies available for dealing with obsolete or unreasonable servitudes.

A. *Unifying Servitudes*

Many reform approaches advocate the unification of restrictive covenants, equitable servitudes, and easements under a single umbrella concept of servitudes.[212] The tendency in many courts to use these various concepts interchangeably[213] indicates that this reform is already occurring. Because servitudes appear in the same documents and often serve the same functions,[214] a single body of law should apply to create predictability in their application.[215] Predictability helps achieve one of servitude law's primary goals—to give effect to the intent of parties.[216] The only disagreement among current reform movements is what the content of the uniform rules should be.

B. *Abolishing Creation Restrictions*

Most servitude reform movements advocate abolishing the horizontal privity requirement.[217] Again, case law shows a movement in this direction already.[218]

Some reformers advocate retaining the vertical privity requirement in cases of a burden running with land.[219] The argument is that a lesser interest than the original estate should not be bound by a burden on the estate because binding the lesser interest would not be

212. *Id.* at 1223-24; Restatement T.D.1, *supra* note 109, at xxiii; Epstein, *Notice*, *supra* note 50, at 1353; Reichman, *supra* note 13, at 1182; Jacob, *supra* note 114, at 1369-70.

213. Rau, *supra* note 66, at 178-79 (finding, through an extensive survey of case law, that American courts use the rules of the various servitudes interchangeably).

214. Reichman, *supra* note 13, at 1182 (stating that American courts often use restrictive covenant, easement, and equitable servitude classifications interchangeably, choosing one classification over another based on the result the court wants to reach).

215. Unification of restrictive covenants, equitable servitudes, and easements under the single legal concept of servitudes would allow a single body of law to apply. French, *Ancient Strands*, *supra* note 19, at 1304; Restatement T.D.1, *supra* note 109, at xxiii; Reichman, *supra* note 13, at 1230.

216. Restatement (Third) of Property (Servitudes) xvii (Tentative Draft No. 4, 1994).

217. *See, e.g.*, French, *Ancient Strands*, *supra* note 19, at 1294 ("It is difficult to divine any useful purpose served by [horizontal privity]."); Restatement T.D.1, *supra* note 109, at xxxii; Reichman, *supra* note 13, at 1221-22 (advocating the abolishment of the horizontal privity requirement); Winokur, *supra* note 3, at 95 (arguing that while horizontal privity served a purpose at one point, it no longer does).

218. *See, e.g.*, Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1314 (N.Y. 1981) (finding that the privity requirement was met if the parties acquired the property with the covenant attached and had notice of it); Gallagher v. Bell, 516 A.2d 1028, 1037 (Md. Ct. Spec. App. 1986) ("The modern view, rather clearly, is that no more than vertical privity is required.").

219. French, *Ancient Strands*, *supra* note 19, at 1296 (stating that a vertical privity requirement in the case of sublessee or tenant is a rule which "produces results which accord with most people's expectations").

within the normal expectations of the parties.[220] For example, a short-term lessee would not be bound by a burden on the estate unless the burden is reflected in the lease.[221] Defining the requirement as vertical privity, however, may defeat the rationale for its retention—protecting expectations. Even if not explicitly provided for in the lease, binding the lessee may well be within normal expectations, as in the case of a long-term lease, which is a recordable interest.[222] Accordingly, the better solution is to look to the lease for allocation of liability or, in those cases where the lease does not specify the responsibility, leave the determination of the reasonable community expectations to the trier of fact.[223]

Like the privity requirements, the demise of the touch and concern requirement has already begun.[224] Many reformers support eliminating the touch and concern requirement[225] and many courts turn to other methods to invalidate servitudes.[226] The reasons are simple: First, disposing of the doctrine does not inhibit courts' ability to invalidate servitudes;[227] rather the doctrine's absence forces them to address the real reasons for termination or invalidation.[228] Second, the

220. *Id.* (citing Jan Z. Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 U. Pa. L. Rev. 711, 719 (1975)).

221. *See* French, *Ancient Strands*, *supra* note 19, at 1294-96.

222. *See, e.g.*, N.Y. Real Prop. Law § 291 (McKinney 1989) (stating that a lease for more than three years is a recordable interest).

