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# Contract-Wrapped Property

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# Contract-Wrapped Property

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*For nearly two centuries, the law has allowed servitudes that "run with" real property while consistently refusing to permit servitudes attached to personal property. That is, owners of land can establish new, specific requirements for the property that bind all future owners—but owners of chattels cannot. In recent decades, however, firms have increasingly begun relying on contract provisions that purport to bind future owners of chattels. These developments began in the context of software licensing, but they have started to migrate to chattels not encumbered by software. Courts encountering these provisions have mostly missed their significance, focusing instead on questions of contract doctrine, such as whether opening shrink wrap constitutes assent to be bound. Property concepts never enter their analysis. The result of this oversight is that courts have de facto recognized equitable servitudes on chattels—a category that our legal system has long forbidden. Yet because courts are often unfamiliar with property-law principles, and because lawyers have failed to make property-based arguments, individual contracts cases are remodeling the architecture of property rights without anyone realizing it.*

*This Article identifies the unexpected emergence of servitudes on chattels via contract law. It explores the consequences of that development and argues that we should see it as deeply troubling. By unwittingly reestablishing equitable servitudes on chattels—something our legal system rejected long ago for good reason—this change in law threatens to undo longstanding precedent, disrupt settled expectations, and effectively recognize a new form of property. More generally, elevating contract over other private law doctrines disrupts the private law's equilibrium in which a complementary suite of doctrines developed to promote economic liberty while curtailing opportunistic impulses. While the pathologies that have flourished internally in modern contract doctrine have been well studied by scholars, the way in which contract law is threatening to consume property and other areas of private law has received less attention. Using servitudes on personal property as a window into the larger problem of contract-dominated private law, this Article explores the private law's role in shaping environmental conservation, autonomy, innovation, and the legitimacy of the law itself. Those values are all in jeopardy as if contract law is allowed to encroach on property and to erode the very concept of ownership.*

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[*] Associate Professor of Law, Washington University in St. Louis. For helpful conversations and comments at various stages, I'm grateful to Jennifer Allison, Scott Baker, Andrea Boyack, Molly Brady, Kevin Collins, Travis Crum, Jared Ellias, Dan Epps, Jill Fraley, Jens Frankenreiter, John Goldberg, Jed Lewinsohn, Henry Smith, Carla Spivack, and Rory van Loo, as well as the participants of the Harvard Private Law Workshop, AALS New Voices in Property, and the WashU Law Faculty Workshop. Special thanks to Jacob Seeley for outstanding research assistance.

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## INTRODUCTION

Tamko roofing shingles are drab rectangles of laminated asphalt and fiberglass.[1] They don't contain any chips, sensors, or software. Roofing suppliers sell these shingles the old-fashioned, low-tech way—no apps or subscriptions required. And yet, these shingles are changing the meaning of ownership. Like many manufacturers, Tamko shrinkwraps a contract around the pallets of shingles that it sells to roofers.[2] Tamko's contract is unremarkable except in terms of whom it purports to bind. This contract, styled as a "Limited Warranty and Arbitration Agreement," purports to bind not merely the purchaser or installer of the shingles, but instead the "the owner of the building at the time the Shingles are installed on that building" and "the first person to occupy the residence after its construction" if the residence is purchased from a builder.[3] The agreement specifies that a homeowner may be bound "even though the Shingles were already installed" at the time of purchase.[4] This agreement even attempts to reach further down the chain of title to secondary purchasers of the home if they purchase within the first five years of the warranty term.[5]

Because it attempts to bind downstream owners of the shingles, notwithstanding the lack of privity between Tamko and that downstream purchaser, this agreement attempts to create a de facto equitable servitude. The problem, though, is that under longstanding property doctrines, equitable servitudes on personal property are unenforceable.[6] Equitable servitudes on real property may be enforceable, but only when they meet particular

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[1] *See* Shingle Colors, TAMKO, https://www.tamko.com/all-shingle-colors.

[2] For some models of shingle, Tamko prints this agreement on the shrink-wrap around bundles of shingles; for a few models Tamko claims to emboss notice of the terms onto the shingles themselves.

[3] TAMKO FIBERGLASS/ASPHALT SHINGLE LIMITED WARRANTY, TAMKO, https://www.tamko.com/docs/default-source/limited-warranties/TAMKO-fiberglass-asphalt-shingle-limited-warranty-(effective-march-1-2021).pdf?sfvrsn=df3320a0_8.

[4] *Id*. If a homeowner does not agree to the terms, the agreement directs them to "RETURN ALL UNOPENED MARKETABLE PRODUCTS TO THE ORIGINAL PLACE OF PURCHASE FOR A REFUND." Never mind, of course, that returning the shingles would mean peeling the roof off of a house at the homeowner's expense. *Id.*

[5] *Id.*

[6] *See generally* Zechariah Chafee Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1927) (explaining court's refusal to allowing equitable servitudes on chattels)

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requirements, notably recording in official property records. In theory, these are mandatory property doctrines that should defeat Tamko's expansive contractual claims. And yet, Tamko keeps winning cases in which it attempts to enforce its alleged contract.[7]

What Tamko is trying to accomplish may seem aggressive, but there is every reason to think that it is merely the vanguard of a coming explosion of would-be servitudes on personal property. For nearly a century, scholars have wondered why courts enforced equitable servitudes on real property but not personal property.[8] This question took on new urgency—and with that, new scholarly interest—starting in the early aughts with the proliferation of software licenses.[9] These licenses appeared to attach to chattels and run with them just as servitudes might run with real property.[10] Servitudes enabled by software licenses initially seemed sui generis: while they were enabled by federal intellectual property law, state property law continued to refuse to recognize servitudes on chattels. That refusal is now eroding.

This Article shows that courts across the country are now effectively recognizing equitable servitudes on private property under the guise of contract law—even if no court acknowledges, or even recognizes, that that is what it is doing. Because courts consider these cases from the exclusive perspective of contract law, they ignore other private-law doctrines that ought to provide guardrails to contracts' reach. After cataloguing the unexpected emergence of equitable servitudes on chattels, this Article goes on to argue that we should find this development deeply troubling. Our legal system has long rejected equitable servitudes on personal property, and for good reason. By unwittingly recognizing a new form of property, courts are upsetting deeply held intuitions about the meaning of ownership.[11]

There are many reasons to be concerned about the rise of equitable servitudes on personal property. Equitable servitudes on chattels threaten the viability of ownership in fee simple,[12] especially given contract doctrine's permissive approach to unilateral modification clauses.[13] Moreover, in failing to engage with relevant property doctrine, courts allow contract to crowd out non-contract private law doctrine and policy. Contracts-focused courts fail to engage with the concerns that led earlier courts to reject equitable

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[7] *See infra*, Part I.D.1.

[8] Chafee, *supra* note 6; Zechariah Chafee Jr., *Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250 (1956); Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449 (2004).

[9] *See* Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885 (2007); Christina Mulligan, *Personal Property Servitudes on the Internet of Things*, 50 GA. L. REV. 1121 (2015); Christina Mulligan, *Licenses and the Property/Contract Interface*, 93 IND. L.J. 1073 (2018).

[10] Van Houweling, *supra* note 9.

[11] *See generally* MICHAEL A. HELLER & JAMES SALZMAN, MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES (2022) (exploring the intuitive contours of private property).

[12] *See infra*, Part III.C.

[13] *See infra*, Part II.B.2.

servitudes on chattels: notably, information costs, competition, and waste. And if equitable servitudes on personal property are permitted, we should expect them quickly to proliferate. For firms, the cost of including these servitudes on their goods is so low that they will likely become as common as contracts of adhesion. Were that to happen, people today could lock up future generations' personal property just as they have done for real property.[14] Doing so would not only impose the preferences of today on tomorrow, but it could also recreate feudal patterns of ownership, as control over use of goods concentrates in the hands of the few.[15]

Courts should reject equitable servitudes on personal property. They should strictly enforce property doctrine forbidding those servitudes and refuse to allow firms to use permissive contract doctrines to recreate them. Even if courts are unwilling to reject these servitudes entirely, a second-best solution would be to subject them rules similar to those that apply to servitudes on real property. These rules are substantively more restrictive than the rules that normally apply to contracts.

Understanding the way in which contract law is threatening to overtake settled property doctrine has broader lessons for private law more generally. Elevating contract over all other private law doctrines disrupts the broader equilibrium of the private law, in which a complementary suite of doctrines developed to promote liberty while curtailing opportunism.[16] While the pathologies that have flourished internally in modern contract doctrine have been well covered,[17] with a few exceptions,[18] the outsized role of contract

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[14] Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 774 (2002).

[15] JOSHUA A. T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 19–20 (2017); Van Houweling, *supra* note 9, at 901–902.

[16] This Article primarily focuses on the relationship between firms and consumers with respect to consumer goods. However, much of this analysis applies in business-to-business relationships as well. It is especially applicable to small businesses who have little comparative bargaining power against some of their essential suppliers. Moreover, the line between individuals and small businesses is blurry—especially given the rise of the so-called gig economy. Much of this analysis also applies among individuals, but they may rarely have the desire or wherewithal to attempt to encumber their property with equitable servitudes, except in the case of heirlooms. For example, imagine a donor stipulating that the diamond in a family engagement ring may never be re-set or used to commemorate a same-sex relationship.

[17] *See, e.g.*, Friedrich Kessler, *Contracts of Adhesion—Some Thoughts about Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) ("the law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege"); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1220–43 (1983) (explaining how contracts of adhesion confer advantages on the drafting parties in light of imperfect competition); *see generally* MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW (2014) (explaining how contract doctrine subordinates all other values to freedom of contract).

[18] Ryan Martins, Shannon Price & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265 (2020); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L. J. 3052 (2015); RADIN, *supra* note 17; *see also* Eyal Zamir & Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283 (2020).

itself has received less attention. Equitable servitudes on chattels are one window into this growing imbalance. Particularly, it is a window that reveals what is lost when freedom to contract subordinates other private law policy concerns. The future of this equilibrium in the private law has significant implications for the future of autonomy, dignity, creativity, and innovation.

This Article proceeds in four parts. Part I lays the doctrinal foundation, beginning with equitable servitudes on real property and early questions about whether, and if so, how, equitable servitudes might work on chattels. Next, it traces how intellectual property law created a second pathway for de facto equitable servitudes on chattels, thereby arguably changing how courts view the property/contract interface. Part I concludes by returning to the core questions about equitable servitudes on chattels, providing examples of their role in the modern property landscape.

Part II explores how an imperial contract doctrine is distorting the structure of the private law. This Part begins by arguing that property doctrine, with its substantive mandatory rules, often acts as a system of checks and balances on contract's excesses, particularly with respect to consumers. It then explains how three developments in contract practice—the decline of formation formalities, unilateral modification rights, and arbitration—have tended to recast a disproportionate share of private law disputes as contracts disputes. This Part closes with descriptive analysis of how lawyers framed a recent series of cases involving terms of service printed on roofing shingles. Rather than contest the propriety of what appears to be a servitude on a chattel, the plaintiffs engaged with the terms of service in contractual terms.

Having set up the equitable servitudes doctrine and its implications on the private law system, Part III turns to the doctrine's implications for society more broadly. This Part builds on earlier analysis of the economic implications of equitable servitudes on chattels, focusing on the consequences of equitable servitudes for the environment, autonomy, the self, and the legitimacy of the legal system as a whole. This Part makes the case that enforcing equitable servitudes on chattels would reduce welfare on many fronts.

With these implications in mind, Part IV loosely sketches out a doctrinal framework for equitable servitudes on chattels if they must exist. Specifically, courts should import the rigorous analyses that they perform on equitable servitudes on real property before enforcing any equitable servitude on chattel. In addition, to promote the efficient reuse of goods and materials, some kinds of entities must be able to sell goods free and clear of any servitudes. This framework, however, is a second-best approach. The first-best option would be for courts to recommit to not enforcing equitable servitudes on chattels, even when they are styled as contracts.

## I. THE PUZZLE OF EQUITABLE SERVITUDES ON CHATTELS

The story of equitable servitudes on chattel is closely tied up with servitudes in real property law. As courts became less skeptical of servitudes running with the land, scholars,[19] and to a lesser extent, courts,[20] questioned whether the law should recognize similar servitude on chattels. The history of servitudes on real property is itself a fraught topic and necessarily beyond the scope of this paper.[21] This section will therefore recount only a compressed history of equitable servitudes to illuminate their most fundamental features. For our purposes, the most fundamental feature is that the obligation attaches to the asset, thereby binding almost anyone owning or in possession of that asset. Before reaching the doctrinal puzzle of equitable servitudes on chattels, however, it is helpful to show exactly what they are.

### *A. Basic Servitudes on Chattels*

Since so few courts have ever explicitly recognized equitable servitudes on chattels, it is unsurprising that there is no overarching authority to cite for a definition.[22] Instead, we'll proceed by analogy to real property since servitudes on chattels closely resemble servitudes on land. Where the Restatement defines a servitude on land as "a legal device that creates a right or an obligation that runs with the land or an interest in land,"[23] a servitude on a chattel can be defined as a legal device that creates a right or an obligation that runs with the chattel or an interest in the chattel. The most essential feature of a servitude is that it automatically binds successors in interests. That is, if you buy a piece of property with a servitude attached to it, you're bound by the servitude—even if you never agreed to it. It is this feature that distinguishes servitudes from mere contracts.[24]

Because servitudes bind successors in interests, the beneficiary of the servitude can enforce the servitude against downstream interest holders. Thus, servitudes dictating the aesthetic character of a neighborhood or limiting permissible uses of property remain enforceable even as the land changes hands. In this way, the servitude puts the holder of the encumbered property and the beneficiary of the servitude into a long-term relationship

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[19] Chafee, *supra* note 6; Robinson, *supra* note 8.

[20] *See* Chafee, *supra* note 8, at 1254 (explaining that beyond price maintenance terms, courts only sporadically enforce equitable servitudes on chattels as such).

[21] For more fulsome histories of servitudes on real property, see Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1183–90 (1981).

[22] Leading authorities on personal property do not contemplate that personal property may be encumbered with servitudes.

[23] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.1.

[24] Molly Schaffer van Houweling, *Exhaustion in Personal Property Servitudes* in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY EXHAUSTION AND PARALLEL IMPORTS 44, 46 (Irene Calboli & Edward Lee, eds, 2016); Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 851–52 (2001). The extent to which contract doctrine does and should influence servitude doctrine is a separate question taken up in Part II, below.

with each other. This ongoing relationship stands in contrast to the finality that accompanies sales without servitudes. Framed positively, this ongoing relationship may stabilize management of an asset over time.[25] Framed negatively, this ongoing relationship allows the past to control the present[26] and tends to recreate feudal patterns of ownership.[27]

A simple servitude on real property may look something like this: Owners subdivides Blackacre into two lots, Northacre and Southacre. They continue living on Northacre and sell Southacre to A subject to the covenant that the owner of Southacre permit Owners to hunt on Southacre. Assuming that the covenant is properly documented and recorded, if A sells Southacre to B, B must continue to allow Owners to hunt on Southacre. If B does block Owners' hunting access, Owners can sue B for violation of the servitude.

Now consider a second example: Owners propagate heirloom rosebushes and sell some to Florist subject to the restriction that Florist cannot sell roses from their bush in the state in which Owners live.[28] The enforceability of this agreement turns on questions of contract law and only implicate the two parties to the transaction, who earlier generations of lawyers would have described as being in privity with each other. Assuming the appropriate formalities are met, there is a contract between Owners and Florist. That contract will be enforceable unless it violates public policy, but those circumstances are vanishingly narrow. Even jurisdictions that might hesitate to enforce restraints on alienation generally enforce restraints protecting distribution territories against the parties that agree to the territorial boundaries.[29]

The distinction between contracts and servitudes appears if, despite the agreement, Florist sells roses to Wedding Planner, who resides in the same state as Owners and knows about the agreement between Florist and Owners. Although Owners can sue Florist for breach of contract, what they really want may be a remedy against Wedding Planner. Contract law would offer no such remedy because there is no contract between Owners and Wedding Planner. Tort law, specifically interference with contract, may offer a remedy, if Owners show that Wedding Planner knew about the contract and intentionally procured its breach, resulting in damage to Owners. [30] Proceeding in tort may

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[25] Carol Rose, *Servitudes*, *in* RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 296, 297 (Kenneth Ayotte & Henry Smith, eds., 2011).

[26] Van Houweling, *supra* note 9, at 900.

[27] FAIRFIELD, *supra* note 15, at 19–20; Van Houweling, *supra* note 9, at 901–902

[28] The heirloom designation here is essential since there are patented roses that would add an unwanted layer of federal intellectual property law to this problem. *See* David Austin Roses v. Jackson & Perkins Wholesale, No. 09-3027-PA, 2009 U.S. Dist. LEXIS 148261, at *5 (D. Or. Nov. 19, 2009).

[29] Although this kind of agreement logically has implications for competition, antitrust law has not consistently prohibited them for roughly half a century. *See* Cont'l T.V. v. GTE Sylvania, 433 U.S. 36, 59 (1977).

[30] *See* Sysdyne Corp. v. Rousslang, 860 N.W.2d 347, 351 (Minn. 2015) (explaining the elements of a tortious interference claim).

not accomplish Owners' goals, since the applicable remedy is likely to be damages.[31] Another option is that Owners could try to sue Florist under a theory of unjust enrichment,[32] but success there is far from certain.[33] Therefore, having the option to sue Florist on the basis of equitable servitude would allow Owners to seek an injunction against Wedding Planner, and perhaps even against Wedding Planner's clients if they also have notice of the agreement between Owners and Florist. Without a theory of equitable servitudes on chattels, however, an injunction may be difficult to get.[34] Furthermore, brides in Owners' state may end up avoiding roses altogether if they must worry about Owners plucking the roses from their flower arrangements from their big day.

The ability of Owners' restrictions to follow the roses even after they change hands from Florist to Wedding Planner is the quintessential feature of equitable servitudes in action. The restriction—no sales in Owners' home state—follows the object no matter how many times it changes hands. All current and future owners of the roses are in a long-term relationship with Owners. The risk that this kind of restriction will not only upset expectations, but also increase information costs on all future purchasers, is why courts have long viewed equitable servitudes with suspicion.

### *B. Equitable Servitudes before Software*

Before the mid-nineteenth century, restrictions that ran with property were enforceable primarily when they satisfied the arduous requirements of real covenants at law. But in its 1848 decision in *Tulk v. Moxhay*, the English Court of Chancery created a path for covenants to run with the land through equity,[35] thereby not only bypassing the law's strict rules for running with the land, but also dramatically expanding the scope of enforceable covenants on real property.[36] Despite embracing equitable servitudes on real

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[31] Developers Three v. Nationwide Ins. Co., 582 N.E.2d 1130, 1133 (Ohio App. 1990).

[32] *See* Sebastian Int'l, Inc. v. Russolillo, 186 F. Supp. 2d 1055, 1074 (C.D. Cal. 2000) (allowing a claim for unjust enrichment to proceed alongside a claim for tortious interference); *see also* First Nationwide Savings v. Perry, 15 Cal.Rptr.2d 173 (1992) (explaining that unjust enrichment requires plaintiffs to show that the defendant received unjust benefit their expense).

[33] *See* Developers Three v. Nationwide Ins. Co., 582 N.E.2d 1130, 1133 (Ohio App. 1990) (cataloging the conflicting precedent on the measure of damages available for claims against a third party for inducing breach of contract); *see also* Dennis M. Sullivan, *Plaintiff's Measure of Recovery for Tortious Inducement of Breach of Contract—Profits or Losses?*, 19 HASTINGS L.J. 1119, 1121 (1968) (comparing remedies in unjust enrichment to remedies for tortious interference).

[34] Chafee noted the close relationship between claims for tortious interference and equitable servitudes on chattels when he kicked off the equitable servitudes conversation in 1927. *See* Chafee, *supra* note 6, at 969–77.

