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Freedom, Coercion, and the Law of Servitudes

Gregory S. Alexander
Cornell Law School, gsa9@cornell.edu

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Gregory S. Alexander †

What do we want from a restatement of servitude law? Doctrinal simplification presents one obvious objective. Property teachers and their students commonly observe that the law of servitudes is a mess.[1] Servitude law consists of three separate categories of interests affecting the use of land: easements, real covenants, and equitable servitudes, each regulated by its own rules and technical jargon. Notoriously vague boundary lines separate these categories. Moreover, the different types of servitudes frequently perform redundant land-use functions. The whole structure of common law land-use interests has the image of rococo design. So, when Professor Susan French, the Reporter for the restatement of servitude law, states that she intends to restructure servitude law, developing for the first time a unified body of rules that will eliminate the frustrating overlaps and inconsistencies that characterize the extant system of easements, covenants, and equitable servitudes,[2] she is unlikely to start anyone's blood boiling.

However, doctrinal simplification surely does not present the only objective of the restatement. Developing a unified body of servitude doctrine, by itself, merely creates a sense of aesthetic coherence. Presumably the project aims at achieving more than just that. Law reformers generally seek to enhance the legal system's substantive coherence. At this level—developing a set of substantively coherent doctrinal practices—I am skeptical about the servitude restatement project.

A restatement requires a background theory that structures the discourse by which the specific issues of policy are debated. Recent scholarship on servitude law[3] clearly indicates that such a back-

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† Professor of Law, Cornell University. This Article is an expanded version of a talk delivered to the Property Section of the Association of American Law Schools in Miami Beach, Florida, on January 8, 1988.

1 *See, e.g.*, J. DUKEMINIER & J. KRIER, PROPERTY 959 (1981) ("The law of servitudes is somewhat disorderly . . .").

2 French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

3 *See, e.g.*, Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982); French, *supra* note 2; Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982) [hereinafter Reichman, *Unified Concept*]; Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978) [hereinafter Reichman, *Judicial*

ground theory already exists for this restatement. That background theory rests on the familiar, liberal distinction between individual freedom of choice and coercion. Recent normative debates over servitude law structured by that distinction have a familiar ring: should servitude law be oriented by a strict contractarian ethic, as Professor Richard Epstein urges,[4] or should it include concessions to a regulatory or interventionist ideology? This normative conflict is the stuff of which the most contentious issues, especially retention of the touch and concern requirement and recognition of a changed conditions doctrine, are made. Although I offer some opinions on these debates, my objective does not lie in taking sides in them, at least not directly. My concern, rather, lies with the conceptual structure of these debates.

An essentialist quality permeates the way participants in these debates have argued. They have implicitly assumed both the possibility and the desirability of classifying every aspect of the legal apparatus for adjusting conflicting land-use preferences as either choice-maximizing or choice-inhibiting. Their discursive framework makes freedom and coercion, choice and choicelessness, mutually exclusive, radically alternative conditions. In their view, legal policy can and should be set only after classifying the available options as either choice-enhancing or choice-limiting, and then determining whether private violation (choice) or social control (coercion) more appropriately govern the issue. Obviously, a strong presumption favors private volition—coercion commonly thought of as exceptional, both descriptively and normatively.

Strong reasons support skepticism about this discursive structure. Its beguiling simplicity seriously distorts social reality. Choice and coercion are not alternative objective social states that either exist or do not exist. Rather they are rhetorics that, though contradictory, are both always available as interpretations of any given social experience. Pretending that they are more than just opposing rhetorics creates a form of nominalism that privileges one understanding, one interpretation.

The discursive structure of the individual choice/collective coercion dichotomy ultimately undermines the very political vision to which it purports to commit, the liberal vision of human empowerment. As long as legal doctrine defines the normative and doctrinal possibilities by an unproblematic distinction between freedom of choice and coercion, it will perpetuate coercion in social relation-

Supervision]; Rose, *Servitudes, Security, and Assent: Some Comments on Professors Reichman and French*, 55 S. CAL. L. REV. 1403 (1982); Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985).

4 Epstein, *supra* note 3.

ships among landholders. Law reformers fail to understand that coercion cannot be avoided, or even cabined, by simply asserting a commitment to maximizing individual freedom of choice. Choice and choicelessness do not occupy isolated realms of human activity. Rather they continuously intrude upon each other. Coping with the problem of coercion requires that we constantly reexamine and unsettle our settled understandings and doctrinal practices.

In this Article, I will discuss how the rhetoric of freedom of choice and coercion obscures the choicelessness problem as experienced by actors in nominally consensual land transactions. To begin with, I will sketch briefly the general contours of the social theory underlying the distinction between freedom of choice and coercion. In Part II, I will describe liberal legal theory's use of the free choice/coercion distinction to explain the process by which the legal system accommodates conflicting land-use preferences. In Part III, I will use the recent debates over the touch and conceru doctrine and the changed conditions doctrine to illustrate that freedom of choice and coercion represent two equally available rhetorics rather than objectively identifiable end-states. Part IV places the current rhetorical practices in historical perspective by showing the similarity between the arguments surrounding the first restatement of servitudes and their counterparts forty years later.