223. L. Berger, *supra* note 35, at 206-07 (suggesting that the trier of fact should determine, based on the nature of the covenant and the time left in the lease, whether the normal community would expect that the obligation to run to tenants or sublessees).

224. French, *Design Proposal*, *supra* note 69, at 1219-20 (explaining that twentieth-century U.S. courts apply changed conditions or doctrines of general application to servitudes rather than hiding behind the touch and concern doctrine); Sterk, *Freedom from Freedom*, *supra* note 104, at 649 (noting that currently, courts rarely use the touch and concern doctrine to invalidate servitudes).

225. Restatement T.D.2, *supra* note 109, § 3.2 reporter's note; Epstein, *Notice*, *supra* note 50, at 1358; *see* French, *Design Proposal*, *supra* note 69, at 1261.

226. In the twentieth century, courts have begun to address alienation problems directly rather than relying on the touch and concern doctrine. Recently, courts have used other doctrines such as unconscionability and have relied on the increased flexibility of remedies rather than using the touch and concern doctrine to address problems arising from servitudes. Restatement T.D.2, *supra* note 148, § 3.2 cmt. b; *see, e.g.*, Sun Oil Co. v. Trent Auto Wash, 150 N.W.2d 818 (Mich. 1967) (disregarding the touch and concern requirement for running of covenants and focusing on reasonableness of the covenant); Davidson Bros. v. D. Katz & Sons, 579 A.2d 288, 294 (N.J. 1990) ("[M]ost other jurisdictions have omitted 'touch and concern' from their analysis and have focused instead on whether the covenant is reasonable."); Gillen-Crow Pharmacies v. Mandzak, 215 N.E.2d 377 (Ohio 1966) (allowing a personal covenant to run despite the touch and concern requirement).

227. French, *Ancient Strands*, *supra* note 19, at 1305 ("Early law restricted the creation of running servitudes because it lacked the means to terminate them. Since modern law can terminate servitudes, it no longer needs to restrict their creation.").

228. French, *Design Proposal*, *supra* note 69, at 1220 (citing the tendency in twentieth century U.S. courts to address the policy considerations in evaluating servitudes rather than hiding behind the touch and concern doctrine).

cumbersome nature of the touch and concern rule made it difficult to apply and interpret consistently.[229]

Nevertheless, notable exceptions exist to the movement away from the doctrine. Both Professors Reichman and Sterk support the retention of the touch and concern requirement as a way for courts to invalidate servitudes.[230] They feel the benefits of providing courts with this interventionist ability outweigh the problems created by the doctrine.[231] In addressing the discontent with the doctrine, Professor Reichman offers a new definition for the touch and concern rule. Beginning with the definition of servitudes as "transfers of owners' entitlement, other than possession, for the efficient utilization of land,"[232] he argues that by focusing on the function of the servitude we can better determine if it touches and concerns the land.[233] Professor Sterk responds in a different manner. He suggests that the few occasions on which courts impose the touch and concern requirement relative to the tremendous number of existing servitudes indicate the requirement is not much of a problem.[234]

These arguments, however, do not address the problem. The doctrine is vague and confusing;[235] a new formulation will not make the concept any clearer.[236] The ramifications of this ambiguity go beyond case law. Each time a servitude is formed, the touch and concern requirement potentially creates confusion and raises transaction costs.[237] The touch and concern doctrine should be abolished because its benefits are dubious and its drawbacks are certain.

Abolishing creation restrictions does not mean that all barriers to creating servitudes will fall. While the primary function of the law is

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229. *See supra* part II.B.

230. Reichman, *supra* note 13, at 1233; Sterk, *Freedom from Freedom*, *supra* note 104, at 646-49, 661.

231. Sterk, *Freedom from Freedom*, *supra* note 104, at 649; *see* Reichman, *supra* note 13, at 1237-38.

232. Reichman, *supra* note 13, at 1238.

233. *Id.* at 1238-39.

234. Sterk, *Freedom from Freedom*, *supra* note 104, at 649.

235. *See supra* part II.B.