[35] 41 E.R. 1143 (1848).

[36] *See generally* George L. Clark, *Equitable Servitudes*, 16 MICH. L. REV. 90 (1917) (tracing the influence of *Tulk* throughout servitudes doctrine).

property, courts remained suspicious of equitable servitudes on chattels.[37] The Supreme Court was initially somewhat more permissive of restrictions enforcing the benefits of patents,[38] but quickly imposed limitations.[39] While later innovations in intellectual property law have since endorsed servitude-like licensing regimes,[40] most twentieth-century courts hesitated to recognize equitable servitudes on chattels except in service to intellectual property rights.[41]

For example, in *John D. Park & Sons v. Hartman*, a discount drug reseller purchased branded pharmaceuticals from a druggist who had contracted with the manufacturer to only sell them subject to certain restrictions, including price controls. The reseller knew about the contract between the manufacturer and the druggist but, critically, never became a party to the contract. The manufacturer sued the reseller in an attempt to enforce the contract, but the Sixth Circuit was wholly unpersuaded by the manufacturer's arguments. The court stated than "a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice."[42] The court even acknowledged that the rule regarding chattels was more restrictive than that for real property, explaining "[a] covenant which may be valid and run with land will not run with or attach itself to a mere chattel."[43] The court then explicitly distinguished cases involving patents as presenting an exception to the general prohibition against servitudes on chattels, rather than presenting an evolution in the law of personal property.[44]

Beyond its blanket denunciation of servitudes on chattels as a matter of property law, the *Hartman* court presciently explained the relationship between this rule, agency doctrine, and public policy. One technique for binding subsequent purchasers of goods to manufacturers' contracts is to assert an agency relationship between the initial purchaser

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[37] Note, *Equitable Servitudes in Chattels*, 32 HARV. L. REV. 278, 278 (1919) (explaining that courts have "sometimes argued against allowing equitable servitudes in chattels at all.").

[38] Heny v. A.B. Dick Co, 224 U.S. 1, 26–27 (1912).

[39] Motion Picture Patents Co. v. Universal Film Mfg. Co., 243 U.S. 502, 518 (1917) (purporting to overrule *Dick*).

[40] *See infra,* Part I.B.

[41] *See* FAIRFIELD, *supra* note 15, at 26–30 (criticizing how courts have used copyright to attach licenses to things)

[42] 153 F. 24, 39 (6th Cir. 1907).

[43] *Id.*

[44] *Id.* at 39-40; *see also id.* at 24 (explaining that the court views the case as an effort to expand doctrines available in patent in copyright cases to personal property law generally).

and the reseller.[45] The *Hartman* court refused to budge from the economics of the transaction, saying "[t]o call such a purchaser an 'agent' is to juggle with words."[46] The court then explained that "'Sale' is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. The case must therefore turn upon the legality of the restrictions imposed by the complainant in sales."[47]

The most suspect class of restrictions are restraints on alienation.[48] At common law, direct restraints on alienation are invalid if they are unreasonable.[49] Direct restraints on alienation is a broad category, encompassing "absolute prohibitions on some or all types of transfers, including leases, prohibitions on transfer without the consent of another, prohibitions on transfer to particular persons, requirements of transfer to particular persons, options to purchase land, and rights of first refusal."[50] Many of the common terms in a software license would fall into this category.

According to the Third Restatement, "[r]easonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."[51] This test is stricter than the test for determining the validity of indirect restraints on alienation—servitudes that reduce the value of property—because clearly they "interfere with the process of conveying land and have long been subjected to common-law controls, which often have been more stringent than a reasonableness test."[52] Courts have arguably become more accepting of restrictions over time. For example, the Third Restatement's reasonableness test is more permissive than the Second Restatement,[53] which had explained that "[a]ll restraints on alienation run counter to the policy of freedom of alienation, so that to be upheld they must in some way be justified."[54]

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[45] *See infra,* Part I.D.1 (explaining how the Eleventh Circuit used agency to bind downstream purchasers but asserting that the initial purchaser was the agent of the downstream purchaser and therefor capable of binding them in contract).

[46] 153 F. 24 at 38.

[47] *Id*.

[48] A. S. S., Jr., *Partial Restraints on Alienation*, 59 U. PA. L. REV. & AM. L. REGISTER 503, 503 (1911) ("One of the fundamental principles in the law of real property is that an estate in fee cannot be created subject to a provision that it shall not be transferred by the owner.").

[49] RESTATEMENT (THIRD) PROPERTY: SERVITUDES §3.4.

[50] *Id*. at §3.4 cmt. B.

[51] *Id.* at §3.4.

[52] *Id.*

[53] Indeed, in 1959, the reasonableness test was the minority rule and only one state had definitively adopted it although others appeared to be headed in that direction. Herbert A. Bernhard, *The Minority Doctrine concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1176–77 (1959).

[54] RESTATEMENT (SECOND) OF PROPERTY: DONATIVE TRANSFERS §4.1 cmt. a.

The reasonableness test was meant to recognize that some restraints served valuable policy goals, such as conservation or maintaining retirement communities for their intended inhabitants.[55] However, these potential benefits needed to be considered in the context of potential costs. The Third Restatement recognized potential harms such as market impediments, limited mobility, frustrated expectations, and "demoralization costs associated with subordinating the desires of current landowners to the desires of past owners."[56] To balance the benefits against the harms, the Third Restatement directs courts to consider the "nature, extent, and duration of the restraint[,]" with long-term restraints on interests in fee simple being more suspicious than shorter-term restraints, or those on lesser estates such as leaseholds.[57]

The Second Restatement did not limit its analysis of the validity of servitudes to real property.[58] Consider the following example from the comments:

> O, owner of a diamond ring, makes an otherwise effective deed of gift thereof to her son S of her entire interest in the ring "but S is hereby prohibited from making any transfer of the ring until he is engaged to be married, this restraint being imposed on S so that the ring, a family heirloom, will be available to S to use as an engagement ring. The disabling restraint, though removable by S at any time he becomes engaged, is invalid. S is free to transfer the ring and any interest therein at any time.[59]

In this case, it is very likely that the grantor would not have transferred the ring without the limitation. Afterall, O could have held the ring until S was ready to become engaged. Nevertheless, any such agreement between the parties is unenforceable in court. O must look to social norms and sanctions for deterrence and, if S does violate the agreement, a remedy. To be sure, social sanctions are not the same as legal sanctions, but that is not an invitation to disregard their effectiveness.[60]

This brings us to the question of why the common law developed such a strong policy against servitudes in general and against restraints on alienation in particular. Molly Van Houweling organizes the main critiques of servitudes into three main categories: notice and information costs, the problem of the future, and externalities.[61] These three categories apply both to servitudes on real property and servitudes on chattels, albeit somewhat differently. Part III will discuss these critiques in greater detail.

For now, the main scholarly critique of courts' unwillingness to recognize servitudes on chattels is that they interfere with freedom of contract, and that the virtues of this

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[55] RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §3.4 cmt. c.

[56] *Id.*

[57] *Id*.

[58] The Third *Restatement* neither limits servitudes to real property nor contemplates that they may apply to chattels. *See* Van Houweling, *supra* note 9, at 888.

[59] RESTATEMENT (SECOND) PROPERTY: DONATIVE TRANSFERS §4.1 illustration 5.

[60] Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine Print Fraud*, 72 STAN L. REV. 503, 6 (2019).

[61] Van Houweling, *supra* note 9.

freedom outweigh the potential problems highlighted above.[62] Glen Robinson has further argued that the traditional hostility to equitable servitudes on chattels makes little sense in a world in which copyright law functionally permits them.[63]

### *C. The Software Wrinkle*

Intellectual property in general, and copyright in particular, has long had the potential to create servitude-like restrictions on goods by arranging legal rights.[64] This is because the only way for people to lawfully use material covered by intellectual property rights is to license their desired use. These licenses opened the door for more detailed contractual relationships that extend to terms well beyond intellectual property rights.[65]

Since licenses are fundamentally contracts, the range of terms they may contain is broad. In some circuits, courts use "misuse or abuse of copyright" to limit the breath of software licenses, particularly when the added terms create antitrust concerns.[66] Two circuits have broadened this "misuse or abuse" defense to apply when copyright owners attempt "to use an infringement suit to obtain property protection . . . that copyright law clearly does not confer, hoping to force a settlement."[67] Still, intellectual property licenses are broad and flexible enough that they facilitate price discrimination and other trade restrictions that had long remained out of reach under equitable servitudes doctrine alone.[68]

The restrictive power of intellectual property licenses exploded when software became a consumer good. The Ninth Circuit unwittingly thrust the debate about equitable servitudes on chattels into the information age, arguably changing the shape of modern property ownership unless and until Congress acts to undo its work. In *MAI Systems Corp. v. Peak Computer, Inc.,* the Ninth Circuit held that merely running software could be copyright infringement because running software creates a temporary copy of that

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[62] Robinson, *supra* note 8 at 1485; Chafee, *supra* note 6; Note, *supra* note 37, at 947.

[63] Robinson, *supra* note 8, at 1452–53.

[64] *See gemerally,* Nancy S. Kim, *Revisiting the License v. Sale Conundrum*, 54 LOY. L. A. L. REV. 99 (2020) (studying firms attempts to restrict use of fully paid products).

[65] *See* Mulligan, *supra* note 9, at 1109 (describing how courts have struggled to determine the scope of software licenses and whether any violation of the license is copyright infringement notwithstanding the subject of the violated term).

[66] See Video Pipeline, Inc. v. Buena Vista Home Entm't, 342 F.3d 191, 206 (3d Cir. 2003)(recognizing abuse of copyright as a defense); Practice Mgmt. Info. Corp. v. Am. Med. Ass'n, 121 F.3d 516, 521 (9th Cir. 1997)(same); Alcatel USA, Inc. v. DGI Techs., Inc., 166 F.3d 772, 793 (5th Cir. 1999)(same); Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979-80 (4th Cir. 1990)(same).

[67] Assessment Technologies of WI. LLC v. WIREdata, Inc., 350 F.3d 640, 647 (7th Cir. 2003). *See also* Lasercomb America, Inc. v. Reynolds, 911 F.2d 970, 979-80 (4th Cir. 1990)(recognizing a broader misuse or abuse of copyright defense when "the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright.").

[68] Herbert Hovenkamp, *Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective*, 66 N.Y.U. ANN. SURV. AM. L. 487, 537–38 (2010); Mulligan, *supra* note 9 at n. 15.

software in a computer's Random Access Memory (RAM).[69] The result of *MAI* has been that anything containing software comes with a license, even when the software is incidental to the thing.[70] That license transforms what it means to own the thing and in some cases, purporting to make it impossible to "own" a thing altogether.[71] Where previously courts had been highly skeptical of efforts to glue licenses onto things, software provided a federal statutory hook for doing just that.[72]

The scholarly reaction to *MAI* has been uniformly negative. Aaron Perzanowski divides the criticism into two forms: arguments that the decision is inconsistent with the Copyright Act and arguments that it is bad policy.[73] The doctrinal criticisms of the case are inapplicable to this Article, but much of the policy critique is directly applicable to the broader problem of servitudes on chattels. RAM copy doctrine gives digital creators rights that other creators lack, notably by eviscerating the first sale doctrine, [74] without which anyone—even subsequent purchasers without notice—who wants to use an object is subject to the terms of the software license that accompanies the object. Those terms may speak strictly to the rights protected by the Copyright Act, but they are often much broader.[75]

The effect is what commentators call software exceptionalism: publishers cannot restrict the right to resell tangible books and board games, but they can restrict the right to resell eBooks and video games.[76] Under *MAI*, once software touches a thing, ownership of that thing may be impossible if the creator purports to license it instead of selling it, notwithstanding the economic realities of the transaction.[77] As Aaron Perzanowski and

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[69] 991 F.2d 511, 518 (9th Cir. 1993).

[70] Fifteen years later, in *Cartoon Network v. CSC Holdings*, the Second Circuit held that some RAM "copies" were too temporary to constitute copyright infringement. 536 F.3d 121, 130 (2d Cir. 2008). *Cartoon Network* has not changed firms' incentives to include an end user license agreement with most software, especially since copyright offers a robust sanctions regime that may disincentivize most users from testing the limits these licenses. Mulligan, *supra* note 9, at 1078 & 1096 *See also*, Aaron Perzanowski, *Fixing Ram Copies*, 104 NW. U. L. REV. 1067, 1071–75 (2010) (explaining *MAI,* its progeny, and their impact).

[71] Christina Mulligan poignantly observed that the rise of software servitudes on chattels has also given rise to "the locution 'user' rather than 'owner' of an article." Mulligan, *supra* note 9, at 1124.

[72] *Id.* at 1123; Van Houweling, *supra* note 9, at 885–86.

[73] Perzanowski, *supra* note 70, at 1075.

[74] *Id.* at 1079.

[75] *See* Mulligan, *supra* note 9, at 1109.

[76] *Id.* at 1100; Perzanowski, *supra* note 70, at 1079.

[77] 991 F.2d 511, 518 n.5 (9th Cir. 1993) ("Since MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under §117"); *see also* Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1899–1900 (2010) ("A cursory, unsupported footnote, consisting of a single declarative sentence, in the Ninth Circuit's *MAI Systems Corp. v. Peak Computer* opinion has done more damage to the appropriate development of the law with respect to transfer of title of copies than perhaps anything else.").

Chris Hoofnagle discovered, these license-based restrictions on ownership do not comport with customer expectations.[78] Nevertheless, courts have sanctioned firms' use of software licenses to control consumers' use of objects, only occasionally using doctrines like patent exhaustion to set limits.[79] The presence of some restrictive software licenses in the market of tangible things increases information costs on all would-be purchasers who face the Copyright Act's stiff sanctions if their use violates the original license under which the object was sold.[80] At the very least, these licenses can trap consumers into subscriptions for products that they could previously own, resulting in higher prices for consumers over time.

Beyond increased information costs, Christina Mulligan identified a more troubling consequence of software licenses on things: waste.[81] Using the example of appliances that run software, she explains how the object itself may be resaleable and repurposeable under the first sale doctrine, but the software that runs the appliance may not be.[82] This creates the potential for a twofold waste: first, people who could benefit from secondhand goods may not be able to access them as the goods go un- or underused by their original "owner."[83] Second, there is the physical waste of resources if the initial purchaser of a thing—even a large thing like a refrigerator—can only dispose of the item when they no longer need it.[84] "[t]he law works to artificially limit the good's value."[85]

One example of this is HP's Instant Ink subscription program, which charges consumers $5.99 per month for ink cartridges to print 100 pages; even when the ink cartridge can print more than that, the additional capacity is locked by HP-controlled software.[86] That additional ink is landfill-bound, as are any unused cartridges that a consumer may

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[78] Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 343–345 (2017); Jason Daley, *Why New Restrictions on Library E-Book Access Are Generating Controversy*, SMITHSONIAN MAGAZINE, https://www.smithsonianmag.com/smart-news/librarians-are-arms-about-new-ebook-restrictions-1-180973459/ (explaining how publishers' restrictions on library purchases of e-books lead to longer wait times for patrons).

[79] *See generally* Kim, *supra* note 64; Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103 (2008).

[80] Mulligan, *supra* note 9, at 1095.

[81] *Id.* at 1097.

[82] *Id.*; *see also* Elizabeth I. Winston, *Why Sell What You Can License? Contracting around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93, 96–97 (2006) (giving early examples of software licenses that appeared to restrict the resale of the chattel embodying that software).

[83] Mulligan, *supra* note 9, at 1097–98.

[84] *Id.* at 1098.

[85] *Id.*

[86] Charlie Warzel, *My Printer Is Extorting Me*, THE ATLANTIC, February 1, 2023, https://www.theatlantic.com/technology/archive/2023/02/home-printer-digital-rights-management-hp-instant-ink-subscription/672913/.

have after cancelling their subscription.[87] In an age of climate disaster, it is morally abhorrent that the law may bind purchasers to landfilling useable goods and their recyclable materials.

To the extent that these software licenses purport to bind all users of an item, they act as equitable servitudes on chattels. The root of the problem with these servitudes lies not in the private law of contracts and property, but in the federal statutory law. Unless the Supreme Court intervenes to reshape decades of precedent, the now well-documented problems that these servitudes create can only be fixed by Congress. Because these servitudes are statutory creatures, this Article will set them aside and focus instead on those servitudes that are creeping onto chattels without a software hook.

### *D. Modern Servitudes Beyond Software*

Beyond intellectual property, no court has yet overtly endorsed equitable servitudes on chattels as enforceable rights, but the doctrine is heading in that direction. This section begins by looking at the Tamko Shingles Litigation to show the influence of software licenses and adhesion contracts on facts that could otherwise suggest an equitable servitude. This part then offers a handful of hypotheticals to highlight the contours of the problems posed by equitable servitudes on chattels.[88]

#### *1. The Tamko Shingles Litigation*

The one factor that lends legitimacy to adhesion contracts is that consumers have notice that they are being bound. But even this norm is eroding. In the case of shrink-wrap agreements, the person who opens the shrink-wrap has notice of the contract, but what about a purchaser on the secondary market? There things become complicated.

Consider Tamko Shingles, a popular roofing product that has underperformed for many homeowners, leading to litigation.[89] Tamko packs its shingles in a wrapper with a contract and claims that by using and retaining the shingles, the homeowners and future purchasers of the home are subject to the contract.[90] On its face, this contract attempts to create an equitable servitude on the shingles, and likely also the home itself, in that it

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[87] *Id.*

[88] Given the pervasiveness of arbitration clauses and the barriers that consumers face in bringing or defending civil suits through the issuance of an opinion, it may be a long time before courts canconfront the question of equitable servitudes on chattels directly.

[89] Karin Price Mueller, *When a 30-Year Roof Lasts Only 7.5 Years*, NJ.COM, March 15, 2018, https://www.nj.com/business/2018/03/when_a_30-year_roof_only_lasts_75_years.html; Williams v. Tamko Bldg. Prods., 451 P.3d 146, 150 (Okla. 2019); Dye v. Tamko Bldg. Prods., 908 F.3d 675, 679 (11th Cir. 2018); Am. Family Mut. Ins. Co. v. Tamko Bldg. Prods., Inc., 178 F. Supp.3d 1121, 1124-5 (D. Colo. 2016); Hoekman v. Tamko Bldg. Prods., No. 2:14-cv-01581-TLN-KJN, 2015 U.S. Dist. LEXIS 113414, 2015 WL 9591471 at *3-4 (E.D. Cal. Aug. 26, 2015); Hobbs v. Tamko Bldg. Prods., 479 S.W.3d 147, 151 (Mo. Ct. App. 2015); Krusch v. TAMKO Bldg. Prods., 34 F. Supp.3d 584, 589 (M.D.N.C. 2014).

[90] TAMKO FIBERGLASS/ASPHALT SHINGLE LIMITED WARRANTY, *supra* note 3.

purports to bind downstream owners of the shingles.[91] The terms purport to apply to the "the owner of the building at the time the Shingles are installed on that building," and, if that party is a builder, then "the first person to occupy the residence after its construction. . . even though the Shingles were already installed," as well as, finally "someone who purchases" from the first occupant of the home within five years of installation.[92] After the contractor opens the packaging to install the shingles, there is no step that any downstream owner must take to assent to the terms of the contract. The terms make it appear that keeping the roof on the house is consent to the contract.

The substance of the contract is unremarkable for consumer contract. It attempts to waive implied warranties, limit damages, and shorten the time to bring an action. It has a binding arbitration clause that has a narrow carve out for individual actions in small claims court which, given the cost of a new roof, may be of limited use. The contract shifts litigation costs to the English rule, which requires the loser to pay the winners' costs and reasonable attorneys' fees. Although styled as a warranty, this agreement is taking more rights from consumers than it is giving. If consumers get any value from the agreement, it can only lie in the price of the shingles. Unsurprisingly, in court cases it is almost always Tamko, rather than the homeowner, who is seeking to enforce the warranty agreement.