I

THE BACKGROUND THEORY OF CHOICE AND COERCION

Scholars commonly frame legal issues in terms of a trade-off between private volition and social control.[5] This simply applies the general social theory of liberalism to specific questions. That theory divides all human activity into two distinct realms: choice and choicelessness.[6] It then supposes that a social equilibrium can be achieved by the right mix of choice and choicelessness.

According to liberal theory, the social order remains coherent despite the simultaneous presence of these opposed modes of governance because they remain separate. Each mode governs appropriate areas of social life. Liberals disagree among themselves about both the correct description of the respective levels of choice and choicelessness in society and the normatively appropriate mixture. But they do agree that, in theory at least, coercive social states of

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5 *See* F. KESSLER & G. GILMORE, CONTRACTS 1-13 (2d ed.1970); Epstein, *supra* note 3.

6 For critical accounts of this vision in other doctrinal contexts, see Dalton, *An Essay in the Deconstruction of Contract Doctrine*, 94 YALE L.J. 997 (1985); Frug, *The City as a Legal Concept*, 93 HARV. L. REV. 1059 (1980); Olsen, *The Family and the Market: A Study of Ideology and Legal Reform*, 96 HARV. L. REV. 1497 (1983).

affairs can be readily identified. They define the relationship between choice and choicelessness in either/or terms, rather than as two simultaneously, but contradictory, sets of discourse. In other words, they regard the distinction between choice and choicelessness as relatively unproblematic.

II
THE UNDERLYING POLITICAL VISION OF SERVITUDE LAW

Mainstream legal scholars rely on the freedom of choice/coercion dichotomy in virtually every controversial modern servitudes law debate. They assume the discreteness and ready discoverability of the realms of individual free choice and coercion. These scholars also assume that servitude law generally enhances individual freedom of choice, and they advance ideological commitments under the guise of neutrally maximizing individual preferences.[7] In this part, I describe how the free choice/coercion dichotomy structures the standard legal vision of the role of servitudes in American property law. Turning to the internal law of servitudes, I then sketch the role played by the free choice/coercion dichotomy in rationalizing the very idea of a land-use obligation that binds non-promisors.

A. Servitudes versus Zoning

The basic contrast that property lawyers draw between servitudes and zoning as land-use planning methods illustrate how legal scholarship uses the free choice/coercion dichotomy to privilege a value choice. Property scholars have used the free choice/coercion dichotomy to privilege servitudes over zoning as ways of accommodating competing desires among land users. The writings of those who argue from explicitly libertarian or wealth-maximizing premises must apparently illustrate this theory[8] but other centrist commentators also comply with it.[9] Most property scholars emphasize the fa-

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7 *See, e.g.*, Dunham, *Promises Respecting the Use of Land*, 8 J. LAW & ECON. 133, 162-65 (1965); Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988) [hereinafter Epstein, Covenants and Constitutions]; Epstein, *supra* note 3; Reichman, *Judicial Supervision*, *supra* note 3.

8 *E.g.*, B. SIEGAN, LAND USE WITHOUT ZONING (1972); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973). For a somewhat softer endorsement of "private" alternatives to zoning by an economist, see W. FISCHEL, THE ECONOMICS OF ZONING LAWS 164 (1985): "I am sympathetic to reforms that increase reliance on these devices [covenants, easements, and residential private governments], but I remain skeptical of them as complete replacements for zoning restrictions."

9 *E.g.*, Kmiec, *Deregulatory Land Use: An Alternative to Free Enterprise Development System*, 130 U. PA. L REV. 28 (1981); Note, *Lane Use Control in Metropolitan Areas: The Failure of Zoning and a Proposed Alternative*, 45 S. CAL. L. REV. 335 (1972).

miliar characterization of servitudes as a private mechanism for adjusting land-use preferences and zoning as a form of collective, or public, regulation.[10] This contrast immediately places zoning in a disfavored position, even among centrist liberals. Liberals widely believe that public regulation raises much more serious problems, in terms of both political legitimacy and cost-reduction, than does privatized regulation. Liberals have attacked zoning as generally less efficient and less equitable than private alternatives, including servitudes.[11]

Robert Ellickson's article *Cities and Homeowners Associations*[12] illustrates the use of the free choice/collective coercion contrast as a shorthand way of privileging servitudes. In comparing homeowners' associations with cities, Ellickson tries to have it both ways. At times he argues that commentators vastly overdraw the distinction between cities and homeowners' associations and that the two modes of governance should be subject to similar legal treatment. For other purposes, however, he argues that fundamental differences exist between the two and that homeowners' associations, as private arrangements, should receive greater legal deference.[13]

Ellickson conceptualizes homeowners' associations as private residential governments, with a constitution composed of various servitudes.[14] He argues that the nature of their membership presents the only important difference between such private governments and cities—membership in homeowners' associations being "perfectly voluntary," while membership in cities at best being imperfectly voluntary.[15] He concludes that homeowners' associations should have greater powers than they presently do because of their greater voluntariness. Restating his argument to highlight its use of the free choice/coercion dichotomy, I will borrow some jargon popular among legal economists, including the distinctions developed by the political economist Albert Hirschman.[16]

Suppose that a city and a homeowners' association both impose the same building height restriction on residents. The city imposed

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10 *See* J. DUKEMINIER & J. KRIER, *supra* note 1, at 915-16.