236. Even Professor Reichman admits that his functional test is imprecise. Reichman, *supra* note 13, at 1238.

237. The touch and concern doctrine may create transaction costs not brought to light through litigation. *See* Epstein, *Notice*, *supra* note 50, at 1363-64.

> The transaction costs associated with the touch and concern requirement are magnified when we consider the incentive effects that it produces. The typical servitude is created by a person who owns an entire parcel of land and wishes to divide it into several parts. If the original seller fears judicial nullification under the touch and concern requirement, he will take evasive action. He may not sell the land at all, fearing that his servitudes will not run; he may be cautious in selecting his buyers . . . ; or he may try to frame the transaction in a way that gives him the right to control future disposition of the land without the use of servitudes.

Id. at 1363.

to give effect to parties' intent,[238] U.S. law prohibits certain types of agreements, such as those that violate constitutional or statutory norms or public policy.[239] Generally, however, servitudes perform an important function in U.S. society.[240] Servitude law should avoid the technical roadblocks that prevent parties from effecting their intent through otherwise valid arrangements.[241]

C. *Terminating or Modifying Servitudes*

Once a unified servitude law that abolishes formalistic creation restrictions is in place, the law's concern should be how to address servitudes that have become obsolete or unreasonable.[242] The difficulty in finding a solution to this problem is that it involves two competing societal interests, freedom of contract and freedom of land use.[243] This part suggests that servitude law can most effectively strike a balance between these concerns by narrowing the scope of the changed conditions doctrine, creating statutory limitations on servitude duration, and expanding the remedies available to the courts for dealing with obsolete or unreasonable servitudes.

1. Narrowing the Scope of the Changed Conditions Doctrine

The changed conditions doctrine in its current form is a vestige of the old model of servitude law.[244] While the doctrine does have use-

238. Restatement T.D.1, *supra* note 109, at xix ("The primary function of the law is to ascertain and give effect to [parties'] intent, not to force them into one transactional form rather than another."); French, *Ancient Strands*, *supra* note 19, at 1307.

239. French, *Design Proposal*, *supra* note 69, at 1221.

240. *See id.* at 1217-19. As Professor French noted:

> Most residential development since World War II has occurred in subdivisions, cluster or planned unit developments, condominiums, and cooperatives. In all of these developments, servitudes impose use restrictions. In many, servitudes create community governance structures and impose obligations to provide and pay for maintenance of common facilities. Restrictive covenants, architectural control, unit owner associations, and dues and assessments have become a familiar part of the American scene.

Id. at 1217.

241. *See id.* at 1221.

242. French, *Ancient Strands*, *supra* note 19, at 1313 ("Simplification of the doctrinal structure of servitudes law hinges on providing an effective means to modify and terminate servitudes when they become obsolete, economically wasteful, or unduly burdensome.").

243. French, *Design Proposal*, *supra* note 69, at 1220 (noting that U.S. courts approach servitude arrangements by balancing the societal concerns of freedom of land use and freedom of contract).

244. The broad language of the changed conditions doctrine, as expressed in section 564 of the *Restatement of Property*, indicates that it confers on courts substantial discretion to invalidate servitudes. This broad discretion reflects the *Restatement*'s view of servitudes as socially undesirable and its desire to afford the courts broad powers of public regulation. *See, e.g.*, Epstein, *Covenants*, *supra* note 117, at 919 (arguing that the changed conditions doctrine, as applied currently, operates discretionarily as public regulation); *see also supra* note 55 and accompanying text.

fulness in certain limited situations,[245] a broad application is inefficient and arbitrary.[246] Servitude law should supplant the doctrine with clearer, less arbitrary forms of control.[247]

The changed conditions doctrine is in many ways similar to the contract doctrine of frustration.[248] The frustration doctrine allows a court to void a contract " '[w]here, after a contract is made, a party's principal purpose is substantially frustrated without his fault by the occurrence of an event the nonoccurrence of which was a basic assumption on which the contract was made . . . .' "[249] In addition, where a party has assumed the risk of a change in conditions, the frustration defense is not applicable.[250] Thus, the contract defense contains two difficult hurdles a party must clear before it can use the defense. First, the party seeking relief from a contract must prove that the purpose of performance was a basic assumption of both parties at the time of contracting, and, second, she must show that the principal purpose of the agreement is substantially frustrated.[251]

The changed conditions doctrine serves a similar function. It allows a court to terminate or modify a servitude that no longer serves its original purpose:[252] The doctrine contains similar requirements. First, that the purpose of the servitude was premised on basic assumptions about the circumstances surrounding the agreement, and second, that those circumstances have changed so that the benefit of the servitude is no longer substantially achievable. The functions and requirements of the two doctrines are analogous, but the changed conditions doctrine reaches far beyond the scope of the contract frustration doctrine.