Because of the arbitration clause, lawsuits between dissatisfied customers and Tamko end up being decided on motions to compel arbitration. There, Tamko has used expansive theories of agency to attempt to enforce the contract against downstream purchasers. The simplest fact patterns are those in which a homeowner hires a roofer who buys and installs the shingles. Because the roofers open the shrink-wrap and discard the agreement printed on the plastic, the homeowners usually argues that they have no knowledge of the agreement and therefore cannot be bound to it.[93]

Courts have split on the question of whether these facts bind the homeowner. The Eleventh Circuit, looking to Florida contract and agency law, held that "(1) that the manufacturer's packaging here sufficed to convey a valid offer of contract terms, (2) that unwrapping and retaining the shingles was an objectively reasonable means of accepting that offer, and (3) that the homeowners' grant of express authority to their roofers to buy and install shingles necessarily included the act of accepting purchase terms on the homeowners' behalf." [94] The court continued: "Moreover, and in any event, that big-box items come with purchase terms and conditions should hardly come as a surprise to modern consumers. Post-purchase, acceptance-by-retention warranties are ubiquitous today—think furniture, home appliances, sporting goods, etc. It's not only objectively reasonable to assume that such items come with terms and conditions, but also eminently reasonable to assume that by opening and retaining those items a consumer necessarily accepts the

[91] *Id.*

[92] *Id.*

[93] Hobbs v. Tamko Bldg. Prods., 479 S.W.3d 147, 151 (Mo. Ct. App. 2015).

[94] Dye, 908 F.3d at 678.

accompanying terms and conditions."[95] Indeed, the court even said, "this expectation—and with it, fair notice—has been building for some time."[96]

Faced with similar facts, the Oklahoma Supreme Court reached the opposite conclusion.[97] Where the Eleventh Circuit had emphasized that the purported contract was clearly printed on the singles' packaging, making the case even easier than software shrink-wrap cases where the consumer had to open the box to see the full terms,[98] the Oklahoma court implicitly looked at the "industry custom"[99] and found that it would be unusual to retain industrial packaging for a consumer.[100] Turning to agency law, the Oklahoma court held that "the scope of the contractor's authority did not include contracting away the Homeowners' constitutional right to a jury trial."[101] Tamko argued that in seeking to enforce a warranty, the homeowners were attempting to benefit from the very contract that they disclaimed.[102] But, in a paragraph that makes this law professor's heart sing, the Oklahoma Supreme Court rejected this argument, explaining that the plaintiffs were "not seeking to enforce their rights under the limited warranty contract. Their claims arise in tort law not contract law."[103] In other words, the private law remains broadly robust even when one party alleges that there is a contract.

Although it may seem remote to property doctrine, these agency questions are important because they facilitate the attachment of terms and conditions to chattels.[104] As the court in *John D. Park & Sons v. Hartman* warned, if any party up the commercial chain can be an agent that binds the end user, these terms and conditions begin to look much more like servitudes that run with the chattel.[105] In the case of Tamko Shingles, the shingles are passing through construction suppliers, roofing firms, and sometimes even

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[95] *Id.* at 682–83.

[96] *Id.*

[97] *Williams*, 451 P.3d at 150.

[98] *Dye*, 908 F.3d at 683.

[99] *Williams*, 451 P.3d at 152.

[100] *Id.* at 151. The Missouri court of appeals made a similar finding in *Hobbs v. Tamko Building Products*, even distinguishing the shrink-wrap on the shingles from shrink-wrap on a computer on the grounds that "the packaging for shingles is not an item typically kept by a consumer after the shingles are unbundled and used." 479 S.W.3d 147, 151 (Mo. Ct. App. 2015).

[101] *Williams*, 451 P.3d at 152.

[102] *Id.* at 153.

[103] *Id.*

[104] *See* Sugartown Pediatrics, LLC v. Merck Sharp & Dohme Corp. (In re Rotavirus Vaccines Antitrust Litig.), 30 F.4th 148 (U.S. 3d Cir. 2022) (holding that pediatricians who never signed and were unaware of any arbitration agreement with a vaccine manufacturer were nevertheless bound to arbitrate their competition claims against the company because they belonged to a Physician Buying Group that had signed an arbitration clause with the manufacturer, even when the physicians purchased vaccines directly from the manufacturer).

[105] 153 F. 24, 38 (6th Cir. 1907).

developers before reaching a homeowner.[106] Agency may yet prove a fruitful path for firms to impose servitudes, since doctrines like ratification could be used to impose the consent of upstream purchasers on downstream purchasers. While the law is not there yet, the lack of analysis in the Tamko cases that turn on agency suggests that such innovations may not be far off. Although they rest at the boundary of the scope of modern agency doctrine, Tamko's agency arguments in these simpler cases are not wholly out of step with the foundations of agency law.

That is not true about of all the cases in which Tamko has attempted to use agency to bind downstream owners of its shingles. For example, in a case that never reached a judicial opinion, Tamko sought to compel arbitration based on the agreement shrink-wrapped to the shingles against homeowners who had purchased a home out of foreclosure. Despite the foreclosure sale, they tried to argue that the roofer who opened the packaging was the agent of the homeowner.[107]

In some cases, courts appear to skip over the privity problems altogether when enforcing the contract. For example, in *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co. et al*, the South Carolina Court of Appeals acknowledged that the shingles were installed on an upscale condominium building before the building was transferred to the condominium association and unit owners.[108] The court never grappled with the question of whether there was any contract between the plaintiff and the defendant. The United States District Court for the Western District of Kentucky did something similar in *Overlook Terraces, Ltd. v. Tamko Bldg. Prods* in a circular passage where it rejected the plaintiff's argument that there was no contract, explaining that "Overlook is the owner of the apartment buildings upon which the allegedly defective shingles were placed. The limited warranty agreement applies between Tamko and the 'owner,' which the agreement defines to be 'the owner of the building at the time the shingles were installed.' Because Overlook acknowledges that it is the owner of the building upon which the shingles were installed in its complaint, the express provisions of the limited warranty agreement are binding upon Overlook as owner." [109] The idea that a party becomes bound by a contract merely because they are named in a contract is bananas—it collapses contract formation into contract drafting, giving anybody with a pen

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[106] American Family Insurance Co. v. TAMKO Building Products, Inc. 178 F. Supp. 3d 1121, 1126 (D. Colo. 2016)(finding the builder to be the agent of the homeowner and the roofer to be the subagent); *Melnick v. TAMKO Bldg. Prods. LLC*, No. 19-2630-JAR-KGG, 2022 U.S. Dist. LEXIS 170082, at *18 (D. Kan. Sep. 20, 2022)(finding a roofer to be the subagent of a contractor who it found to be the agent of a condominium association that owned a roof).

[107] Nelson v. Tamko Bldg. Prods., No. 15-1090-MLB, 2015 U.S. Dist. LEXIS 75597, at *3 (D. Kan. June 11, 2015).

[108] *One Belle Hall Prop. Owners Ass'n v. Trammell Crow Residential Co.*, 418 S.C. 51, 56, 791 S.E.2d 286, 289 (Ct. App. 2016)

[109] Overlook Terraces, Ltd. v. Tamko Bldg. Prods., No. 3:14-CV-00241-CRS, 2015 U.S. Dist. LEXIS 119325, at *10 (W.D. Ky. May 21, 2015).

the ability to impose legally enforceable obligations on others. The only time a party can be bound by an agreement merely because they occupy the role of owner of a good is if the agreement is a servitude on that good.

It may be tempting to write off cases in which an arbitration clause appears to attach to a chattel as a quirk of the Federal Arbitration Act, but this is a mistake. Many of the published opinions on the enforceability of arbitration clauses speak only to the arbitration question because the strong presumption in favor of enforcing arbitration clauses sends all other issues to the arbitrator, where they cease to be fodder for the progress of the common law.[110] In theory, an arbitrator could decide that the terms of service on Tamko shingles were an effort to make an equitable servitude on chattels, a form of property not recognized by the law. The substance of the clauses that Tamko is seeking to enforce is irrelevant for our purposes. The real question is whether there is a contract at all.

*2. Hypothetical Cases*

*(a) Not for Resale.*

Imagine kids selling candy bars at a school fundraiser. The wrapper of each candy bar says "not for resale." This label is likely the product of food labeling requirements. Anyone who ignores the label may be committing a regulatory wrong and may face sanctions from the state. A rational manufacturer would only spend its own resources enforcing the "not for resale" restriction if it had an interest in limiting the secondary market for its candy. The label may be a kind of term of service on the object. On its face, it is a direct restraint on alienation that most courts would hesitate to enforce. Compliance with food labeling rules might provide enough reason to overcome courts' skepticism, but what happens if the label is not a compliance shield, but just the manufacturer's preference?

Here a second example might help. Imagine candy bars for sale at a school concession, but instead of the usual "not for resale" warning, the outer carton of candy bars says, "scan this QR code for the full terms of service to which you agree by opening this carton." Anyone who scanned could read might find a prohibition on reselling, an arbitration clause, and a statement that the manufacturer may amend those terms at their sole discretion from time to time. If the manufacturer in this example wants to stop the concession, it might sue whoever purchased the candy for breach of contract. This case might look like the typical shrink-wrap case that courts now routinely enforce, subject to public policy considerations about whether direct restraints on alienation are enforceable. To be sure, whoever bought the box of candy bars might have believed that they were purchasing the candy outright, but the contract attached to the candy invalidates that assumption.

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[110] *See* Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 807 (2020) (explaining that arbitration clauses are the most commonly challenged clauses in unconscionability claims).

The more interesting question is whether the purchasers of the individual candy bars are subject to the terms of service.[111] It is difficult, if not impossible, to argue that the seller at the concession is the agent of the end purchasers and therefore able to bind them to the contract. The doctrine of good faith purchaser for value might favor shielding the end purchaser from the alleged contract, particularly if the end purchaser had no notice of the QR code. Nevertheless, the court's language in *Dye* suggests that purchasers have a duty to investigate whether the candy comes with a contract. And the good faith purchaser for value doctrine would offer little comfort to someone who did not purchase the candy, such as a volunteer who got a treat for their service. These gaps help reveal why servitudes doctrine remains essential.

If enforceable against the candy purchasers, this agreement may shape the relationship between the candy-eater and the manufacturer even after the candy has been consumed. Unlike property relationships, which last only while the parties hold an interest in the object, contracts need not terminate there. For example, the licenses could contain an arbitration clause obligating the parents to arbitrate any claim they have against the manufacturer—even those unrelated to the candy purchased for the bake sale.[112] In other words, the contract fundamentally changes the duration of the relationship between the consumer and the firm—locking the consumer into a contractual relationship with the firm while also granting the firm the right to redefine that relationship over time.

*(b) The Pinkest Pink*

Not all servitudes on chattels are corporate overreach. They may serve prosocial functions like limiting scalping on in-demand goods. They may also enhance equity in art markets[113] or facilitate artistic expression. For example, in response to superstar artist Anish Kapoor contracting for exclusive rights to an exceptionally black coating called Vanta Black, Stuart Semple created what is allegedly the pinkest pink.[114] Semple was so mad about Kapoor's exclusive license, that he added this agreement to his online storefront:

> By adding this product to your cart you confirm that you are not Anish Kapoor, you are in no way affiliated to Anish Kapoor, you are not purchasing this item on behalf of Anish Kapoor or an associate of Anish Kapoor. To the best of your knowledge, information and belief this paint will not make its way into the hands of Anish Kapoor.[115]

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[111] Indeed, a court might have to grapple with the age of the purchasers who may be too young to bind themselves to a contract and whose parents may have no knowledge of their candy consumption.

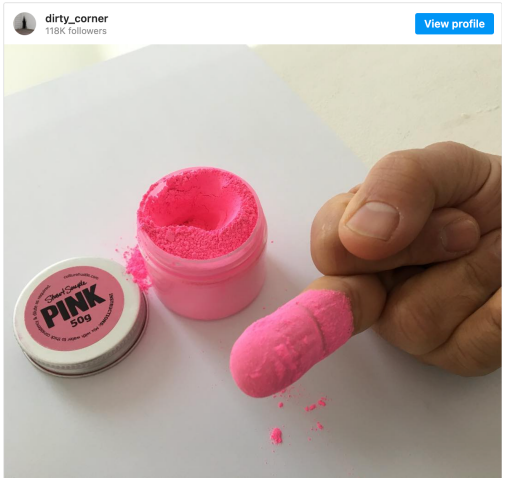
[112] *See* Mey v. DIRECTV, LLC, 971 F.3d 284, 294 (4th Cir. 2020)(enforcing an infinite arbitration clause while acknowledging that "construing the broadest language of this arbitration agreement in the abstract could lead to troubling hypothetical scenarios.").

[113] Adrienne Davis, *Art Markets* [on file with author].

[114] Adam Rogers, *Art Fight! The Pinkest Pink Versus the Blackest Black*, WIRED, https://www.wired.com/story/vantablack-anish-kapoor-stuart-semple/.

[115] https://www.culturehustleusa.com/products/pink-50g-powdered-paint-by-stuart-semple.

Naturally, Anish Kapoor responded by posting this image to his Instagram page with the comment "up yours #pink":[116]




If Kapoor, himself or through an agent, bought the pigment off Semple's website, then he violated the website's terms of service. That is a simple contract problem. But if a third party sent the pigment to Kapoor, Semple would have to argue that something about that tub of pink prevented it from coming into Kapoor's ownership to prevent Kapoor from using his pink. This would be a hard lift precisely because property doctrine has not historically recognized servitudes on chattels. Here, an equitable servitude on the pigment may tend to Semple greater control over his work. Other artists may want to use servitudes to to capture value on the secondary market.[117] But there is no path to these autonomy-enhancing aspects of equitable servitudes without the costs.

## II. IMPERIAL CONTRACT DOCTRINE

What happens to ownership when firms use contract to fundamentally alter what it means to own something? Writing about the technology, Joshua Fairfield has argued that contracts are destroying ownership. [118] In his assessment, contract are inserting information costs into transactions that property doctrine long ago streamlined.[119] Relationships that once had predictable configurations now come laden with contracts that curtail or outright prevent a thing from being owned.[120] Servitude-like software licenses have already revealed their power to thwart ownership over the objects we bring into our

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[116] Anish Kapoor, https://www.instagram.com/p/BOWz73wgj7R/?utm_source=ig_embed&ig_rid=9d776768-7ee8-4e2e-acc2-0ea9487426d7. [editors, I'll remove this image if it's too much]

[117] Adrienne Davis, *Art Markets* [on file with author].

[118] FAIRFIELD, *supra* note 15, at 161–62; *see also* AARON PERZANOWSKI & JASON SCHULTZ, THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY (2016).

[119] FAIRFIELD, *supra* note 15, at 161–62.

[120] PERZANOWSKI & SCHULTZ, *supra* note 118.

homes.[121] For example, consumer electronics manufacturers can brick otherwise useable goods with software updates, without being required to offer a refund.[122] As companies attempt to use servitude-like contracts to bind downstream owners of things, ownership itself is threatened. Where previously ownership had a mostly predictable meaning, contract is now attempting to reconfigure the rights that traditionally comprise ownership. Indeed, one way to interpret modern servitudes on chattels is as undoing ownership altogether.

This part first portrays property and contract doctrine as counterweights to each other that ideally exist in a welfare-optimizing balance of predictability and customizations. It then explains how this balance has been upset by how small shifts in contracts law interact with the overall decline in private law cases that proceed to judicial opinions. The final part of this section is a small case study of how lawyers attempted to fight Tamko's efforts to compel arbitration against its disappointed shingles customers. These cases reveal that lawyers themselves elevate the contractual elements of cases even when they might avail themselves to property arguments, which may explain why contracts doctrine dominates these opinions.

### *A. The Private Law Equilibrium*

Equitable servitudes exist at the boundary between property and contract. They are contract-like in that they are an agreement between private individuals that creates court-enforceable obligations. When interpreting servitudes courts sometimes look to principles of contract interpretation.[123] They are property-like in that they attempt to bind all holders of the encumbered object, even if that party had no part in the formation of the covenant. Equitable servitudes are also property-like in that they are enforceable by property rules, namely injunctions, even when the only remedy for a contract governing the same behavior might be damages. In practice, equitable servitudes allow parties to customize their property rights by festooning them with contract terms.

Sitting on the boundary of property and contract, they are emblematic of the law's delicate balance between predictability and customization.[124] Even after courts begrudgingly began enforcing equitable servitudes on real property, they drew the line at equitable servitudes on chattels except in rare cases.[125] The costs of allowing contracts to glom onto personal property were just too high.[126] This refusal is a substantive choice that courts and legislature repeatedly made and reaffirmed throughout the twentieth century.

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[121] *See generally* Mulligan, *supra* note 9 (arguing that software licenses are federal-law enabled servitudes on chattels).

[122] Karl Bode, *Sonos Backs Off Plan To Brick Older, Still Functioning Speakers*, TECHDIRT (2020), https://www.techdirt.com/2020/03/13/sonos-backs-off-plan-to-brick-older-still-functioning-speakers/.

[123] Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 475 (Tenn. 2012).

[124] Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1694 (2012).

[125] Chafee, *supra* note 8, at 1251.

[126] *See infra*, Part III.

The unenforceability of equitable servitudes on chattels is one of property doctrine's substantive mandatory rules.

But things are changing. The private law operates as a semi-cohesive system governing the rights and obligations between parties. Today some of the most pressing questions in the private law ask about the boundaries on freedom to contract. The rise of de facto equitable servitudes on chattels is an example of the balance of power shifting towards contract.

Shifting this balance expands the reach of contract law's problems. A decade ago, Margaret Radin argued that the doctrinal degradation of contract law was enabling a democratic degradation as firms used boilerplate in adhesion contracts to replace the law of courts and legislatures with firms' own bespoke rules.[127] Boilerplate shifted the balance of power towards firms in all kinds of relationships, including, employment, travel, and warranty. To be sure, some of contract's newfound power was the result of legislative choices, but most of the shift comes from courts themselves. Today, we are beginning to see the intrusion of boilerplate onto software-free things.

Here, it is fair to question whether the idea of property law principles as a source of substantive mandatory rules remains accurate. But, as we shall see, there are other points of interface between contract and property where courts do prevent contract from inserting unexpected customization into rights that otherwise track property rights. Limiting the reach of customization is important because, as Thomas Merrill and Henry Smith explained, "in rem rights impinge upon a very large and open-ended class of third persons, the legal rules must be designed so as to minimize the information-cost burden imposed on a great many persons beyond those who are responsible for setting up the right."[128] As contract creeps deeper into the traditional domains of property, it undoes some of the design choices that reduce these information-costs.

These design choices might be less essential if there were alternative means for accomplishing the same goals: notably, minimizing information costs for third parties and preserving flexibility for the future. Unfortunately, there is not. Society has two paths for imposing its will on private contracts: procedural rules and substantive rules. The latter is far more effective than the former at protecting individuals from firm overreach.[129] Procedural protections try to ensure that consumers can make informed decisions. They police *how* consumers bind themselves with contracts. Getting procedural rules right is important for the legitimacy of the system of law itself. Courts would be tarnished if they

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[127] RADIN, *supra* note 17.

[128] Merrill & Smith, *supra* note 24, at 802.

[129] *See generally* Zamir & Ayres, *supra* note 18(making the case that substantive mandatory rules are superior to procedural rules for improving consumer welfare).

enforced contracts formed under duress or deceit.[130] Contract would become yet another tool for might makes right—which is the opposite of law.

One common tactic to avoid claims of procedural imperfections in contracts is to provide consumers with notice of suspicious contract terms. Consumer protection regulations often decline to prohibit unexpected terms, preferring instead to require that firms disclose such terms prominently.[131] These disclosure rules are meant to be information-generating, thereby lowering consumers' information costs. Here, the procedure—giving consumers conspicuous notice—shields the substance of the contract from judicial critique. Today, a rich literature exists theorizing how to improve disclosure regimes and cataloging their persistent failures.[132] Moreover, procedural protections have little value when the substantive options are all bad.