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245. Epstein, *Covenants*, *supra* note 117, at 924.

246. *See supra* part II.C. (discussing the problems with the current changed conditions doctrine); Rose, *supra* note 114, at 1409-10 (arguing that a broad application of the changed conditions doctrine is arbitrary).

247. Epstein, *Covenants*, *supra* note 117, at 924 ("While there is doubtless some small place for the doctrine of changed conditions to operate on agreements that are incomplete, it should have at best a tiny importance once governance structures are in place.").

248. *Id.* at 919.

249. Chase Precast Corp. v. John J. Paonessa Co., 566 N.E.2d 603, 606 (Mass. 1991) (quoting Restatement (Second) of Contracts § 265 (1981)).

The Restatement (Second) of Contracts sets forth four requirements for a defense of frustration:

> (1) The object of one of the parties in entering into the contract must be frustrated. (2) The other party must also have contracted on the basis of the attainment of this object. In other words the attainment of this object was a basic assumption common to both parties. (3) The frustration must be total or nearly total . . . . (4) The party seeking to use the defense must not have assumed a greater obligation than the law imposes.

Joseph D. Calamari & Joseph M. Perillo, Contracts § 13-12 (3d ed. 1987) (footnote omitted); *see* Restatement (Second) of Contracts § 265 (1981); U.C.C. § 2-615 (1987).

250. *See* Calamari & Perillo, *supra* note 249, § 13-12.

251. *Id.*

252. Epstein, *Covenants*, *supra* note 117, at 919.

While courts narrowly apply the contract doctrine of frustration, they apply the doctrine of changed conditions much more broadly.[253]

By following the contract frustration analysis, the changed conditions doctrine would be a less arbitrary tool for the modification and termination of servitudes.[254] Rather than allowing courts broad discretion to expunge agreements, the doctrine should require a strict test as to the intent of the parties.[255] Furthermore, application of the doctrine should be a remedy of last resort rather than carte blanche for judicial regulation of private agreements.[256] It should be limited to situations where an agreement is incomplete, and the court cannot determine an assignment of the risk of the changed conditions from the servitude itself.[257] In this way, courts would limit the situations in which they substitute their view of intent for that of the parties.[258] While this substitution is necessary in some instances, courts should strive to limit these instances as much as possible.[259]

Some commentators argue that U.S. courts will not, in the name of freedom of contract, abandon their efforts to control the harmful effects of servitudes.[260] While this may be true, an expansive changed conditions doctrine is not the optimal means to provide a method of control. Because of its arbitrary nature and its inaccuracy in determining intent, a broad changed conditions doctrine creates many of the problems it seeks to avoid.[261] By addressing the harmful effects of

253. Professor Epstein describes the difference between the doctrines:

> In one sense . . . the doctrine of changed conditions is a slightly more robust form of the doctrine of frustration of purpose as it exists in the general law of contract. But the doctrine of changed conditions has a more distinctive and coercive caste. Courts may invoke it to invalidate covenants notwithstanding the parties' express contractual intent to be bound in perpetuity unless released by contrary unanimous agreement.

Id.

254. *See, e.g.*, Epstein, *Notice*, *supra* note 50, at 1364-68 (finding that the current changed conditions doctrine can be arbitrary and inefficient); Shepard, *supra* note 83, at 240-42 (noting that the current changed conditions doctrine can lead to inefficient and harsh results).

255. *See* Epstein, *Covenants*, *supra* note 117, at 919 (advocating a changed conditions doctrine that acts as a plausible default rule rather than one of public regulation).

256. *See id.* (proposing that a changed conditions doctrine should fill a "more modest" role than a rule of public regulation).

257. *See id.* at 924.

258. *See* Epstein, *Notice*, *supra* note 50, at 1366 ("The relevant question, therefore, is whether judicial determinations [of intent] are superior to private ones."); Rose, *supra* note 114, at 1410 ("In putting forth the doctrine of 'changed circumstances' to quash or limit obsolete servitudes, . . . authors imply that our own current understanding of usefulness should prevail over the understanding of the original parties.").

259. Epstein, *Covenants*, *supra* note 117, at 924 ("While there is doubtless some small place for the doctrine of changed conditions to operate on agreements that are incomplete, it should have at best a tiny importance once governance structures are in place.").

260. French, *Design Proposal*, *supra* note 69, at 1220.

261. *See supra* part II.C.

servitudes outside of the changed conditions doctrine, through statutory limitations and expanded remedies, however, servitude law can create a clearer, less arbitrary body of law.

2. Statutory Limitations

Under current servitude law, if a servitude does not specify a termination date, a court determines the outer limit of duration based on its view of the intent of the parties.[262] If the conditions surrounding a servitude that was valid at its inception have not substantially changed, the court's assumption will be that the servitude survives.[263] In essence, a servitude that does not specify termination survives in perpetuity.[264] Nevertheless, society does not have to expect servitudes to last indefinitely in every case.[265] A statutory limitation on the duration of servitudes can change society's expectations regarding servitude life.[266]

By providing a limited, thirty-year life for servitudes, a statute puts the onus on the dominant estate to renegotiate its interest at specified intervals.[267] The benefit of such a term is that parties will tend not to renew obsolete or unreasonable servitudes.[268] Statutory limitations will create the presumption of a limited life for servitudes.[269] Hence, the problem of inferring parties' intent as to longevity is limited to cases where the circumstances change within the limitation period and the negotiation process breaks down.[270]

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262. Powell & Rohan, *supra* note 29, at 734.

263. *See, e.g.*, Rick v. West, 228 N.Y.S.2d 195, 199 (Sup. Ct. 1962) (finding that a court can refuse to enforce a restrictive covenant, based on changed conditions, only when the change makes the restriction valueless).

264. *See, e.g.*, Reichman, *supra* note 13, at 1232 (noting the "theoretically perpetual duration of servitudes").

265. Rose, *supra* note 114, at 1413-14 (advocating natural and historic heritage servitude exceptions to statutory limits); Winokur, *supra* note 3, at 78-80 (advocating special rules for mutually enforceable servitudes among small groups of landholders); Clark, *supra* note 12, at 197-205 (acknowledging the possibility of exceptions to statutory limitations).

266. *See, e.g.*, Winokur, *supra* note 3, at 78 (arguing that servitude durational limits would shift the burden onto the parties to periodically renegotiate a servitude); Rose, *supra* note 114, at 1413-14 (suggesting that statutory limitations change servitudes' presumptive life span).

267. Rose, *supra* note 114, at 1414.

268. French, *Ancient Strands*, *supra* note 19, at 1315-16 (stating that a statute providing for termination of servitudes would facilitate private resolution of the problems created by obsolete servitudes); *see also* Winokur, *supra* note 3, at 78 ("Shifting the burden of addressing servitude obsolescence from the discretionary changed circumstances doctrine to statutory limitations on enforcement beyond a fixed durational limit is the most urgently needed doctrinal servitude reform.").

269. Rose, *supra* note 114, at 1414.

270. Winokur, *supra* note 3, at 84 (arguing that statutory limitations restrict application of the changed conditions doctrine to instances where the servitude's purpose is wholly frustrated before the time period expires).