Substantive protections remove options from contracting altogether. Eyal Zamir argues that substantive mandatory rules "can be appropriate when the law is trying to protect people outside or inside the contract" . . . especially where procedural mandatory rules are likely to be ineffective."[133] He argues that "just as regulators set minimal standards for the safety of physical product . . . they should set such standards for the safety of contractual products, which may be just as risky." Following Elizabeth Warren and Oren Bar-Gill, Zamir argues that disclosure is not a sufficient protection against dangerous contracts any more so than it is against dangerous toys and cars.[134]

Property doctrine has long been a source of substantive mandatory rules that provide a counterweight to contract law's freedoms. The goals behind mandatory rules include promoting efficiency in bargaining, reducing verification costs, and limiting opportunistic behavior.[135] There are many justifications for property being a system of mandatory rules, and the most compelling of these focus on the obligations that property imposes on those without an ownership or possessory interest. According to Hohfeld's now canonical analysis, every property right imposes a duty to respect that right on everyone else

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[130] *Id.* at 294 (explaining that parties seeking to legally enforce a contract are not engaging in a purely private activity).

[131] *See* Merrill & Smith, *supra* note 24, at 802 (explaining the choice between substantive protection regimes and notice regimes); Zamir & Ayres, *supra* note 18, at 284.

[132] Eric A. Posner, ProCD v Zeidenberg *and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1181 (2010).

[133] Zamir & Ayres, *supra* note 18, at 287.

[134] *Id.* at 282–3; *see also* Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1, 1 (2008); Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 JRSLM. REV. LEGAL STUD. 137, 163 (2015) ("As the subprime crisis has demonstrated, unsafe contracts can involve risks to individuals and society that are no less damaging than the risks of unsafe drugs and toys.")

[135] Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The* Numerus Clausus *Principle*, 110 YALE L.J. 1 (2000); Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The* Numerus Clausus *Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373 (2002).

who encounters that property. That is, every property right is good against the world. If property rights are non-standardized, they may impose information costs on a large number of people who have to learn how to interact with that particular type of property in space and over time. Even if those information costs are low on a case-by-case basis, they may be high when multiplied over large numbers of people.[136] Similarly, non-standard property interests would impost high information costs on prospective buyers, lessees, and lenders.

Turning to time, the permitted forms are flexible enough to ensure that assets are both useable and available in the future. The basic forms of property may not be ideal for everybody in all cases, but they work well enough for many people in most cases. If these forms were more specialized, the assets might become obsolete too quickly, creating waste wherever property can be found. Such waste would be especially destructive in the physical world, since putting land to appropriate use is essential to meeting humans' most basic needs for survival and flourishing: housing, food, and stability. Preventing excessive fragmentation of property interests protects the same essentials. If utilizing property requires significant transaction costs to assemble the necessary rights—if those rights can be assembled at all—welfare-enhancing transactions may not occur.

Mandatory rules only work if they are actually mandatory, meaning that firms cannot avoid them by using contract to opt out of property categories. Preserving the "mandatoriness" of property's rules is a longstanding problem at the intersection of property and contract. For example, secured transactions law tightly polices the line between a lease and a loan paid on installment because insolvency laws treat leased and owned property differently. Unscrupulous parties may attempt to game the system by using contract to label a transaction as a lease or a sale according to the parties' preferences.[137] Whatever the contract may say, it is only evidence of what the transaction is and not the final word. Instead, courts apply a multifactor test to determine whether a challenged transaction is a lease or a sale. For example, in *In re Hunt*, the owner of Malad Plumbing offered to sell the business to his employee, Donny Hunt.[138] To quickly raise the money necessary to buy the business, Mr. Hunt teamed up with a friend, Gary Shepherd. Hunt and Shepherd did not reduce their agreement to writing. When the business failed and Hunt filed for Chapter 7 bankruptcy, he listed Shepherd as the lessor of various valuable equipment under a "rent to own agreement."[139] If Shepherd owned the property, it would not be turned over to the bankruptcy trustee and sold. However, if Hunt owned the property and Shepherd merely had an unperfected security interest, bankruptcy law required that

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[136] Merrill & Smith, *supra* note 24, at 793–95.

[137] *See also* BROWN ON PERSONAL PROPERTY §9.2 (3d ed.) (explaining that sellers might attempt to manipulate when title passes to buyers but that title will pass at delivery at the latest, regardless of payment).

[138] 540 B.R. 438, 440 (Bankr. D. Idaho 2015).

[139] *Id.*

it be turned over.[140] That Hunt and Shepherd agreed that their agreement was a lease was not dispositive. The court explained that "legal ownership in this context is not resolved based solely by the belief of the parties, but by reference to all of the facts of the case and the requirements of state law."[141] The Bankruptcy court turned to state law, itself modeled on Article 9, and found that even written agreements purporting to be leases will be reconstrued as security interests when, at the end of the alleged lease, the lessee has the right to acquire title to the property for nominal consideration.[142]

Put differently, the lesson from *Hunt* is that parties cannot contract around property's categories of interests, especially when doing so imposes costs on third parties. Some courts have reached the same conclusion when parties attempt to contract out of bailment relationship despite the economic reality that their relationship is, in fact, a bailment.[143] Still, the necessity of a contract, actual or implied, to the transaction can muddy the analysis.

Similarly, firms that provide secure storage may attempt to disclaim a bailment relationship by contract, but many courts will look not to the contract but to the nature of the relationship to determine whether bailment doctrine applies.[144] In both secured transactions and bailment, the facts on the ground determine the allocation of property rights. Contract shapes those facts, but in theory, it cannot override property's mandatory rules.

Eyal Zamir documented three debates around the desirability of mandatory rules. The first, which he calls the "liberal perspective," revolves around whether substantive mandatory rules are too strong an incursion on contracting parties' freedoms.[145] In his view, the best response to this perspective is that mandatory rules in one area "enhance people's positive liberty . . . by providing them with the means of taking control of their lives and realizing their fundamental purposes."[146] The second debate documented by Zamir concerns whether mandatory rules are economically efficient.[147] Unregulated freedom to contract may be efficient in perfectly competitive markets, well-documented market failures found in almost all consumer-oriented spaces may, tend to render substantive rules more efficient instead.[148] The third debate concerns the distribution of resources. Zamir argues that substantive mandatory rules may "promote the welfare of the

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[140] *Id.* at 441.

[141] *Id.* at 442.

[142] *Id.* (citing Whitworth v. Krueger, 558 P.2d 1026, 1029 (Ida. 1976)).

[143] Saribekyan v. Bank of Am., N.A., No. B285607, 2020 LEXIS 25, at *6 (Cal. Ct. App. Jan. 3, 2020), as modified (Jan. 6, 2020).

[144] Danielle D'Onfro, *The New Bailments*, 97 WASH. L. REV. 97 (2022).

[145] Zamir & Ayres, *supra* note 18, at 293.

[146] *Id.* at 294

[147] *Id.*

[148] Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1 (2017).

underprivileged by giving them entitlements that objectively improve their wellbeing."[149] Without substantive mandatory rules, consumers are often left feeling like the law condones taking something away from them, especially when as contracts erode ownership and laden everyday items with subscription costs.[150] These distributional concerns are entangled with autonomy and dignity because ownership is an essential tool for constructing the self.[151]

Unlike in contract, substantive mandatory rules are common in property. These substantive mandatory rules form the *numerus clausus* principle, which explains that courts only recognize certain configurations of rights as property.[152] In other words, the different forms of property are different bundles of substantive mandatory rules.[153] Henry Smith and Thomas Merrill described this difference in attitude towards customization as one of the "central" differences between property and contract.[154]

Any asset may be subject to both *in rem* and *in personam* rights. For example, covenants may encumber a parcel of real estate. If these covenants run with the land, they bind all current and future owners to their conditions, while also providing beneficiaries of the covenants with a remedy if the parcel falls out of compliance with those conditions. To prevent covenants from undermining the excessively interfering with ownership of the parcel, only those that "touch and concern" the land are binding on future owners.[155] Neighbors are free to bind themselves within the limits of contract doctrine. As the Tennessee Court of Appeals explained, the content of covenants is covered by the public policy animating contracts where the law "plainly reflects the public policy allowing competent parties to strike their own bargains."[156] Once the parties wish to bind future landowners—that is, once they engage in a transaction that with greater risk of negative externalities—property's mandatory rules kick in. Specifically, to run with the land, covenants must "touch and concern" the land.[157]

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[149] Zamir & Ayres, *supra* note 18, at 301.

[150] PERZANOWSKI & SCHULTZ, *supra* note 118.

[151] *See infra*, Part III.C.

[152] Merrill & Smith, *supra* note 135, at 3–4.

[153] The fixed list of property forms is one of the animating principles of the forthcoming Fourth *Restatement of Property*.

[154] Merrill & Smith, *supra* note 135, at 3.

[155] The Third Restatement of Property attempted to simplify away the "touch and concern" requirement but courts have not followed suit thus the forthcoming Fourth Restatement restores the requirement. *See* Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal, 122 HARV. L. REV. 938, 939–45 (2009) (explaining how the Third Restatement tried and failed to eliminate the touch and concern requirement for servitudes to run with the land).

[156] Schodowski v. Tellico Vill. Prop. Owners Ass'n, No. E2015-01145-COA-R3-CV, 2016 Tenn. App. LEXIS 275, at *20 (Ct. App. Apr. 22, 2016) (quoting Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 475 (Tenn. 2012)).

[157] Spencer's Case, 77 Eng. Rep. 72 (K.B. 1583)(holding that a covenant will run with the land if it "touch[es] or concern[s] the thing demised.").

The primary criticism of the touch and concern requirement is that it is impossible to define with much certainty.[158] Earlier decisions stressed that covenants could only run with the land if they changed the burdened party's interest in the land.[159] Some commentators, however, focused on the economic relationship—whether the covenant decreased the value of the burdened parcel while increasing the value of the benefitted parcel.[160] But later courts balked at covenants merely obligating the payment of money for services without something more like upkeep of common spaces.[161] Of course, nothing prevents owners and neighbors from attempting to style agreements for personal services as covenants that run with the land. But if they ever need to enforce these agreements, careful courts look past the form to the substance of the agreement and will recast those that do not touch and concern the land as mere contracts or *in personam* rights.[162] In other words, the touch and concern requirement was and is a restraint on the substance of the obligations that owners can impose on futures holders of property.

Historically, property's mandatory rules covered all conveyances of real estate and chattels. If a consumer bought a chattel from a store, the consumer understood their rights vis-à-vis that chattel. Future parties encountering that chattel would understand that they might have to worry about whether the chattel was lost, mislaid, or abandoned, but they need not worry that the chattel could impose additional obligations on them because property's mandatory rules curtailed that possibility.

Commentators have observed that courts prefer property's mandatory rule approach where customization imposes high costs on third parties, especially future holders of interests in the asset.[163] Rather than limiting the enforcement of licenses to be like servitudes on chattel, courts may make such servitudes enforceable in the same way that licenses are between the bargaining parties. There are two lines of reasoning that suggest that this outcome is possible and even likely. The first is the Eleventh Circuit's language in *Dye*, where the court quipped "[m]oreover, and in any event, that big-box items come with purchase terms and conditions should hardly come as a surprise to modern consumers."[164] According to the court, the prevalence of shrink-wrap agreements gave consumers "fair notice" that chattels might be subject to contracts even when the consumers had no actual knowledge of the contract.[165] It is possible that the law will continue down this

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[158] Touch and Concern, *supra* note 155, at 939 (The requirement has endured decades of scholars' failed attempts at articulating a definitive definition, test, or rationale for the requirement, and it has weathered severe criticism.).

[159] Congleton v. Pattison, 103 Eng. Rep. 725 , 727 (Ch. 1808).

[160] Harry A. Bigelow, *Content of Covenants in Leases*, 12 MICH. L. REV. 639, 145 (1913)

[161] *See* Eagle Enterprises, Inc. v. Gross, 349 N.E.2d 816 (1976).

[162] Merrill & Smith, *supra* note 24, at 800 (explaining that in personam rights are those that involve few costs to third parties).

[163] *Id.* at 802–06.

[164] *Dye*, 908 F.3d at 682–83.

[165] *Id.* at 83.

path, and that ownership in fee will no longer be the default presumption. The way to avoid that outcome is to recognize property as a domain of substantive mandatory rules and to resist the encroachment of contract into its space. [166]

### *B. Pressure in the System*

This Part explores why equitable servitudes on chattels are emerging now. I have already argued that software licenses normalized contracts that follow objects instead of people,[167] but that is not the whole story. The proliferation of software licenses made changes throughout contract doctrine that both raised the status of contract in the private law and made it easier for firms to attempt to attach contracts to things. At the same time, the common law has continued to wither, boxed in by statutes and starved of cases that are well-litigated and conclude with the issuance of an opinion on the merits. A more accurate description of the state of modern servitudes doctrine is that courts have not told firms that they cannot encumber personal property with servitudes, not that courts have enthusiastically endorsed the expansion of equitable servitudes. Finally, developments in various personal property markets stand to make equitable servitudes even more attractive to firms in the future.

#### *1. Making and Modifying Contracts*

Adhesion contracts are terms that a consumer must accept to proceed with a service or use a product. They differ from other contracts in that the consumer has no option to negotiate the terms of the agreement.[168] The consumer can only accept or reject the contract or choose from a menu of contracts offered by a firm.[169] More than half a century ago, Friedrich Kessler explained that these take-it-or-leave-it contracts proliferate when one party to the contract has a monopoly or when all of the competitors use the same terms.[170] Since then, adhesion contracts have proliferated, with courts first blessing shrink-wrap contracts, then expanding those blessings to include click-wrap and even browse-wrap or scroll-wrap contracts.[171]

Shrink-wrap contracts are agreements that consumers assent to by opening a product's packaging, even if they do not ultimately use the product. To be binding, consumers

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[166] To be sure, even if courts are inclined to resist contract's imperialism into property, intellectual property, specifically copyright law, may prove to be a trojan horse as more and more things contain trace amounts of software. *See supra*, Part I.B. The problem of intellectual property creep is one for Congress to fix.

[167] *See supra*, Part I.C.

[168] *See* Arthur Allen Leff, *Contract As Thing*, 19 AM. U. L. REV. 131 (1970).

[169] Danielle D'Onfro, *Error-Resilient Consumer Contracts*, 71 DUKE L.J. 541, 556 (2021).

[170] Kessler, *supra* note 17, at 62.

[171] David A. Hoffman, *Defeating the Empire of Forms*, 51 (2023), https://papers.ssrn.com/abstract=4334425 (arguing that we make more contracts every day or two that people made every year a decade ago and in a lifetime a generation ago).

need to receive notice of the contract before they open the product, but they need not have had the chance to read the contract. The paradigmatic shrink-wrap contract is the licensing agreement that used to appear on a sticker on the plastic-wrapped packaging around discs of software. Similarly, click-wrap contracts are a variation of shrink-wrap contracts that are attached to the use of an internet website. Firms notify consumers that by using the website, they agree to be bound by terms and conditions that are available elsewhere and can be accessed by clicking a link. If the consumer proceeds to use the website, the consumer is bound to the contractual terms.

Contract by scrolling is another potential path for imposing servitudes on chattels. If consumers must order a product through a manufacturer's website, use the website to register their goods, or look to the website for assistance with their product, that terms governing the website might also attempt to govern the use of the chattels. These terms might bind both direct purchasers and downstream purchasers alike.

Courts' willingness to enforce contracts by notice facilitates de facto equitable servitudes on chattels by making it possible that a notice printed onto or wrapped around a chattel be a binding agreement. Otherwise unremarkable adhesion contracts evolve into equitable servitudes when they try to bind future owners of the chattel. This is what Tamko's warranty does when it purports to bind not only the home builder, but also the home purchaser and even future owners.

The problems with adhesion contracts have been well documented.[172] Where commentators used to fret that they violated basic contracting principles, the draft Restatement of Consumer Contracts appears to suggest that assent is no longer an essential element of contract.[173] It is widely accepted that consumers do not read the endless adhesion contracts with which they interact with daily: even if consumers could understand the legalese in which firms write these contracts, their length makes reading infeasible. Moreover, as Ayres and Schwartz noted, consumers may be better off if the expectation was

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[172] *See* Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (demonstrating that consumers do not read adhesion contracts); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) (exploring the implications of norms against reading contracts); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019)(demonstrating that many adhesion contracts are unreadable even when consumers try); Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862 (2020) (showing that courts care about adhesion contract formatting despite consumers not reading adhesion contracts); Lauren E. Willis, *Performance-Based Consumer Law*, SSRN ELECTRONIC JOURNAL (2014), http://www.ssrn.com/abstract=2485667 (arguing that the disclosure model of consumer protection embedded in consumer contract law is ineffective); Kessler, *supra* note 17 (explaining that adhesion contracts "have become one of the many devices to build up and strengthen industrial empires"); Rakoff, *supra* note 17 (assessing adhesion contracts' relation to dickered contracts and finding that the terms in most adhesion contracts ought be unenforceable); RADIN, *supra* note 17 (assessing the decline of assent and its implications)

[173] RESTATEMENT OF CONSUMER CONTRACTS, Reporters' Introduction 2-3 (Tentative Draft No. 2, April 2022).

the contracts are not read, because these contracts may, in fact, be more enforceable in a world in which reading is the norm.[174]

Once consumers are bound by a contract, they have little protection against the terms of that contract changing.[175] Just as the legal standards governing consent to formation have weakened, so too have standards around consent to modification. Today, consumer contracts may also include a unilateral right, upon notice to the consumer, to modify the terms of the agreement, as well as a provision indicating that, by continuing to use the product, the consumer consents to the modification. Thus, even if a savvy consumer understands that the contract is the product and chooses accordingly, the product may change. These clauses are relevant for our purposes because they can make the contract more restrictive over time, potentially curtailing consumers' rights to use, modify, and even alienate goods.

The implications of unilateral modification rights are radical. No object subject to an agreement with a unilateral modification right can be "owned" in any traditional sense of the word because the firm can rearrange the consumers' rights. The unilateral modification right gives the firm an option to take back some or all the benefit that it purported to sell, even when they do not require buyers to return the object. In sum: firms selling goods that are subject to unilateral modification clauses are selling access, not ownership.

Selling access alone may be desirable in some cases—for example, consumers may prefer the access that a media streaming service like Disney+, which would eliminate their need to store an ever-expanding collection of movies on DVD. But unilateral modification rights can make it difficult for consumers to strike their preferred bargains. To date, the examples of firms imposing big surprises on consumers are mostly confined to the area of intellectual property.[176] Consider the recent controversy at videogame platform Steam. When users "buy" games on Steam—sometimes for as much as $70—they are only accessible via Steam. Steam "sells" these games for roughly the same price on discs at physical retail locations. Consumers who buy the discs can play the game as long as they have a console that plays that generation of disc. Consumers who buy the game on Steam can play the game only as long as Steam has an agreement with the game creators to make it available. Gamers were recently alarmed to learn that Ubisoft, the creator of the popular Assassins Creed series, was planning to turn off access to some of its games on the

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[174] Ayres & Schwartz, *supra* note 172; Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117 (2017).

[175] Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting Special Feature: Cyberlaw*, 72 MD. L. REV. 452, 471–72 (2012).

[176] The best explanation for why surprises are not more common may be that firms often treat consumers better than their contracts require them to, even absent meaningful competition. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 833–34 (2006).

Steam platform.[177] These consumers were alarmed to find out that they did not own their games, despite having paid for them.[178] But, as the Washington Post explained "[f]rom a consumer perspective, games are no longer a product. They're a service you pay for indefinitely until the publisher decides to pull the plug."[179] It is an empirical question whether consumers would pay equivalent value for access to a digital asset versus ownership of a tangible asset if they understood the implications of unilateral modification rights.