Some commentators argue that statutory limitations on servitudes are arbitrary and defeat the permanency necessary for land use planning.[271] Well-designed statutory limitations, however, need not be arbitrary. While a statute should avoid specific special interest exceptions,[272] some exceptions are necessary. A statute should include exceptions for specific types of servitudes that may merit longer lives based on public policy, such as servitudes designed to protect historic buildings or designed to preserve the natural environments.[273] A statute should also exempt servitudes between small numbers of parties, twelve or less,[274] because many of the transaction costs of removing an obsolete servitude would not arise in situations involving few estates.[275]

Similarly, other types of servitude arrangements do not encounter high transaction costs as a barrier to negotiation. Where a servitude arrangement itself promotes regular reevaluation and facilitates renegotiation, the servitude should fall outside statutory durational limits. For instance, a planned community may intend mutual restrictions to last longer than a thirty-year period.[276] Having to renegotiate these restrictions among a large group of individuals every thirty years would generate exactly the type of prohibitive transaction costs that servitude reform attempts to avoid.[277] A statute, therefore, should allow for internal control structures to modify or terminate existing mutual servitudes involving more than a certain number of estates. For example, statutory limitations should exempt a housing community of more than twelve homes that provides for existing servitude modification or termination based on a less than unanimous periodic vote of community home owners.[278] This arrangement avoids the problems

271. Reichman, *supra* note 13, at 1232 (stating that permanence is important for land use planning).

272. Clark, *supra* note 12, at 204 ("[C]onsideration of any exceptions should be tempered by the realization that the enactment of a great variety of special-interest exceptions . . . serves only to weaken the statute and make it as innocuous and ineffective as the earlier legislative attempts have proven.").

273. Rose, *supra* note 114, at 1413-14.

274. French, *Ancient Strands*, *supra* note 19, at 1316 (recommending that statutory limitations exclude servitudes involving twelve or less parcels); Winokur, *supra* note 3, at 79-80 (suggesting that servitudes among fewer than eleven parties should be exempt from statutory limitation).

275. The transaction costs of contacting the parties and negotiating a settlement regarding a servitude tend to be low in situations where the number of parties is small. *See, e.g.*, Epstein, *Covenants*, *supra* note 117, at 915 (stating that where the number of parties to a servitude is small, the transaction costs tend to be low); Winokur, *supra* note 3, at 79-80 (suggesting that many of the transaction costs that threaten servitude negotiation are not present in servitudes involving small numbers of parties).

276. French, *Ancient Strands*, *supra* note 19, at 1315 n.255.

277. *Id.*

278. *See, e.g.*, Epstein, *Covenants*, *supra* note 117, at 922 (finding that majority rule provisions for modification of servitudes displace the need for government control);

of holdouts[279] and provides that the servitudes would not become obsolete because the voting provision allows for periodic internal renegotiation.[280]

Notwithstanding these exceptions, legislation limiting servitude duration narrows the focus of the changed conditions doctrine.[281] Conditions surrounding servitudes tend to change and frustrate an agreement's original purpose more over the long term.[282] By limiting servitudes' duration, legislation reduces the likelihood that conditions will change sufficiently to merit judicial intervention.[283] Within the limitation period, courts should not apply the changed conditions doctrine to terminate or modify a servitude unless the purpose of the agreement is almost totally frustrated, the original conditions were a basic assumption of the servitude, and none of the parties involved assumed the risk of the changing conditions.[284] With a presumption of a limited life, discretionary questions currently addressed in the changed conditions doctrine will be better left to the creating parties' judgment.[285]

3. Expanding Remedies

While a statutory limitation on the duration of servitudes will avoid many instances where courts must infer intent, some situations where courts must do so will continue to arise.[286] For example, where the purpose of a servitude completely expires before the running of the statutory duration period, or a dispute arises concerning a servitude among twelve estates or less, a court may have to decide a proper course of action.[287] In these instances, expanding the remedies available to courts to terminate and modify servitudes addresses many of the problems which arise from the free choice/free alienability con-

French, *Ancient Strands*, *supra* note 19, at 1314-15 (suggesting a community arrangement that provides for modification based on a less than unanimous vote).

279. Individual parties cannot holdout in a less-than-unanimous voting arrangement because a prescribed supermajority can overruled their vote. *See* Epstein, *Covenants*, *supra* note 117, at 922.

280. French, *Ancient Strands*, *supra* note 19, at 1315.

281. Winokur, *supra* note 3, at 84.

282. *Id.*

283. *Id.*

284. *See supra* part III.C.1.

285. Winokur, *supra* note 3, at 84.

286. Epstein, *Covenants*, *supra* note 117, at 924 (stating that the changed conditions doctrine should have "at best a tiny importance once governance structures are in place"); Winokur, *supra* note 3, at 84 (arguing that durational legislation relegates the changed conditions doctrine to a role only when a servitude's purpose is wholly frustrated).

287. In cases of total frustration of purpose, even within the statutory period, courts may have to apply the doctrine of changed conditions. Winokur, *supra* note 3, at 84. If private negotiations break down, courts may have to decide disputes involving servitudes that are exempt from the statutory limitations. *See* French, *Ancient Strands*, *supra* note 19, at 1316.

flict.[288] By including damages as well as injunctive relief in the remedies available to courts for modifying servitudes, servitude law can facilitate free market functioning, avert holdout problems, and avoid the inequity of extinguishing real interests.

Courts normally employ only equitable remedies when evaluating whether a servitude runs with the land.[289] Specific performance, however, does not have to be the only remedy available.[290] In instances where changing conditions do not merit injunctive relief a court should be able to award damages to compensate estates for any surviving interest.[291] In New York and Massachusetts, for example, damages are available where the court decides to terminate a servitude.[292] The availability of a monetary award in lieu of injunctive relief creates an incentive for parties to settle[293] and protects the dominant estate's interest.[294] The dominant estate owner, knowing that she may end up with damages as opposed to an injunction, will want to settle to avoid litigation expenses and secure the most compensation for their interest; similarly, servient estates will be willing to provide a premium to the dominant estate to avoid delay and litigation costs.[295] The availa-

288. The expansion of the types of remedies available to courts for terminating or modifying servitudes is an area where Professors French and Epstein agree. *See* French, *Ancient Strands*, *supra* note 19, at 1317; Epstein, *Covenants*, *supra* note 117, at 920-21.

289. While damage awards are possible, they are rarely granted. Ralph A. Newman & Frank R. Losey, *Covenants Running with the Land, and Equitable Servitudes: Two Concepts, or One?*, 21 Hastings L.J. 1319, 1342 (1970) (stating that when courts invalidate a servitude based on changed conditions they rarely provide for damages); Shepard, *supra* note 83, at 238 n.64 (same); *see, e.g.*, Centex Homes Corp. v. Boag, 320 A.2d 194, 196 (N.J. Super. Ct. Ch. Div. 1974) (recognizing that the presumed uniqueness of land has made specific performance a common remedy in land transactions); Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310, 1316 (N.Y. 1981) (recognizing the possibility of damages but denying an award).

290. Damages are sometimes available for breaches of a restrictive covenant. *See* 2 American Law of Property § 9.24 (A. James Casner ed., 1952); *see Orange & Rockland Utils.*, 418 N.E.2d at 1314 (commenting that N.Y. Real Prop. Acts. section 1951 provides for payment of damages to the party who would be entitled to servitude enforcement).

291. Epstein, *Covenants*, *supra* note 117, at 920-21 (advocating that specific performance should be available as a servitude remedy, but only as one of many options); French, *Ancient Strands*, *supra* note 19, at 1317 (arguing that servitude law should be more flexible in enforcing servitudes by allowing for damages more frequently).

292. N.Y. Real Prop. Acts. Law § 1951 (McKinney 1995); Mass. Ann. Laws ch. 184, § 30 (Law. Co-op. 1995).

293. *See, e.g.*, Epstein, *Covenants*, *supra* note 117, at 920 (comparing the payment of tort damages to nuisance victims with servitude remedies and finding that the damages award in the nuisance case facilitates market functioning).