For a consumer protection perspective, the problem with these agreements is not that game publishers retain the option to retire games, it's that consumers do not understand what this option means. In addition to the harms to the consumer, these options may create broader social harms as archivists and scholars lose access to material because it is impossible for them to own and preserve a copy.[180] When these games eventually fall into the public domain, it is unclear how future creators will be able to access them for the raw material from which to create new art.

The most radical implication for equitable servitudes on property comes via unilateral modification rights: a chattel subject to unilateral modification rights by the manufacturer or seller cannot be owned in fee simple by anyone other than the holder of that modification right. Rather, any alleged ownership is subject to the later terms imposed by the beneficiary of the servitude. These modifications may change the chattel's use, disposal, alienability, or other core attributes. Put differently, it is impossible for owners to know which sticks in the bundle of rights they hold in a world in which another party has the right to rearrange the sticks.

### *2. The Decline of Private Law Case Law*

Contract doctrine gained traction against other private law doctrines right as the cases needed to liquidate the conflicts between contracts and these doctrines dried up. For decades, commentators have documented how trials are vanishing from the U.S. legal system.[181] Marc Galanter warned that the declining number of trials deprives the legal

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[177] Jonathan Lee, *After Backlash, Ubisoft Says It Isn't Revoking Access to Owned Games*, WASHINGTON POST, July 13, 2022, https://www.washingtonpost.com/video-games/2022/07/13/assassins-creed-steam-delisting-ubisoft/.

[178] *Id.*

[179] *Id.*

[180] [eds: this will be updated for recent litigation]

[181] *See generally* Marc Galanter, *The Vanishing Trial*, 10 DISP. RESOL. MAG. 3 (2003) (quantifying the decline in trials from 1962–2002); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of Federal Civil Cases*, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) (documenting the rise of non-trial dispositions in federal court cases); Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976-2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 770 (2004) (documenting the decline in civil jury and bench trials in state courts from 1976-2002); *see also* Margo Schlanger, *What We Know and What We Should Know about American Trial Trends*, 2006 J. DISP. RESOL. 35 (2006) (surveying studies and commentary on the vanishing trials phenomenon).

system of "benchmarks" for deciding future cases.[182] Rather than "bargaining in the shadow of the law," our system "may well become one of adjudication in the shadow of bargaining." The result may be a reversal the roles of bargaining and adjudication.[183]

Twenty years later, Galanter's hypothesis is more attractive still. Without a steady drip of well-reasoned opinions to renew and refresh the common law, what precedent there is available becomes increasingly remote from current disputes. The primary sources that judges do have to work with are limited to the alleged contract between the parties and an increasingly contract-focused case law that militates in favor of just enforcing the contract.

Morgan Ricks and Ganesh Sitaraman have identified an important second thread that weaves into private law cases, twisting them toward contract. They argued the common law baseline is being forgotten in the age of statutes.[184] Where courts might have previously wielded their common law power to update the law, a decline in belief that the law reflects society's "relatively uniform customs" may have generated skepticism towards entrusting the law to judges.[185] In many areas, federal, state, and even municipal lawmakers have undertaken the job of codifying the law.[186] But there are and there will always be gaps, particularly in areas of rapid change such as technology. When confronted with such a gap, the presence of a contract relieves judges from their common law obligations. Instead, they can just enforce the contract. What is lost is analysis of whether the contract is the correct and just lens for understanding the what the relationship is and how the law should treat it.

The structure of the common law system predisposes it to prioritize contracts over bigger, systemic interests.[187] This predisposition begins at the foundational question of which interests are visible to the private law at all. As Hanoch Dagan explains "the bipolar encounter between plaintiff and defendant" tends to exclude the concerns of both impacted third parties and the concerns of society more broadly.[188] There is a robust debate among private law theorists about the extent to which society's concerns should inform the content of the private law.[189] Regardless of whatever one might believe the private law

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[182] Galanter, *supra* note 181, at 4.

[183] *Id.*

[184] Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law* (draft on file with author).

[185] Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 775 (2004).

[186] Sitaraman & Ricks, *supra* note [X].

[187] *But see* David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 998 (2021) (describing "an anti-canon of other-regarding contract cases: a set of disfavored and odd cases that result from extraordinary facts.").

[188] Hanoch Dagan, *The Limited Autonomy of Private Law Values*, 56 AM. J. COMP. L. 809, 809 (2008).

[189] *Id.* at 811–13 (explaining the debate between "autonomist" and "instrumentalist" accounts of the private law).

should do, it does not systemically balance the centrality of the dispute under adjudication and social concerns. This means that most courts only consider the issues and arguments presented to them, and that if the parties focus their efforts on the contractual dimensions of a relationship, a court is likely to focus its energies there as well. Therefore, if the parties fight about the enforceability of a contract merely on principles of contract doctrine, a court has no obligation to consider the effects of that framing on other areas of the law, notably property.

A universe in which courts hear multiple cases on most issues and have regular opportunities to revisit issues is one in which we might expect the litigants to introduce broader societal interests for consideration in the resolution of legal disputes, albeit in fragments and only when the interests align with those of litigants. A universe in which courts hear few disputes and rarely have the chance to reconsider doctrine, especially if courts feel disempowered to reconsider doctrine, is one in which it is unlikely that broader societal interests will be set before the court.

To be sure, robust amici participation can blunt the narrowness brought on by a dearth of cases, but only to the extent that courts read the amici.[190] Amici can also mitigate the impact of poor or merely timid lawyering on the part of the litigants.[191] This is particularly important in cases that pit consumers against firms, since the parties are likely to have vastly different budgets, access to talented lawyers, and willingness to litigate issues for the betterment of the law itself.[192] Unfortunately, amici participation outside of cases involving social and macroeconomic issues is uneven at best.[193] Without parties to bring in broader societal concerns, courts may be deciding cases that, although they appear to be merely simple contractual disputes, in fact stretch the boundaries of contract law.

One particular statute, the Federal Arbitration Act, has likely accelerated the decline in private law cases that proceed all the way to opinions on the merits.[194] The FAA has

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[190] At least in the Supreme Court, citations to amicus briefs have increased with the rise in the volume of amicus briefs. *See* Joseph D. Kearney & Thomas W. Merrill, *Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 757 (1999).

[191] The question of whether amici should be advocates for one party versus merely disinterested "friends" of the court was previously controversial but there can be little doubt today that many amici act as advocates for one side. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1909–14 (2016).

[192] Judge Richard Poser was one of the few recent judges to hold onto the idea that amici had a limited role, including evening out the legal firepower of the two parties. *See* Ryan v. Commodity Futures Trading Comm'n, 125 F.3d 1062, 1063 (7th Cir. 1997) ("An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.").

[193] Paul M. Jr. Collins & Wendy L. Martinek, *Who Participates as Amici Curiae in the U.S. Courts of Appeals?*, 94 JUDICATURE 128, 173 (2010).

[194] Hoffman, *supra* note 171, at 31–32.

fostered contract supremacy both directly and indirectly. Directly, cases that go to arbitration do not generate precedent for the common law system. If there are substantive private law constraints on modern contracts, those constraints are not memorialized in opinions. Indirectly, the FAA cuts off courts' analysis of many of the contracts that do appear before them. The Supreme Court has dramatically limited the grounds on which courts can refuse to send cases to arbitration. Arbitration clauses act as contracts within contracts, which means that even if substantive private law would prohibit the enforcement of a particular contract, that contract may be sent to arbitration as long as the agreement to arbitrate is validly formed.

Although controversial when first permitted,[195] there is no question today that arbitration agreements on shrink-wrap are enforceable.[196] The open question for servitudes doctrine is whether an arbitration clause printed on an object would be enforceable by someone other than the first purchaser. That is, can a mandatory arbitration clause run with a chattel?

Without cases that reach opinions on the merits, it can be difficult to know what the law is. Even if cases like *Dye* are the closest that courts have come to recognizing equitable servitudes on chattels, what is missing is a body of case law reaffirming the prohibition on these servitudes. Part II.C., below, argues that one explanation for the lack modern case law addressing equitable servitudes is the litigation choices being made by consumers' attorneys. But the litigation choices of any one attorney would be less important for the law as a whole if there were more cases overall on which courts could reach opinions on the merits.

### *3. Firm-Friendly Terms*

Rational firms would not bother to encumber chattels with equitable servitudes unless those servitudes gave them value. The kinds of terms that firms would want to style as servitudes likely tracks what they already have in their consumer contracts: waivers, limitations on remedies, procedural hurdles to recovery, choice of law, and arbitration.[197] These are the same kinds of terms that Radin described as supplanting the choices of

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[195] Posner, *supra* note 132, at 1193 (describing *ProCD*, the case that endorsed shrink-wrap arbitration clauses, as "probably the most criticized case in the modern history of American contract law.").

[196] *See* Schnabel v. Trilegiant Corp., 697 F.3d 110, 122 (2d Cir. 2012) ("Whether or not there is notice to the consumer on the outside of the packaging that terms await him or her on the inside, courts have found such licenses to become enforceable contracts upon the customer's purchase and receipt of the package and the failure to return the product after reading, or at least having a realistic opportunity to read, the terms and conditions of the contract included with the product.").

[197] *See* Martins, Price, & Witt, *supra* note 18, at 1294 ("contract is increasingly winning the ongoing tug-of-war over enforcement. Where tort's victory once seemed assured, the last three decades of waiver law development have, in many states, tipped the balance back in favor of contract.").

democratically-elected lawmakers with the desires of firms.[198] That firms would want a stronger, arguably *in rem* version of these terms is unsurprising.

A waiver structured as a servitude lets firms choose their liability resulting from their products in perpetuity. Imagine if the waiver on Tamko's limited warranty had instead been on lead paint[199] or 3M's combat earplugs.[200] Had courts enforced the limitation against downstream owners, the firms' liability—from litigation to payout—may have looked very different. If firms can use servitudes to limit the period for which they are liable for harms arising from their products, they may end their risk of litigation prior to the manifestation of their products' harms. In allowing firms a path to customize their liability beyond the initial purchaser of their good, servitudes on chattels stand to undo products liability doctrine altogether. In other words, allowing equitable servitudes on chattels to edge into property doctrine would reshape the law of obligations generally.

In addition to these standard consumer-facing terms, equitable servitudes on chattels could also grant firms greater control over the supply of their goods. Two related trends may make firms more interested in control: robust secondary markets and pervasive counterfeiting. Whether out of economic necessity, environmental concern, or aesthetic preferences, thrifting has become more common in recent years.[201] Virgil Abloh famously predicted that streetwear would die as consumers turned to second-hand markets for more custom looks.[202] A recent report by Accenture explained that "buying one-off new items is no longer the primary shopping experience many of us desire. . . Product lifetimes are being extended by consumers' growing desire to recycle and repurpose."[203] For manufacturers, both longer product lives and growing secondary markets may be existential threats to their ability to maintain profits unless they can capture some of the value passing through that secondary market.[204]

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[198] RADIN, *supra* note 17.

[199] Like a roofing shingle, paint is arguably not a chattel after it is applied to a building, but any shrink-wrap or noticed contract on paint would likely be on the paint in the can, when it is still a chattel.

[200] Mari Gaines, *3M Earplug Lawsuit Update*, FORBES, February, 2023, https://www.forbes.com/advisor/legal/product-liability/3m-earplug-lawsuit/.

[201] Suzanne Kapner, *The Rise of Hand-Me-Down Inc.*, WALL STREET JOURNAL, August 16, 2019, https://www.wsj.com/articles/the-rise-of-hand-me-down-inc-11565947804.

[202] Nancy MacDonell, *Will We Buy Mostly Vintage Clothes in the Future?*, WALL STREET JOURNAL, January 30, 2020, https://www.wsj.com/articles/will-we-buy-mostly-vintage-clothes-in-the-future-11580402104.

[203] Accenture, The Retail Experience Reimagined 17 (https://www.accenture.com/_acnmedia/PDF-152/Accenture-POV-06-Full-Report-Retail-Experience-Reimagined.pdf)

[204] This is an old problem in the used book market. Textbook publisher Pearson recently contemplated using blockchain to "participate" beyond the first sale, getting a cut of the secondary market. https://www.businessinsider.com/publisher-pearson-explores-nfts-make-money-off-used-textbook-sales-2022-8.

Servitudes are one strategy for retaining control after the first sale. Accenture even ventured that "with the emergence of new models such as rent and return and the growing popularity of subscription, 'ownership' is being redefined," touting Ikea's "sofa-as-a-service" model as one potential future.[205] Firms could try renting their goods to consumers, but then they would have to manage the inventory at the end of the lease. Firms may prefer to not take the item back yet still wish to prevent it from being resold on just any market.[206] Many firms are experimenting with markets for their own used goods—the equivalent of the certified preowned car, but for clothing and housewares.[207] These bespoke secondary markets give manufacturers a cut of the resale price whereas on an open market, the manufacturer receives nothing when their product resells. An equitable servitude could attempt to force owners to resell through designated channels from which the original manufacturers are guaranteed a cut of the profits.

Thriving resale markets also create brand concerns for manufacturers as listings for counterfeit goods become intermingled with those for authentic pieces.[208] Counterfeit goods can harm consumers' impression of a brand's quality.[209] Furthermore, too many counterfeit goods or distribution through down-market channels can harm a brand's cache.[210]

Secondary markets may also frustrate consumers when resellers scoop up the supply of desirable products on the primary market and list the inventory at a premium on the

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[205] Accenture, The Retail Experience Reimagined 17-18 (https://www.accenture.com/_acnmedia/PDF-152/Accenture-POV-06-Full-Report-Retail-Experience-Reimagined.pdf).

[206] See Kevin Purdy, *Why It's So Hard to Get Rid of Used Mattresses*, WIRECUTTER: REVIEWS FOR THE REAL WORLD (2018), https://www.nytimes.com/wirecutter/blog/get-rid-of-used-mattresses/(explaining why returning an item like a mattress is so difficult); Jaclyn Peiser, *The age of free online returns is ending*, WASHINGTON POST, December 9, 2022, https://www.washingtonpost.com/business/2022/12/09/free-returns-holiday-shopping/(explaining the costs that returns impose on retailers).

[207] Charity Scott, *Urban Outfitters to Take On Poshmark With Its Own Thrift Store App*, WALL STREET JOURNAL, August 24, 2021, https://www.wsj.com/articles/urban-outfitters-to-take-on-poshmark-with-its-own-thrift-store-app-11629802800.

[208] Walter Loeb, *With The Secondhand Designer Market Booming, Consumers Should Be Wary Of Fakes*, FORBES, https://www.forbes.com/sites/walterloeb/2019/09/06/secondhand-designer-apparel-can-be-fake--even-if-macys-or-jcpenney-sells-it/.

[209] Sanjeev Sularia, *The Counterfeit Problem And How Retailers Can Fight Back in 2020*, FORBES, 2020, https://www.forbes.com/sites/forbestechcouncil/2020/03/17/the-counterfeit-problem-and-how-retailers-can-fight-back-in-2020/?sh=19288a831f32.

[210] *See* Misty Sidell, *Louis Vuitton, Chanel, Hermès Bags Hit Amazon Through Secondhand Distributor – WWD*, WWD, 2022, https://wwd.com/fashion-news/designer-luxury/louis-vuitton-chanel-hermes-bags-hit-amazon-secondhand-distributor-1235394863/("When asked if WGACA is nervous about potential blowback from the brands they are selling on Amazon, Weisser said: 'We have always been a distributor of brands that don't want to be distributed.'").

secondary market.[211] While some firms may be happy to have sold through their inventory, others may lament the lost relationship with their customers and the blow to their reputation caused by the high prices.[212]

Manufacturers have long wanted servitudes to control the channels of commerce. Zechariah Chafee identified several early efforts at these restrictions when he took up the question of equitable servitudes a century ago.[213] Servitudes are a desirable tool for this problem because they grant the beneficiary a remedy against the platform or subsequent purchaser. By contrast, a contract only provides a remedy against the first purchaser and extracting damages from that person may do little to address a firm's immediate concerns.[214]

### *C. Complex Doctrine and the Limits of Lawyers*

The ongoing litigation over the premature failure of Tamko roofing shingles offers a window into how lawyers are litigating cases in which a firm attempts to bind subsequent owners of a chattel to a shrink-wrap contract. The facts of the Tamko cases are follow the same broad pattern: a contractor or subcontractor purchases the shingles. That contractor or a subcontractor opens the packaging that is printed with the arbitration clause. The homeowners never sees or has knowledge of the arbitration clause.[215] Years later, when the shingles fail the homeowner or their insurer sues the manufacturer, Tamko Buildings Products, Inc. At that point, Tamko attempts to compel arbitration. Tamko typically frames the lawsuit as a claim arising under the contractual warranty even in cases in which the plaintiff intentionally raises only common law claims to avoid implicating

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[211] Luxury designers have long employed purchase limits to stem currency arbitrage of the goods. Eric Wilson, *Retailers Limit Purchases of Designer Handbags*, THE NEW YORK TIMES, January 10, 2008, https://www.nytimes.com/2008/01/10/fashion/10CAPS.html ("We are very sensitive, first and foremost, to serving the customer, but secondly to any potential for reselling by customers.").

[212] See Deloitte, Money-making bots: The legal threat destroying consumer trust 8 (2021) https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/risk/deloitte-uk-risk-money-making-bots.pdf) (explaining that scalpers may be the source of customers' frustration but that they direct their ire at the original seller).

[213] Chafee, *supra* note 6, at 949; *see also* Chafee, *supra* note 8, at 1255–56 (reassessing efforts to impose resale restrictions thirty years after his first study).

[214] *See* Hovenkamp, *supra* note 68, at 543 (exploring the power of injunctive remedies versus contract remedies where intellectual property creates servitude-like restrictions).

[215] For example, the plaintiffs in *American Family Mutual Insurance Co. v. Tamko Building Products, Inc.* asserted that "[a]t no time did any member of the American Family's insureds; Boards of Directors ever receive, read or agree to any packaging, writing, agreement or contract containing provisions with an arbitration clause before they became aware that they did not meet impact resistance standards." Plaintiff's Memorandum Brief in Opposition to Defendant Tamko Building Products, Inc.'s Motion for Stay Pending Ruling on Motion to Dismiss or Compel Arbitration, American Family Mutual Insurance Co. v. Tamko Building Products, Inc. (D. Col. 1:15-cv-02343-REB-NYW, Dkt. No. 36).

the alleged contract.[216] In a few cases, the terms and conditions were embossed into the roofing shingles themselves, but that litigation has progressed along the same broad lines as the shrink-wrap cases.

Tamko has been so aggressive in asserting that its arbitration clause is binding on downstream purchasers that it has even attempted to compel arbitration against a Kansas plaintiff who purchased a home in a foreclosure sale.[217] In that case, the plaintiffs discovered that the relatively new Tamko roof needed to be replaced at a cost of nearly $90,000. When they sought reimbursement from Tamko, Tamko sought to compel arbitration, alleging that their claim arose out of a warranty contract, which the plaintiffs denied.[218] That case never reached the merits because Tamko failed to produce a copy of the agreement that it was trying to enforce against the plaintiffs.[219]

Seeking reimbursement for claims paid to a condominium association and a homeowners' association, American Family Mutual Insurance Company sued Tamko on six claims, including negligence and strict liability.[220] In response, Tamko argued all of American Family's claims were subject to arbitration because the arbitration clause on the shingles covered "EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER . . . REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY." [221] Since all of American Family's claims "unquestionably 'relat[es] to or aris[es] out of the' shingles," Tamko argued that they all must be dismissed or sent to arbitration.[222]

Replying to Tamko's motion to compel, American Family argued that "[i]t is inconceivable that this Court could bind American Family to an arbitration agreement that it

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[216] *See, e.g.*, Tamko Building Products v. Jonesburg United Methodist Church, Mo. Ct. App. (Jul. 29, 2014)(Attached as an exhibit to Case 2:14-cv-01581-TLN-KJN Document 17-3 Filed 11/06/14 Page 42 of 50) (transcript of Tamko's lawyer explaining that the warranty was at the heart of the suit but acknowledging that the plaintiffs did not bring a breach of warranty claim)(motion to compel arbitration denied without opinion or explanation).