294. Shepard, *supra* note 83, at 244.

295. People generally act to maximize their benefit. They will avoid paying more or getting less for their goods. Hence, if a party is on notice that courts will provide damages as opposed to injunctive relief, she will try to negotiate to avoid litigation costs. If parties negotiate individually and avoid litigation costs the economic benefit they share will be larger. *See* Posner, *supra* note 30, § 3.1, at 34.

bility of this intermediate remedy, between enforcement or extinguishment in equity, encourages market efficient decisions.[296] In some cases, by applying damages, a court can avoid the harsh, all-or-nothing remedy and identify a more realistic servitude value.[297] If the law can clearly define the realistic value of a servitude, the optimal solution should ensue: The land will be put to its most efficient use.[298]

Expanded remedies also discourage holdouts. A holdout is someone who tries to extract an exorbitant price for her interest.[299] Where legal damages are available, a holdout is at risk of receiving only the damages she can prove.[300] If a holdout is at risk of receiving only her true damages minus litigation costs from the court, she will have incentive to settle.[301] Further, a court's decision as to damages to a particular estate in extinguishing a servitude puts additional holdouts to the same servitude on notice as to the approximate value of their interest, thus facilitating future negotiation.

In theory, once a court determines in equity that a servitude is invalid because of changed conditions, no interest remains to merit damages.[302] Similarly, in practice, courts rarely award damages when terminating a servitude through the changed conditions doctrine.[303] This all-or-nothing injunctive relief can lead to harsh results. The court must either protect an interest at the expense of market efficiency or invalidate it without accounting for any remaining interest.[304] Courts can avoid this inequity by providing damages to estates whose interests they eradicate. Awarding damages also avoids ques-

296. *See* French, *Ancient Strands*, *supra* note 19, at 1318 ("Lack of an intermediate remedy has no doubt resulted in some distortion in the decisionmaking process.").

297. *See id.* at 1318 n.262 (noting that limiting courts to extreme remedies tends to produce rather peculiar decisions).

298. *See* Posner, *supra* note 30, § 3.1 (finding that, given clearly defined ownership rights, when two parties value land differently and the difference is greater than the transaction costs, there is a strong incentive for voluntary exchange).

299. *See supra* note 203.

300. *See, e.g.*, N.Y. Real Prop. Acts. Law § 1951 (McKinney 1995) (allowing a court, when extinguishing a servitude, to award damages, if any are merited, to the party who would have been able to enforce the servitude).

301. *See supra* note 295 and accompanying text.

302. The *Restatement*'s description of the changed conditions doctrine implies that the interest disappears:

> Injunctive relief against violation of the obligations arising out of a promise respecting the use of land cannot be secured if conditions have so changed since the making of the promise as to make it impossible longer [sic] to secure in a substantial degree the benefits intended to be secured by the performance of the promise.

Restatement, *supra* note 1, § 564.

303. Newman & Losey, *supra* note 289, at 1342 (stating when courts invalidate a servitude based on changed conditions they rarely provide for damages); Shepard, *supra* note 83, at 243 (same).

304. Shepard, *supra* note 83, at 240.

tions that may arise concerning private takings[305] by providing compensation for extinguished interests.

CONCLUSION

Servitude law serves an important societal function by negotiating the sometimes conflicting policies of free alienability of land and freedom of contract. Current servitude law, however, does not meet the demands of today's society. Many of the arcane nineteenth-century doctrines and distinctions are redundant and do not address current problems created by the expanding use of servitudes. Servitude law can travel a long way towards effective reform by unifying servitudes under a single body of law and by abolishing formalistic restrictions on the creation of servitudes. The reform should go further. By combining a narrowed changed conditions doctrine, a statutory time limit on servitude life, and expanded remedies for servitude modification and termination, servitude law can create a clear, effective body of law that addresses current concerns and anticipates future problems.

Where would these changes leave Holland? Under old servitude law a court would have to decide either to enforce or extinguish her interest. Given the competing interests in this case, a court might refuse to enforce the servitude.[306] Under a reformed servitude law, at the least, Holland would know that her interest in the servitude will be protected. Under a narrow interpretation of the changed conditions doctrine the purpose of the servitude was not totally frustrated. The original intention of maintaining a rural environment survives. While Holland's claim may not merit injunctive relief, a court should award legal damages, to compensate her for her remaining interest.

305. *See supra* note 208.

306. *See, e.g.*, Orange & Rockland Utils. v. Philwold Estates, 418 N.E.2d 1310 (N.Y. 1981) (finding that the changed conditions issue "is not whether [a party] obtains any benefit from the existence of the restriction but whether in a balancing of equities it can be said to be . . . 'of no actual and substantial benefit' " (emphasis omitted)).