[217] *Nelson v. Tamko Bldg. Prods.*, No. 15-1090-MLB, 2015 U.S. Dist. LEXIS 75597, at *3 (D. Kan. June 11, 2015)

[218] *Id.*

[219] *Id.*

[220] Memorandum Brief in Opposition to Defendant Tamko Building Products, Inc.'s Motion to Dismiss or Compel Arbitration, *Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods.*, 178 F. Supp. 3d 1121 (D. Colo. 2016) (D. Col. 1:15-cv-02343-REB-NYW, Dkt. No. 19). These cases also included claims for breach of express and implied warranties, and misrepresentation to which Tamko argued that American family was estopped from asserting claims sounding in express warranties while attempting to carve out the arbitration clause contained in the same contract. Motion to Dismiss or Compel Arbitration , *Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods.*, 178 F. Supp. 3d 1121 (D. Colo. 2016) (D. Col. 1:15-cv-02343-REB-NYW, Dkt. No. 15).

[221] *Id.*

[222] *Id.*

never saw and accompanied a product it did not purchase." Tamko's successful counter-argument: American Family's beneficiaries were bound by the arbitration clause because their contractors and their subs were agents of the building owners when they opened the packaging and thereby agreed to the arbitration clause.[223]

Tamko even prevailed its agency argument in a case where the plaintiff homeowner's contractor purchased the shingles through a roofing supply company that was a co-defendant in the products liability case.[224] In that case, *Krusch v. TAMKO Building Products, Inc.*, the following notice was molded into each individual shingle:

> PURCHASE OF THIS PRODUCT IS SUBJECT TO THE TERMS, CONDITIONS AND LIMITATIONS OF A LIMITED WARRANTY WHICH IS INCORPORATED INTO THE PURCHASE TRANSACTION. THERE ARE NO OTHER WARRANTIES, EXPRESS OR IMPLIED FOR THIS PRODUCT. FOR A COPY OF THE LIMITED WARRANTY OR THE INSTALLATION INSTRUCTIONS, CONTACT YOUR TAMKO DISTRIBUTOR. CALL TAMKO AT 1-800-641-4691, OR VISIT WWW.TAMKO.COM[225]

These shingles were then affixed to the roof of the house such that the structure was crowned in Tamko's terms and conditions. Even if the homeowner did discover the terms embossed into the shingles on his roof, at that point it would have been too late to return them to Tamko.[226] Despite having no knowledge that these terms were nailed to the roof of his house, the court bound the homeowner to the terms using a theory of agency.[227]

Throughout the litigation proceedings in *Krusch*, the parties focused on contract doctrine alone. They considered questions such as whether arbitration clauses needed to be signed and other nuances of shrink-wrap agreements. They argued about whether the timing of the agreement made it unconscionable. They delved into agency law to determine whether the homeowners' contractor had the authority to bind the homeowner to the alleged contract. However, at no point did they contemplate whether the terms molded into the shingles attempted to create a servitude on a chattel. Indeed, in none of the recent Tamko litigation has the plaintiff argued that Tamko is seeking to create an equitable servitude on its shingles.

And yet, it looks like Tamko is seeking to create an equitable servitude on its shingles. In *Krusch*, Tamko sought to enforce the terms molded onto the product not against the first purchaser, the roofing supply company, or the second purchaser, the contractor, but

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[223] Reply in Support of Motion to Dismiss or Compel Arbitration, , *Am. Family Mut. Ins. Co. v. TAMKO Bldg. Prods.*, 178 F. Supp. 3d 1121 (D. Colo. 2016) (D. Col. 1:15-cv-02343-REB-NYW, Dkt. No. 21); other federal courts have agreed with this argument Krusch v. TAMKO Bldg. Prods., Inc., 34 F. Supp. 3d 584, 589-90 (M.D.N.C. 2014), Hoekman v. TAMKO Bldg. Prods., Inc., No. 2:14-cv-01581-TLN-KJN, 2015 U.S. Dist. LEXIS 113414, at *16-18 (E.D. Cal. Aug. 24, 2015).

[224] Krusch v. TAMKO Bldg. Prods., Inc., 34 F. Supp. 3d 584, 589-90 (M.D.N.C. 2014).

[225] Krusch v. TAMKO Bldg. Prods., 34 F. Supp. 3d 584, 589 (M.D.N.C. 2014).

[226] M.D.N.C. 1:14-cv-00116-TDS-JEP, Dkt. No. 16

[227] *Krusch*, 34 F. Supp. 3d at 595.

against the homeowner. To do this, they effectively cut the building supply company out of the analysis then allege that the builder is the homeowners' agent. These facts are similar to those in *Hartman* where the court said "[t]o call such a purchaser an 'agent' is to juggle with words" before explaining that the common law does not recognize servitudes on chattels.[228]

Similarly in *Disher v. Tamko Building Products*, Tamko acknowledged that one of the plaintiffs was a subsequent purchaser of the home and used this fact to argue that the plaintiff was ineligible for compensation under the terms of the express warranty while also arguing that under the terms of that same warranty the plaintiff had waived any implied warranty claims.[229] In Tamko's view, the contract it made with the first purchaser of the shingles in 2005 was binding on the family that later purchased the home in 2011.[230] That's not how contracts are supposed to work.

This raises the following question: why is it that litigants are not trying to approach some of these terms of services cases as servitudes cases? While there is no guarantee that courts would be receptive to arguments based on arcane property doctrine, given the ease of pleading in the alternative, it is surprising that the issue is so uniformly missing. From the outside, it looks like the familiar fights over the enforceability of arbitration clauses are consuming the lawyers' and courts' attention, leading them away from other potentially fruitful arguments. The servitudes argument is particularly compelling in cases like *Krusch* where the shingles would change ownership with the sale of the home and a new homeowner may attempt to assert a products liability claim against Tamko.

The counterfactual scenario, in which every building supply manufacturer can print a reference to a terms of service on each part and that contract is binding on all future homeowners, verges quickly into dystopian territory. Rather than being a discrete transaction with closure, purchasing a home would be opening a can of worms. Homebuyers would enter into long-term contractual relationships with hundreds or even thousands of product manufacturers. They may need the consent of dozens of firms to sell their home. This shift in the duration of the contractual relationship is significant. Where previously buyers could know what they were getting, enforcing terms of service on parts would force buyers to choose between considerable information and monitoring costs or, more likely, rationally ignoring the contracts and hoping for the best.[231]

Purchasers of so-called smart homes that run on software-driven products are already in this situation.[232] Over time, consumers may come to understand that they cannot truly own anything software touches, but to say the same of all chattels is to fundamentally

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[228] 153 F. 24 at 38.

[229] Disher v. Tamko Bldg. Prods., No. 14-cv-740-SMY-SCW, 2015 U.S. Dist. LEXIS 100453, at *27 (S.D. Ill. July 31, 2015)

[230] *Id.* at 23.

[231] Ayres & Schwartz, *supra* note 172.

[232] Mulligan, *supra* note 9.

disrupt ownership. Doing so would inject the pathologies of consumer contract—lopsided terms, opportunism, and consumer mistrust—into the built environment. The following parts contemplate the impact of such a shift.

## III. REVISITING THE COSTS OF SERVITUDES ON CHATTELS

### *A. Information Costs*

Information costs have long been the primary justification for courts' refusal to recognize equitable servitudes on chattels except in very limited circumstances.[233] The basic argument is that if courts recognize any equitable servitudes on chattels, everyone must worry about equitable servitudes on chattels. Because a servitude imposes a duty on everyone to comply with its mandates, it can impose costs on everyone.[234] Even when there is no servitude present—and therefore no one deriving any benefit from the servitude—everyone incurs the cost of investigating for servitudes.

The problem of notice is one of both fairness and information costs. Because servitudes can run with the property, be it real or personal, there is always a chance that a subsequent purchaser will not have notice of the restriction. Courts are then faced with an unfortunate choice: they can either enforce the covenant against an unwitting party and potentially frustrate that party's expectations, or they can decline to enforce the covenant and frustrate the expectations of the party seeking to enforce it. Either way, one party will be unhappy. For this reason, the problem of notice was one of the historical justifications for judicial suspicion of servitudes[235] on real property, and it remains a barrier to enforcing servitudes even today, despite the fact that they are a long-recognized interest in land.

Servitudes as secret interests are particularly troublesome because they increase the risk of opportunism that property doctrine has sought to limit elsewhere. In general, courts do not enforce secret interests against parties that run afoul of those interests. Indeed, property doctrine is replete with rules designed to reveal secret interests. Imagine that O sells Blackacre in fee simple absolute at $T_1$ and A does not record. At $T_2$, O sells a Blackacre in fee simple absolute to B, who has no knowledge of A's purchase, and B promptly records. Under all three forms of recording acts currently in use, B would be the rightful owner of Blackacre. On these facts, A bears the loss from O's fraud because between A and B, A was in the best position to prevent the loss. Recording, a kept their interest a secret and secret property interests are not typically enforceable against those who run afoul of them.

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[233] *See supra*, Part I.B.

[234] Merrill & Smith, *supra* note 135; Mulligan, *supra* note 9; Van Houweling, *supra* note 9.

[235] *See supra*, Part I.B.

Likewise, secret liens are typically unenforceable against bona fide purchasers for value[236] except in limited circumstances. [237] But the name is somewhat misleading since the public may have no notice of a particular lien but has notice of the laws that can create statutory liens.

To strike the right balance, the law sometimes favors use over formal notice. Here, apparent exceptions can help clarify the rule. For example, adverse possession can create interest in property that ripen into interests in fee simple that are enforceable against subsequent purchasers of the property, even though interests created by adverse possession are typically not recorded. Courts and commentators alike have struggled with how to square these interests with not only the mandates of the recording system, but also the general policy against enforcing secret interest in property. The elements of adverse possession provide some reprieve in that the party seeking to gain title by adverse possession must occupy the property "openly and notoriously." Visible occupation or possession of the property provides inspection notice to would-be purchasers that someone other than the record owner holds an interest in the property.

Similar notice occurs when a seller conveys property subject to a lease agreement and does not disclose the lease to the buyer. If there is a tenant in possession of the property, the would-be buyer is on notice that the property is subject to a lease and, therefore, would be bound by the terms of the lease.[238] This rule protects tenants by preventing landlords from invalidating inconvenient leases through sales.

Equitable servitudes on chattels threaten this balance because there is no foolproof way to give the world notice of the servitude short of printing it on the item itself. Labeling objects with notice of a servitude may be sufficient for enforcement purposes in the near term if the terms are findable. In the longer term, dead links,[239] changed mailing addresses, and even rebranding could all make it practically impossible to find the terms. This problem is different than the problem of notice in real estate. There, the applicable covenants are all supposed to be recorded in the property records. Those records may be difficult and expensive to use, and there will be mistakes, but that situation is very different from terms that could be anywhere. Moreover, even if a firm does print a servitude on an object at the time of sale, that print may no longer be legible at a later time. For

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[236] *See* In re Bay State Yacht Sales, Inc., 117 B.R. 16, 18 (Bankr. D. Mass. 1990) (Explaining that the prevention of secret liens this is one of bankruptcy law's animating policies).

[237] In re Sheldahl, Inc., 298 B.R. 874, 877 (Bankr. D. Minn. 2003) (allowing enforcement of a secret lien when the legislature has specifically allowed enforcement of such liens).

[238] *See* Snyder v. Sperry & Hutchinson Co., 368 Mass. 433, 439, 333 N.E.2d 421, 425 (1975) ("the buyer can adequately protect himself against a right to possession for less than seven years by consulting the seller and the present lessee to ascertain the contents of any outstanding unrecorded lease agreement").

[239] Consider that over eighty percent of research guides, which are created by library professionals for the purpose of facilitating access to knowledge contain at least one dead link shortly after creation. Rebecca Jackson & Kristine K. Stacy-Bates, *The Enduring Landscape of Online Subject Research Guides*, 55 REFERENCE & USER SERVICES QUARTERLY 219, 226 (2016).

example, a designer could print a servitude onto a tag in a garment and even include the exhortation that the tag cannot be removed. And yet, a purchaser is fully capable of cutting the tag out. The only way for a buyer on the secondary market to know about this servitude is for them to have knowledge from some third-party source that the garment should have had a tag inside that contained terms of use.

### *B. Waste*

In this context, waste means that the tangible goods that occupy our space and time are shackled by contracts and can become unusable—not by any malfunctioning of their own, but through the workings of the contract. Put differently, should a contract on a thing $T_1$ be able to turn that thing into trash at $T_2$—is the law concerned about the creation of trash?[240] Conceivably, an arrangement like this could mean that artists, inventors, and other people who would like to use these goods in ways other than the manufacturer contemplated would not be able to legally use those materials. A skeptic might say that only complex goods are subject to such contracts; accordingly, the law generally should not concern itself with true raw materials for inventors and artists.[241] But as the case of Tamko shingles shows, restrictions on building materials are already here.

Julia Mahoney and Molly Van Houweling call the question of waste "the problem of the future," which they define as one generation having excessive control over future generations without the ability to know what those generations will need.[242] This control creates both philosophical and practical problems. By allowing the present generation to consolidate and control the material resources of future generations, the law risks recreating feudal incidents.[243] It also risks creating a whole lot of trash and, with that, problems of space and ecological destruction. And to what end? To honor the legal rights of an entity that may no longer exist?

The doctrine of waste offers some answers. Courts sometimes turn to waste as a justification for not enforcing property arrangements that would otherwise be enforceable. The paradigmatic case here is *Eyerman v. Mercantile Trust Co.*, in which the Missouri Court of Appeals enjoined the executors of Louise Woodruff Johnston's estate from burning down her house as she specified in her will.[244] Although her home was—and today still is—in one of Saint Louis's most exclusive neighborhoods, the court, when granting neighbors' request that the burning be enjoined, recognized that destroying housing

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[240] *See* JOEL FEINBERG, RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 180–181 (2014) ("Surely we owe it to future generations to pass on a world that is not a used up garbage heap. Our remote descendants are not yet present to claim a livable world as their right").

[241] Chafee, *supra* note 6.

[242] Mahoney, *supra* note 14; Van Houweling, *supra* note 9, at 900.

[243] Van Houweling, *supra* note 9, at 900.

[244] 524 S.W.2d 210, 214 (Mo. Ct. App. 1975).

harms the whole community.[245] As Lior Strahilevitz observed, courts do permit the intentional wasting of property in many circumstances, but buildings appear to be different. [246]

As society grapples with climate catastrophe, it is inaccurate to think of personal property resources as unlimited. Every new object produced extracts a toll on the environment from energy, water, and raw materials costs to the space that that object will occupy if and when it finishes its useful life. While space in a landfill is not approaching the same level of scarcity as space for desirable housing, it is not infinite. And indeed, landfill space is in competition with housing space in many regions. In this way, waste in the personal property context implicates many of the same concerns as waste in the real property context. Managing excess future trash is an externality imposed on the future, as is the cost of re-configuring rights to reduce trash.[247]

A more troublesome iteration of the waste problem is the issue best described as orphan servitudes. Orphan servitudes are servitudes that protect beneficiaries that are indeterminable, uncontactable, or no longer in existence. This definition mirrors orphan works in copyright.[248] In copyright, the visual arts pose the greatest challenges to identifying the artist, tracing rights, and tracking down parties with authority to resolve rights issues.[249] With physical objects, there may not be enough information on or accompanying the object itself to determine what it is or who the rights holders were at the time of manufacture. And even if an object can be identified, it may be impossible to trace the successors to those rights, particularly when those successors are non-public companies whose deals are not systemically made public.[250]

As Jerry Brito and Bridgit Dooling have identified, there are three main costs to orphan works in copyright: "the pass-through of a risk premium to consumers, a diminished public domain, and harm to the preservation of cultural heritage."[251] Versions of these same risks would apply in a system that broadly enforced equitable servitudes on chattels. In addition to these risks, orphan servitudes could create waste in our material world and materially reduce the wealth of people who cannot easily trade out goods they no longer need for goods that they do need.

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[245] *Id.*

[246] Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796–800, 807–808 (2005).

[247] Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1173 (1999).

[248] UNITED STATES COPYRIGHT OFFICE, *Report on Orphan Works*, 15–16 (2006), https://www.copyright.gov/orphan/orphan-report-full.pdf.

[249] *See* Christian L. Castle & Mitchell, Amy, *Unhand that Orphan Evolving Orphan Works Solutions Require New Analysis*, 27 ENT. & SPORTS LAW. 1, 21 (2009) (comparing the problem of orphan works in visual arts to the performing arts).

[250] Here, the privacy functions of the corporate ownership could work against anyone attempting to determine who the beneficiary of an equitable servitude on a chattel is.

[251] Jerry Brito & Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, 12 MICH. TELECOMM. & TECH. L. REV. 75, 84 (2005).

As in the orphan works context in copyright, the threat of an injunction creates the most significant risks when using a license-burdened object. When the United States Copyright office studied orphan works, filmmakers and publishers commented that it was the fear of an untimely injunction, after the work was done and the money spent, that caused them to avoid using orphan works.[252] For visual artists and inventors, untimely injunctions pose a similar risk if courts vigorously enforce equitable servitudes on chattels. Because a safer path for them would be to use only unencumbered materials, many objects would not be repurposed and recycled. Indeed, all recycling is threatened if broad servitudes and the threat of injunctions make scrap operations riskier than they are profitable.

Beyond the problem of trash, the problem of waste also concerns time, money, and intangible resources. If equitable servitudes on chattels litter the built world, everyone has to spend time researching those terms, attempting to secure the rights that they need, or coping with the risk they bring upon themselves when they, perhaps rationally, decide to ignore the terms and just live their lives.[253] We can express this time as increased transaction costs, but that framing is does not capture the fully capture what it means to consume this ultimately non-renewable resource.

### *C. Autonomy, Dignity, and the Self*

In addition to imposing costs on third parties, equitable servitudes on chattels have costs to owners. Restrictions on freedom to contract that address these costs are more controversial than those to address costs to third parties because these costs are part of the bargain that the owner struck. If there is demand for a servitude-free configurations, we might expect the market to provide them, albeit at a price that reflects whatever value firms receive when they choose to include a servitude. On these facts, many consumers might prefer lower cost but restricted goods.[254] But we should be skeptical that the ability to choose among terms, especially non-salient terms, is valuable to consumers at all.[255]

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[252] UNITED STATES COPYRIGHT OFFICE, *supra* note 248, at 13.

[253] *See* Heller, *supra* note 247, at 1173 (explaining that it may be expensive to reassemble rights fragmented over numerous parties).

[254] There are ample examples of consumers preferring lower-cost goods when price discrimination is possible. For example, Tesla buyers choosing vehicles with software that limits the range of the battery over higher-priced vehicles that lack the range-blocking software. To be sure, these same consumers would probably prefer to pay the lower price and avoid the range-blocking software, but without that option, price may be a more important consideration. Robert H. Frank, *Tesla's Tiered Pricing Is a Hurdle, but a Fair One*, THE NEW YORK TIMES, October 27, 2017, https://www.nytimes.com/2017/10/27/business/teslas-pricing-hurdle-not-hindrance.html

[255] Nathan B. Oman, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much about Boilerplate and Other Puzzles Essay*, 83 BROOK. L. REV. 215, 217 (2017).

More choices does not ensure more autonomy,[256] especially when none of the choices are good.[257]

Moreover, it can be difficult to argue that sellers have a duty to sell a good in a particular configuration when they, in fact, have no duty to sell that good at all. Still, because ownership in fee simple has been so central to western culture for so long it is worth considering what might change if equitable servitudes on chattels are allowed to chip away at the meaning of ownership.

Equitable servitudes on chattels complicate individual autonomy. The fee simple absolute, property's most basic form, is the epitome of autonomy. Fee simple, as it is commonly called, is a potentially indefinite interest that bestows on the owner the right to exclude, possess, use, consume, improve, sell, and devise. It is the "the largest possible aggregate of rights, privileges, powers and immunities with respect to the land."[258] This strong form of ownership is what commentators like Blackstone had in mind when they speak of ideals like owners' "despotic dominion" over their property.[259]

Autonomy requires a threshold level of wealth that makes choices possible. Greater wealth enables a greater range of choices. The default form of ownership, the fee simple absolute, bestows on holders both the downside risk that the asset may lose value and the upside risk that the asset will increase in value—it is the latter, of course, that enables wealth creation.[260] Likewise, if an owner decides to abandon their interest in property and someone else claims it, thereby acquiring title to the property, the new owner then holds the upside risk. If that asset appreciates in the future, the former owner cannot demand a share of that increase from the new owner, because the default rule is that upside risk follows title. Asset holders who want to grant others access to their assets but retain the upside risk should use licenses to grant that access and avoid selling it, since a sale typically transfers upside risk to the new owner.

Thinking about fee ownership of chattels can seem trivial given the low average value of most consumers' possessions. Still, each thing is an asset or a liability if it proves expensive to dispose of. For many people, the ability to sell their things is an important source of income during tough times. Without ownership in fee, consumers would pay money to acquire things, but may not be able to recoup these costs when those things are no longer useful or when the value stored in those things must be deployed elsewhere.

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[256] Cass R. Sunstein, *Choosing Not to Choose*, 64 DUKE L.J. 1, 40 (2014).

[257] Hoffman, *supra* note 171, at 49.

[258] STOEBUCK & WHITMAN, § 2.2, at 28.

[259] 1 WILLIAM BLACKSTONE, COMMENTARIES *2.

[260] *See* Carruth v. Easterling, 247 Miss. 364, 371, 150 So. 2d 852, 855 (1963) (explaining the rule of increase as allocating the benefit of an increasing herd to the owner).

Autonomy over one's thing is the right to choose whether to share, strengthen relationships, and build community with that thing. Consider, for example, what commentators have called inclusion and dispossession.[261] In this context, inclusion refers to what is broadly called the sharing economy, even though micro transactions between peers are not quite the same as altruistic sharing.[262] We might think of inclusion as the ability to give others access to property that we own. Dispossession, according to commentators such as Dave Fagundes and Jill Fraley, refers to voluntary disposition to talk about donating property.[263] Fagundes looks to recent advancements in the study of happiness—hedonics—to explain why giving away one's property, whether through charitable contributions or gifts in kind are more happiness-inducing than acquisition. Prioritizing dispossession over acquisition effectively turns the focus of property on its head.[264] The ability to choose to use one's things in the service of another is an argument in favor of policies that favor alienation. Donating is but one form of alienation, although it is a particularly expressive form in that the donor chooses their beneficiary and, in so doing, expresses their values. This is somewhat different from selling an asset at market in a commercial transaction. Indeed, we might think of choosing to donate unwanted goods rather than throwing them away as an expressive choice in its own right.

Equitable servitudes can also pose a direct threat to expression. For example, a shrink-wrap contract could attempt to limit how owners display or discuss products. Non-disparagement clauses were already common in other consumer contracts before Congress stepped in to protect the right to leave bad reviews.[265] Firms would undoubtedly welcome the opportunity to tether the restriction to the thing instead of just its first user. Because these non-disparagement clauses remove information from the market and otherwise impinge on free expression values, many jurisdictions have limited their enforceability,[266] even if some commentators defend them as essential for businesses in today's online environment.[267] Copyright licenses already sometimes include non-disparagement clauses, which have the effect of tying the clause to the item bearing the copyright. Whether doctrine such as abuse of copyright might prevent the enforcement of these terms, however,

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[261] Jill Fraley, *The Meaning of Dispossession*, 50 IND. L. REV. 517 (2016); Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361 (2017).

[262] Fraley, *supra* note 261; Fagundes, *supra* note 261.

[263] Fraley, *supra* note 261; Fagundes, *supra* note 261.

[264] Fraley, *supra* note 261.

[265] Consumer Review Fairness Act of 2016, H.R. 5111, 114th Cong. (2015-2016); *see also* Wayne R. Barnes, *The Good, the Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law after the Consumer Review Fairness Act*, 53 GA. L. REV. 549, 576–82 (2019) (evaluating the CRFA); Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMM. & TECH. L. REV. 1 (2017)(tracing the enactment of the CRFA and its goals).

[266] For example, The Consumer Review Fairness Act of 2016, Pub. L. No. 114-258, 15 U.S.C. § 45(b) limits firm's ability to retaliate against customers who leave poor reviews.

[267] Lori A. Roberts, *Brawling with the Consumer Review Site Bully*, 84 U. CIN. L. REV. 633, 683 (2016).

is not well developed.[268] For example, in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc*., Disney's licenses granting websites permission use its film trailers mandated that the website "not be derogatory to or critical of the entertainment industry or of [Disney]" otherwise the license would be rendered "null and void" and the licensee would "be liable to all parties concerned for defamation and copyright infringement, as well as breach of contract."[269] Video Pipeline argued that "such licensing agreements seek to use copyright law to suppress criticism and, in so doing, misuse those laws, triggering the copyright misuse doctrine,"[270] which would give them a defense to an infringement action by Disney. The Third Circuit ultimately rejected Video Pipeline's argument. Other courts have allowed a misuse of copyright defense when, among other things, the rights holder is attempting to restrict access to materials not protected by copyright.[271] Regardless of which path courts ultimately choose, the mere presence of these restrictions might chill free expression. These same concerns would apply beyond the intellectual property context to equitable servitudes more generally. While any non-disparagement agreement presents these concerns, equitable servitudes, because they may bind more people over a longer period of time than a simple contract would, might have a deeper impact on expression.

Autonomy and self-expression intersect again in the right to tinker and create. Those who view themselves as handy people or artists need access to raw materials with which to create. While some people use commercial products specifically designed for tinkerers and artists—the kinds of things for sale at Home Depot and Blick—there is an even stronger custom of creative people using found objects, repurposing what they have, and putting old materials to novel uses. Equitable servitudes that restrict how property might be repurposed would thwart this custom.

It is a mistake to underestimate the significance of the loss of the right to tinker and create. Many exciting and essential products that help increase the standard of living over time have been created by people playing with things they have in their proverbial garage. Consider the Corsi-Rosenthal Box, the DIY air purifier used to cheaply supplement HVAC systems that were not designed with airborne respiratory illnesses like COVID-19 in mind. Made of a box fan, four square MERV-13 filters, tape, and carboard, this filter has proven itself to be effective and economical.[272] The Corsi-Rosenthal Box is emblematic of how people put goods to novel uses to solve problems: the filters were originally designed for HVAC systems, box fans have been around for decades, and the fan's

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[268] *See* 4 NIMMER ON COPYRIGHT § 13.09 (2022).

[269] Video Pipeline, Inc. v. Buena Vista Home Entm't, Inc., 342 F.3d 191, 203 (3d Cir. 2003).

[270] *Id*.

[271] Shloss v. Sweeney, 515 F. Supp. 2d 1068, 1080 (N.D. Cal. 2007).

[272] Rachael Dal Porto et al., *Characterizing the Performance of a Do-It-Yourself (DIY) Box Fan Air Filter*, 56 AEROSOL SCI. & TECH. 564 (2022).

own packaging has proven to be a good source for just the right cardboard for the job.[273] The Corsi-Rosenthal box is just on example of the DIY efforts deployed by desperate people the world over to keep their loved ones safe from a harm.[274] We might look back at the intense DIY phase of the pandemic cynically, but these efforts were an expression of love and community in an emergency. They were, and still are, profoundly human.

Now imagine that the air filters came with a shrink-wrap contract claiming that owners and their successors can only use the filters in the HVAC systems for which they were intended. If this contract were truly binding and firms could get courts to grant relief against anyone misusing the filter, this innovation may never have occurred, and if it did, publicizing it would have invited legal risk.[275] Anyone who benefits from cheap air filtration would be worse off if only because of the uncertainty of getting sued by the air filter manufacturer. Although reputational concerns about blocking air filtration technology in a global pandemic may keep enforcement actions at bay, the innovation environment likely would have been chilled.

Less urgent perhaps, but no human or profound is making art. Whether as a hobby or as profession, or something in between, visual artists take raw materials and transform them into something new. Some of these supplies already come tangled up with intellectual property-related restrictions that prevents the artists from fully owning their creations. For example, bolts of fabric printed with sports logos are often labeled "This fabric is for individual consumption only. Any unauthorized use of this fabric is prohibited and illegal."[276] Online advice for crafters warns that the "individual use" language prohibits crafters from giving away their creations for free.[277]

While these IP-related restrictions may have a solid footing in trademark law, the boundaries between real IP concerns and mere servitudes on chattels are eroding. For example, bolts of calico fabric that home quilters relied on to build the United States' rich tradition of needlecrafts can now also be labeled as being for individual use only. Here, however, the analogy requires some nuance. The creators of fabrics are artists to the same extent as the quilters and deserve to be compensated for their work. Likewise, if the fabrics incorporate trademarks, those rights need to be cleared. These intellectual

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[273] Lena H. Sun, *After Three Years of Covering Covid, I Built My Own Air Filter*, WASHINGTON POST, January 14, 2023, https://www.washingtonpost.com/health/2023/01/13/air-filter-diy-covid/.

[274] Adam Rogers, *Could a Janky, Jury-Rigged Air Purifier Help Fight Covid-19?*, WIRED, April 6, 2020, https://www.wired.com/story/could-a-janky-jury-rigged-air-purifier-help-fight-covid-19/.

[275] While filter makers would have little incentive to enforce their rights against anyone whose creation stands to increase demand for filters, if the filter maker is owned by a firm that produces pre-built air filtration systems these incentives may shift.

[276] *Fabric Traditions New England Patriots Fleece Fabric Logo*, JOANN, https://www.joann.com/new-england-patriots-nfl-fleece-fabric/7410277.html.

[277] *Intellectual Property Infringement: Can I Sell Handmade Creations from Licensed Fabric?*, LUM LAW GROUP, https://www.lumlawgroup.com/can-i-sell-handmade-items-made-of-licensed-brand-fabric/.

property rights problems mirror equitable servitudes on chattels, but they are the predictable outcome of the intellectual property laws rather than the unexpected offspring of adhesion contracts. In this context, the more problematic equitable servitudes occur when the licensing norms that follow IP-laden fabrics begin appearing on more generic fabric bolts as well. After all, it is very easy to print "for individual use only" on a bolt, even if the fabric on that bolt is the commodity-grade cotton muslin that quilters for centuries have used as their canvas. When this license creep happens, more of, if not potentially all of, the supply of materials appears to be locked up. Quilters might hesitate to sell work that they incorrectly believe to be made with restricted fabric. Worse still, they may stop creating altogether if they cannot recover the costs of their hobby through sales.

The introduction of IP-like licenses into supplies adds a layer of transaction costs and risk to artists' work. And, where artists cannot secure the rights they need, their expression is constrained. The constraint already occurs when artists cannot clear the intellectual property rights that they need to create new works with old material, even when the rights holder is nowhere to be found.[278] To be sure, quilters could make their own fabric from scratch—raising the cotton, spinning the thread, weaving the fabric, and dyeing it—all before they start quilting. But if vertical integration is the only path to full ownership, that is a big change in the structure of economy and in where power lies in society.

Although restrictions on materials may sound fanciful, increasingly they are not. For example, many are complex consumer goods are now impossible to repair because they come wrapped in a license that permits repair only by professionals authorized by the manufacturer.[279] This is the so-called right-to-repair debate, in which consumers and their advocates have lobbied governments to limit the enforceability of such restrictions. Their arguments against these restrictions are two-fold: they create waste when products are no longer repairable because companies would prefer that you purchase new goods, and they increase the cost of repair because people who can perform the repairs themselves are not permitted to do so. Firms, of course, counter that restrictions on the right to repair are essential: not only do they help maintain the quality and safety of the products, but they are also simply included as part of the pricing plan. While it may be true that consumers would happily trade their right to repair for a significant reduction in upfront costs, to date there is little evidence of such price reductions occurring. Moreover, because things persist in space over time, the bargain that the first consumer would make is not the only relevant concern. Property design must consider the needs of the people who will occupy the same space in the future.

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[278] *See* Christian L. Castle & Mitchell, Amy, *supra* note 249 (explaining how projects are abandoned when rights cannot be traced and resolved); UNITED STATES COPYRIGHT OFFICE, *supra* note 248, at 1 (explaining that it is not in the public interest for artists to abandon projects when they cannot find the rightsholders they need to complete their projects).

[279] *See generally* AARON PERZANOWSKI, THE RIGHT TO REPAIR: RECLAIMING THE THINGS WE OWN (2022); Aaron Perzanowski, *Consumer Perceptions of the Right to Repair*, 96 IND. L.J. 361 (2021).

The right to repair, make art, and tinker are all things that consumers could pay for if firms made that option available. But there is no reason to assume that firms do or should have the power to use contract to limit these rights, especially by imposing limitations on the material environment itself. Indeed one of the benefits of the traditional prohibition against equitable servitudes on chattels is that it prevented firms from reaching too deep into the material environment to clamp down on novel uses of their products. Equitable servitudes on chattels stand to push us further away a society of makers towards a society of consumers. Servitudes could transform our material environment into an even more single-use space in which only professionals have the materials to create new things. Such a shift would be a large-scale deskilling. Beyond the practical implications, these restrictions deny individuals one source of meaningful accomplishments.

These shifts in how the creative economy works and in how individuals relate to their material environment are so significant that, if they are going to occur, they ought not happen accidentally. Yet that is what is happening. Half-lawyered individual contracts cases are remodeling the architecture of property rights without anyone raising these implications to courts or legislatures.

### *D. Administrability and Legitimacy*

The beauty of a bright-line prohibition on equitable servitudes on chattel is that such a prohibition is easy to enforce. There will be some difficult cases, such as trade disputes like those Chafee identified as slipping past the prohibition.[280] There will also be times when courts must decide if a novel argument about agency or tortious interference is a ploy to circumvent the ban. But courts will not be called on to determine whether some feature of an alleged servitude on a chattel causes it to violate public policy.

While it is theoretically possible that consumers—and the many businesses who find themselves with no more bargaining power than consumers[281]—may be able to challenge overreaching servitudes, the costs and other burdens of litigation all but guarantee that few servitudes that might be invalidated actually will be invalidated. Any legitimization of equitable servitudes on chattels is likely to lead to the same ubiquitous and onerous terms that predominate software licenses.

One of the triumphs of common law until the middle of the twentieth century was the development of doctrines that better align with consumers as they actually exist.[282] Where doctrines like caveat emptor placed significant information costs on consumers, innovations in common law imposed obligations to disclose on those parties that are in a better position to generate accurate information. Courts have explained that increasingly complex technology and changes in baseline knowledge among consumers justified

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[280] Chafee, *supra* note 8.

[281] TIM WU, THE CURSE OF BIGNESS: ANTITRUST IN THE NEW GILDED AGE (2018).

[282] Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 5–8 (1979).

imposing obligations on landlords and consumer products manufacturers alike.[283] This shift was not a perfect move towards behavioral-science informed law, but it was an important step in that direction. Subjecting consumers to new fact-intensive tests to determine whether an equitable servitude on a chattel is enforceable would be a discouraging step backwards.

The low likelihood that consumers could reliably invalidate overreaching equitable servitudes on chattels suggests that allowing them to stand could further undermine the legitimacy of the adversarial system and the private law. Consumers would not be wrong to feel like the deck is stacked against them.

## IV. SECOND-BEST RULES

The work of identifying the costs of a doctrine is distinct from the work of reforming or replacing that doctrine. The foregoing Parts have made the case that the best path forward is for courts to reject servitudes on chattels more vigorously. The reasons for rejecting equitable servitudes on chattels remain as vital today as they were a century ago.[284] Indeed, all of the now well-worn arguments against enforcing adhesion contracts against consumers apply equally to prohibiting the enforcement of equitable servitudes against consumers.[285] Moreover, modern environmental concerns should increase the law's skepticism towards doctrine that promotes waste.

Still, it is indisputable that there is demand for equitable servitudes on chattels. In a world in which courts do routinely enforce software-enabled servitudes, it is arguably anomalous to declare all non-software servitudes unenforceable. Such a rule may encourage firms to insert software into chattels that do not otherwise need it, thereby spreading the costs of software, which include threats to information privacy, difficult repairs, and premature obsolescence. For these reasons, and in light of the favored status of private ordering within private law doctrine, it is worthwhile to think about what equitable servitudes on chattel might look like if they must exist.

This Part explores a second-best doctrine if a wholesale rejection of equitable servitudes on chattels is off the table, and attempts to propose a coherent and conservative doctrine for their use. This framework aims to capture the economic, environmental, and personhood concerns discussed above in Part III. Where possible, this proposal attempts to preserve symmetry between real and personal property, but the two diverge where the dominant concerns differ. Finally, this proposal is small-c conservative in that it attempts to preserve the existing common law to the greatest extent possible.

The second-best solution is a change from the status quo, in that it provides a path for courts to police the substance of the terms that is more probing and less cured by

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[283] MacPherson v. Buick Motor Co., 217 N.Y. 382, 111 N.E. 1050 (1916).

[284] Chafee, *supra* note 6; Chafee, *supra* note 8.

[285] *See generally* Leff, *supra* note 168 (arguing against the enforcement of consumer adhesion contracts on the grounds that they bear little resemblance to the dickered contracts at the heart of contract doctrine).

procedural machinations than mere contract. Contracts scholars have long advocated for courts to shift their focus from the formation to the substance of contracts when determining their enforceability.[286] This substantive analysis already occurs when courts decide whether to enforce servitudes on real property, and it ought to continue if courts must recognize servitudes on chattels.

### *A. Unlabeled Chattels*

The primary problem with equitable servitudes on chattels is notice. With chattels, there is not, nor can there be, a central system that could provide record notice to downstream purchasers.[287] Emerging technologies may create digital analogs to registries,[288] but the sheer number of chattels that individuals encounter daily make a registry system impracticable. This category of unlabeled chattels includes every object that is not durably labeled with the servitude. Shrink-wrap labels would be ineffective for this purpose because they are typically discarded before they have the opportunity to confer notice on downstream purchaser. Under present norms, downstream consumers could have notice of a purported servitude if that servitude were indicated on the chattel itself, either in full or by reference to another source containing the terms.[289]

Looking to real property reveals some of the difficulties in promulgating a doctrine for unlabeled chattels. In real property, the baseline rule is that purchasers who have no notice of a servitude are not bound by it. But this rule is not quite as protective of purchasers as it may seem. While purchasers are deemed to have notice of servitudes properly recorded in the land records, there are many cases in which courts deem purchasers to have notice of a servitude even when it is not perfectly recorded. For example, they have notice if the servitude is recorded anywhere in their chain of title, even if their own deed is silent,[290] and if they should infer from the neighborhood's characteristics that there is a common plan.[291] In the cases challenging these servitudes, there is often no dispute that the purchaser lacked actual knowledge of the servitude. Still, courts tend to emphasize that the buyers could have known about the servitude with just a bit more care and that the servitude benefits the buyers—just as it benefits the other encumbered property.[292] Courts are less concerned with any individual buyer's investment-backed expectations

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[286] Wilkinson-Ryan, *supra* note 174, at 166.

[287] *See* Van Houweling, *supra* note 9, at 907.

[288] *See infra*, Part IV.C.

[289] Commentators have rightly criticized notice by reference regimes for providing consumers with notice of terms when it is too late for them to make a different choice and otherwise concealing the terms of the contract. *See* RADIN, *supra* note 17, at 10–12. The timeline of agreeing to be bound before one receives the terms of a contract is now so ingrained in the law that this proposal does not attempt to undo it.

[290] French v. White Star Ref. Co., 201 N.W. 444, 445 (Mich. 1924); Collins v. Rodgers, 938 So. 2d 379, 391 (Ala. 2006).

[291] Sanborn v. McLean, 206 N.W. 496, 498 (Mich. 1925).

[292] *Id.*

than with upholding the general agreement struck among buyers when the property was first developed.[293] In some cases, courts explicitly acknowledge that geography or changed circumstances mean that some owners will not receive the true benefit of the characteristic or price impacts of a servitude, while nonetheless making clear that those owners remain bound by the servitude to protect the original bargain.[294]

Where buyers of real property have a duty to inspect both the land records and the property itself and are on notice for whatever they may find there, buyers of chattels have not traditionally faced similar expectations. Indeed, language that appears to alter that expectation is part of what makes the Eleventh Circuit's opinion in favor of Tamko's motion to compel arbitration so radical.[295] The scale of the undertaking may justify the obligations to inspect imposed in real property law. Most purchases of personal property are too small to warrant imposing equivalent duties to inspect on purchasers. And if consumers did have a duty to conduct in-depth inspections for servitudes, it may well be rational for them not to do so, much in the same way that not reading the contracts that purport to impose the servitudes is often rational.[296]

*Dye* notwithstanding, it is presently difficult to see how a purchaser of a chattel could be deemed to have notice of a servitude on that chattel. There is no duty for the purchaser of a chattel to do any research to see what if any restrictions come with that chattel. Information costs alone suggest that this norm is an efficient one.

If consumers had a duty to search beyond the chattel itself for servitudes on that chattel, risk-averse consumers may rationally assume that all chattels have restrictive servitudes, thereby spreading the costs of such servitudes even where manufacturers and sellers are receiving no benefit from the servitude.[297] Because of this risk, all chattels that are not durably labeled with the servitude should be deemed to be unlabeled for the purposes of enforcing any alleged servitude.

A more balanced doctrine for unlabeled chattels would look something like Table 1.

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[293] Scheuer v. Britt, 118 So. 658, 660 (Ala. 1928).

[294] Bolotin v. Rindge, 230 Cal. App. 2d 741, 744 (1964).

[295] Dye v. Tamko Bldg. Prods., 908 F.3d 675, 682 (11th Cir. 2018) ("[T]hat big-box items come with purchase terms and conditions should hardly come as a surprise to modern consumers. Postpurchase, acceptance-by-retention warranties are ubiquitous today—think furniture, home appliances, sporting goods, etc. It's not only objectively reasonable to assume that such items come with terms and conditions, it's also eminently reasonable to assume that by opening and retaining those items a consumer necessarily accepts the accompanying terms and conditions.").

[296] *See* Ayres & Schwartz, *supra* note 172, at 548–50 (explaining the tension between contract's duty to read doctrine and consumers' decisions not to read contracts).

[297] Mulligan, *supra* note 9.

*Table 1.*

| ***Purchaser*** | ***Restraint on Alienation*** | ***Restraint on Use*** |
|---|---|---|
| *Purchasers with notice, not through a clearinghouse* | Unenforceable[298] / Reasonability[299] | Enforceable unless irrational,[300] unconscionable,[301] or unreasonably restrains trade or competition[302] |
| *Second and later through clearinghouse* | Unenforceable | Unenforceable |
| *Any without notice* | Unenforceable | Unenforceable |

This framework treats restraints on alienation and restraints on use differently, both because they are subject to different rules when applied to real property, and because absolute restraints on alienation may impose higher costs and fewer benefits that restraints on use. As Story explained "the right of alienation has been considered an inseparable incident to an estate in fee, and it is repugnant to the estate conveyed and against the policy of the law to allow restraints to be imposed on the alienation of such an estate."[303]

Landowners have long tried to avoid this rule with provisions in wills, deeds, and covenants, but courts read through the letter of these attempts to the substance. For example, in *In re Estate of Vera E. Cawiezell v. Coronelli*, the decedent attempted to bequeath real property under what the executor dubbed a "limited fee" that "did not include the right for the [beneficiaries] to sell or transfer the property outside their immediate family for twenty years."[304] The executor argued that there was no restraint on alienation, because the beneficiaries never received the right to alienate in the first place. The Supreme Court of Iowa rejected this argument, holding that bequeathing an interest in fee necessarily includes the right to alienate, thereby rejecting the concept of a "limited fee" that lacked this right.[305] In the context of chattels, absolute restraints on alienation create trash. Unusable real property may at least have conservation value. Unusable chattels are headed for a landfill.

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[298] *See* In re Estate of Vera E. Cawiezell v. Coronelli, 958 N.W.2d 842, 847 (Iowa 2021) (rejecting the *Restatement*'s reasonability test for restraints on alienation).

[299] *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §3.4.

[300] *See id.* §3.5.

[301] *See id.* §3.7.

[302] *See id.* §3.6.

[303] 31 C. J. S., ESTATES § 8.

[304] In re Estate of Vera E. Cawiezell v. Coronelli, 958 N.W.2d 842, 845 (Iowa 2021).

[305] *Id.*

The first row of this framework attempts to mirror the law of real property servitudes for initial purchasers and those who take with notice of the servitude. Skeptics of equitable servitudes will prefer the doctrines of states that continue to hold that direct restraints on alienation are unenforceable while other jurisdictions may rely on the Restatement's reasonability test. Both approaches balance concerns about externalities with honoring private ordering and preventing windfalls to parties who are freed from obligations to which they agreed.

One significant benefit of aligning personal property law with real property law is that it guarantees that there is a deep well of case law for litigants, courts, and importantly, arbitrators to draw upon when disputes arise. To the extent that questions of legitimacy demand that the law to track citizens' expectations of the law, aligning personal and real property law also makes sense, since it is not clear that people hold different conceptions of what it means to own real property and personal property.[306]

The main innovation in this framework is the addition of the idea of a clearinghouse that could sell encumbered chattels free and clear of servitudes. The archetypical clearinghouse is the resale shop or scrap yard: any place that is regularly in the business of reselling used goods from various sources. Places like charity resale shops receive goods as donations, which means that they are not good faith purchasers for value. Their charitable missions would be seriously hindered if they were required to investigate whether their donations were subject to equitable servitudes. Moreover, their own markets would be limited if potential purchasers who knew about servitudes—for example, collectors—could not buy certain goods free and clear but less sophisticated purchasers could. Likewise, scrap yards may have notice of servitudes if they are expert buyers of specific materials. Still, they play an essential role in the recycling of raw materials beyond competing with the manufacturers of new goods. Accordingly, they may warrant different treatment. This clearinghouse category acts as a safe harbor that strips servitudes off unlabeled chattels even when parties in the chain of ownership may have knowledge of the servitude.

For-profit resale shops and apps like Plato's Closet, ThreadUp, and antique stores complicate the clearinghouse category.[307] Individual employees at these firms perhaps would have the subject matter expertise to sometimes know which unlabeled chattels were covered by servitudes, but it would be difficult for them to avoid buying encumbered goods without adding so much process to their business model as to render their business impracticable. Including them in the clearinghouse category balances the benefits of a deep secondary market for goods with relative ease of durably labeling chattels.

Adding the clearinghouse category is not without costs. It reflects a value judgment that it is more important to avoid even well-intentioned equitable servitudes on chattels

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[306] HELLER & SALZMAN, *supra* note 11.

[307] This category does not include resale platforms where sales occur peer-to-peer, such as eBay, Facebook Marketplace, and Poshmark.

because enforcing any of them raises the costs for everyone. Rendering equitable servitudes on chattels unenforceable against parties who take without notice of the servitude creates the risk that first purchasers will opportunistically sell the good in violation of the servitude. Servitude beneficiaries, usually manufacturers, would be unable to enjoin the subsequent purchaser or undo the sale in a suit against the subsequent purchaser. Critically, however, they could still have a remedy against the first purchaser for damages. A suit for damages may not fully protect the bargain struck by the manufacturer, but the inadequacy of a damages remedy in this context is no greater than the inadequacy of damages in many contracts cases. Moreover, manufacturers who wish to preserve their servitudes could mitigate the risk posed by clearinghouses by making it efficient for owners of their goods to return those goods to them.

One criticism of the clearinghouse category is that it may favor the scalpers who have come to plague all kinds of markets beyond concert ticket sales.[308] In this framework, manufacturers may set purchase limits on products, but their remedies would be limited to actions against the first purchasers who resell in violation of the limitation. Given the unpopularity of scalping, manufacturers might find strict enforcement of some servitudes to be reputation-enhancing.[309] Furthermore, they could, of course, choose to label the chattel itself if they want an easier path to enforcement.

Even in the context of unlabeled chattels, use restrictions remain enforceable in limited cases. As Glen Robinson observed, there is a small universe of cases in which courts already enforce equitable servitudes on chattels as such, notably around preservation of a brand's goodwill, such as through packaging requirements.[310] What is important is that these cases are the exception rather than the rule. Still, these cases may be better litigated as claims sounding in tortious interference and unfair competition. And since these doctrines may tend to become entangled with equitable servitudes at the margin, any policy against recognizing modern servitudes ought take care not to undermine them except where they attempt to create de facto servitudes.

### *B. Labeled Chattels*

Labeling chattels does not eliminate many of the concerns about equitable servitudes on chattels,[311] but it does ease some of the concerns that buyers have regarding surprise.

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[308] For a few very recent examples, consider the competitive resale markets for stainless-steel Rolexes, lululemon Everywhere Belt Bags, and Sony PlayStation 5s—not to mention toilet paper at the outset of the pandemic.

[309] Ariel Adams, *How Scalpers & Speculators Are Ruining The Watch Purchasing Experience For Many Consumers*, ABLOGTOWATCH (2018), https://www.ablogtowatch.com/how-scalpers-speculators-are-ruining-the-watch-purchasing-experience-for-many-consumers/.

[310] Robinson, *supra* note 8, at 1458.

[311] Merrill & Smith, *supra* note 135, at 43–45.

Moreover, since our contracts regime now operates primarily on notice, it may be unreasonable to think that requiring notice, despite its shortcomings, would be irrelevant to courts.

This category deals only with chattels that are labeled in a way that would give notice to a reasonable consumer. It is possible for a notice to be printed on a chattel and for that notice to nevertheless be inaccessible to the person in possession of that chattel. This was one of the issues in *Krusch v. Tamko Building Products, Inc.* where the manufacturer molded notice of terms and conditions onto shingles that the eventual owners of those shingles could not inspect before they were nailed to their roof and unreturnable to the manufacturer. One can imagine an even more extreme case involving medical devices that are literally inside their owner and therefore impossible to inspect for terms and conditions. Chattels with indecipherable labels ought to be analyzed as unlabeled chattels, if only to incentivize better labeling, particularly for the blind and other marginalized groups.

Compared to unlabeled chattels, labeled chattels pose easier evidentiary questions: more people are on notice of a servitude that is printed on a chattel,[312] thereby sparing them the information costs that otherwise militate against enforcing equitable servitudes.[313] This state of affairs is likely true for a short while, but would quickly give rise to the orphan servitudes problem. This is when the usefulness of a good has changed, but there is no way to contact the beneficiary of the servitude to seek permission for the new use, nor is there anyone benefitting from the continued restraint on use. In other words, the label is not a panacea.

The conditions for enforcing servitudes on labeled chattels should track those for enforcing servitudes on unlabeled chattels against purchasers with knowledge of the servitude. Some states may prefer bright line prohibitions against restraints on alienation while others will prefer tests for reasonability. Restrictions on use could be evaluated for irrationality, unconscionability, and restraints on trade. These considerations are influenced by contract but could be customized for the unique considerations of chattels, much as they are customized for the unique considerations of real property.[314] In particular, courts could be sensitive to concerns about waste.

It may be tempting to think of labeled chattels as not implicating servitudes at all because the label puts every owner into contractual privity with the firm. Consider the

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[312] Labeling does not provide notice for many groups including the blind, people who cannot read or do not speak English. Any doctrinal regime that gives preferential treatment to labeled goods would tend to discriminate against these groups.

[313] *See supra*, Part III.A.

[314] *See* RESTATEMENT (THIRD) PROPERTY: SERVITUDES §3.7 cmt. a (explaining the influence of the uniform commercial code when courts analyze servitudes on real property for unconscionability).

arbitration clause that McDonalds noticed on its French Fry carton in *James v. McDonald's Corp.*[315] McDonalds could style the contract as forming anew every time someone plucks a fry out of the carton: a small serving containing 42 opportunities to contract and a large containing 90. Firms would certainly prefer this to be the state of the world so that all French-fry eaters, not just the purchaser, would be bound by their terms.[316] Modern shrink-wrap doctrine would appear to favor McDonald's view here. But stopping the analysis at the presence of the contract ignores the property doctrine that has equal claim to the transaction. Outside of cases where the first purchaser is the agent of the subsequent owner of a good, any contract that attempts to bind subsequent owners is an equitable servitude.

### *C. Intangible Frontiers*

This part looks to the future of property. Intangibles have long frustrated property commentators because, historically, property is concerned with real estate and things. Indeed, the idea of numerus clausus is that property rarely recognizes new forms and only does so after great consideration.[317] But real estate and things are only part of the story. Today, value is as likely to be stored in forms that cannot be held as it is to be stored in a place or a thing. This part uses the term intangible to describe these new value stores because that term is widely adopted in the literature. As I have argued elsewhere, much of what courts and scholars call intangibles are not literally intangible.[318] Rather, many new forms of value have mediated tangibility, meaning that they can only be held with the assistance of some other chattel. At common law, tangibility is more of an open concept than a description how value exists in space and time.[319] To call an asset an "intangible" means only that it is not a place or a directly portable thing.

Because intangibles cannot be directly carried, at least not without great difficulty, they often require some interface with a service or other technology to be useful. The addition of this intermediary creates an opportunity for contract to creep into the relationship. Now, even if the party holding rights in the intangible the intermediary did not explicitly enter into a contract, a court is likely to imply a contract between the two parties. Still, given the ease of contracting even over large numbers of people, it is reasonable

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[315] 417 F.3d 672, 678 (7th Cir. 2005) (enforcing an arbitration agreement that was included in the "official rules" of a promotion that was referenced on a carton of French Fries and expressing that it would be "unreasonable and unworkable" to have customers sign the fourteen pages of rules for the promotion).

[316] Here, we can imagine anyone passing a French fry to be the agent of the diner coveting the French fry.

[317] *See* Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1509–10 (2016) (explaining how *numerus clausus* can accommodate new forms of ownership).

[318] D'Onfro, *supra* note 144, at 121.

[319] For example, in *Adams v. Cleveland-Cliffs Iron Co.*, the court described industrial dust as intangible although the plaintiffs' complaint hung on the physical burdens that the dust was imposing on their space. 602 N.W.2d 215, 223 (Mich. Ct. App. 1999).

to expect that most of these relationships are governed by explicit contracts. Indeed, many of these agreements will be standard form contracts between firms and consumers that likely either to take the form of click-wrap contracts, or to be merely noticed at the bottom of the webpage that acts as the intermediary through which the consumer accesses the intangible. The presence of a contract may, in fact, overshadow the fact that many of these intangibles could be conceived of as property. Instead, the contract makes the relationship seem like a pure service relationship.

This is not a new problem. Courts have long struggled with the question of where and, if so, how to locate intermediated intangibles in property. This difficulty is because intangibles resist traditional conceptions of possession,[320] a prerequisite for falling under the aegis of property.[321]

This disconnect between the law of intangibles and popular understandings of property is a well-documented source of consumer confusion and disappointment.[322] Video games and eBooks are low-stakes examples.[323] Cryptocurrency, especially its goofiest form, the non-fungible token (NFT), offers higher-stakes examples.[324] Sorting out whether these neo assets fall under the law property or the law of contract will bring greater certainty both to holders of these assets and to the law more generally.

Integrating these new technologies into existing private law doctrine opens new paths in the conversation about equitable servitudes on chattels. Insofar as blockchain technology creates a durable registry and, accordingly, assets with chattel-like characteristics,[325] concerns about notice and transaction costs may evolve over time. And while it might be facetious to expect homeowners buying roofing shingles to root around for terms and conditions, consumers of digital assets may be different. Indeed, it may be more consistent with consumer expectations for digital assets to conform to the norms of software licensing rather than those of chattels, even when there are no software licenses at stake. This is an empirical question that needs to be studied and restudied as these digital markets grow.

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[320] *See* Moore v. Regents of University of California 793 P.2d 476 (Cal. 1990) (refusing to recognize a patient's alleged property interest in his own cells, rewarding the superior claim, if any, to the doctor who harvested and isolated those cells, albeit without Moore's consent.).

[321] João Marinotti, *Possessing Intangibles*, 116 NW. U. L. REV. (2022).

[322] Perzanowski & Hoofnagle, *supra* note 78.

[323] *See supra,* Part I.B.

[324] João Marinotti, *Can You Truly Own Anything in the Metaverse? Blockchains and NFTs Don't Protect Virtual Property*, CRYPTONEWS, https://cryptonews.com/exclusives/can-you-truly-own-anything-metaverse-blockchains-nfts-dont-protect-virtual-property.htm.

[325] The Uniform Law Commission is developing a new Article of the Uniform Commercial Code concerning "controllable electronic records" that purports to bring some of these technologies into existing commercial law frameworks. *See UCC, 2022 Amendments to*, UNIFORM LAW COMM'N, https://www.uniformlaws.org/committees/community-home?CommunityKey=1457c422-ddb7-40b0-8c76-39a1991651ac.

## CONCLUSION

This Article has demonstrated that the question of whether equitable servitudes can and do attach to chattels remains as fraught today as it was when scholars took it up nearly a century ago. In the intervening years, questions about the enforceability of equitable servitudes on chattels have become more difficult as the functional equivalents of servitudes on chattels have grown with the help of federal intellectual property law. At the same time, the contracting norms that developed around intellectual property, and especially software licensing, are now flowing back into the law of low-tech chattels, bringing new urgency to these questions.

Changes like these reinforce the necessity of robust private law education for future lawyers and judges. To be sure, it is not feasible to teach every law student everything there is to know about contracts, property, and torts, but it is possible to teach them too little. Or perhaps worse, it is possible to teach them that these fields are full of unimportant novelties[326] that can and should be simplified[327] or made to yield to contract. It is also possible to put contract on a false pillar, acknowledging its faults, but suggesting that no path beyond private ordering is possible in this political climate. If we inadvertently teach law students that the private law beyond contract is archaic or worse, interventionist, we should not be surprised when these students grow into judges who continue to thin out non-contract private law doctrines. This is especially true when those judges face heavy dockets of cases that present more immediate emergencies than untangling servitudes doctrine.

Cleaning doctrine of disused concepts is a noble task. However, when it is taken too far it risks eliminating tools and flexibility that future lawyers need. In a world in which common law courts are disinclined to use their power to promulgate truly new doctrine, pruning the common law means reducing it. The more we tame the chaos of the common law with statutes—and, arguably, restatements[328]—the less common law there will be to solve future problems. If lawyers and judges are made to feel embarrassed for scouring the crusty corners of the common law for tools, the common law faces narrowing forces on both ends. For better or for worse, contract will fill that empty space.

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[326] *See* Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2123 (2022) (describing property as "legal nonsense" and a "disembodied spirit").

[327] Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman Comments*, 55 S. CAL. L. REV. 1403, 1416 (1981) ("However, we must remember that the confusing doctrines that they attempt to unify developed in response to actual circumstances relating to the use of property. Any attempt to unify the concept of servitudes must recognize that these circumstances still exist, so that the pressures for slightly different rules may reappear in a new context").

[328] *See generally* Balganesh, *supra* note 326 (criticizing how courts use the Restatements as statutes).