11 *See, e.g.*, B. SIEGAN, *supra* note 8; Dunham, *A Legal and Economic Basis for City Planning*, 58 COLUM. L. REV. 659 (1958); Ellickson, *supra* note 8, at 681; Kmiec, *supra* note 9, at 28.

12 Ellickson, *supra* note 7.

13 *Id.* at 152-53. As Gerald Frug has explained, a preference for protecting property rights over all other values underlies Ellickson's apparent schizophrenia about the character of homeowners' associations. Frug, *Cities and Homeowners Associations: A Reply*, 130 U. PA. L. REV. 1589, 1594-96 (1982).

14 *See also* Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976).

15 Ellickson, *supra* note 7, at 1520.

16 A. HIRSCHMAN, EXIT, VOICE, AND LOYALTY (1970).

its restriction through a zoning measure, while the homeowners' association imposed its restriction through a covenant in its original declaration of restrictions. Ellickson contends that the zoning measure raises greater fairness and efficiency objections than the servitude does. Unlike the homeowners' association provision, included as a part of all of the purchasers' deeds, no unanimous consent for the municipality's zoning measure was obtained, only a majority vote was required. The existence of unanimous consent, obtained through individual contracting between the developer and each affected owner, assures complete loyalty for the association's height restriction among all of the community's members. No such assurance exists for the zoning provision. Membership (i.e., residence) in the city does not itself signify loyalty to this or any other provision of city governance. If voice, through attempts to remove the restriction through the political system proves ineffective or unattractive because of the high costs of securing political change, then exit represents the only alternative to loyalty. Exit is at best an imperfect strategy for disgruntled land owners because the immobility of their asset limits their options. They can convert their land to capital by selling it, but selling represents capitulating on the very matter at issue: to be able to use *their* land free from the unwanted height restriction. To keep the land, they must comply with the restriction (grudging loyalty); to avoid the restriction they must give up the land (exit). Either way, the coercive effects of the public regulation stand in stark contrast, according to this analysis, to the developer's servitude.

Ellickson's argnment represents only a particularly clear example of how policy analysts[17] attempt to privilege servitudes as a method of governance by simply assuming a categorical distinction between choice and choicelessness, and then locating servitudes in the realm of choice and relegating zoning, as an instance of "public" regulation, to the realm of choicelessness.

In an ironic way, one can view Ellickson's analysis as supporting my argument about the problematic character of the free choice/coercion dichotomy. His model of planned residential development's constitutions as a system of uniform schemes of residential servitudes—a model that Richard Epstein endorses in his paper[18]—implicitly recognizes that coercion exists even in the nominally private sphere.

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17 For an example of this view from an economist, see Fischel, *The Economics of Land Use Exactions: A Property Rights Analysis*, 50 LAW & CONTEMP. PROBS. 101, 107 (1987).

18 Epstein, *Covenants and Constitutions*, *supra* note 7, at 927 (1988).

B. Reconciling Running Covenants with Individual Freedom

The notion of a land-use obligation binding persons who did not make the promise presents something of an anomaly in the liberal conception of property. Indeed the term "servitude" embarrasses a property regime committed to the autonomy of private owners.[19] So liberal legal theory has had to develop a rationale which reconciles the legal notion of obligations that bind all successive owners with the liberal commitment to private owner autonomy. That rationale presents essentially a contractarian argument that relies on the freedom/coercion dichotomy.

The standard explanation used to reconcile running covenants with individual freedom is that a legal system that holds a subsequent owner to a promise made by a predecessor is in fact enforcing private intentions. This intentionalist model necessitates assuming that the person who succeeded to the promisor's estate has assented to the obligation even though he may never have expressed his consent.[20] The purchaser manifested her assent simply by purchasing land subject to a discoverable obligation. The obligation is not law-imposed but privately created, and the whole regime of land-use obligations running with the land is thereby erected on the foundation of free choice.

The contractarian rationale's normative force depends upon the coherence of the distinction between choice and choicelessness as social phenomena. If in social reality actors pervasively experience choicelessness in conditions of nominal freedom, then entitlement assiguments justified by the principle of individual autonomy appear arbitrary. They are, at least, not grounded solely in the neutral norm of maximizing individual choice.

Liberal legal discourse itself undermines the justificatory apparatus predicated on our ability to identify a distinct realm of social action ordered strictly by individual, subjective choice. In the next part, I will discuss recent debates over the touch and concern doctrine and the changed conditions doctrine to illustrate both how an essentialist freedom/coercion dichotomy informs legal discourse about servitude law and how legal discourse itself undermines that essentialism.

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19 *See* Rose, *supra* note 3, at 1403.

20 Recognizing the importance of the assent theme in servitude law, Carol Rose points out, correctly in my opinion, that "fairness" considerations, which modern property scholars widely believe to inhere in servitude law, are better framed as matters affecting consent. Revising fairness into consent helps to explain why contract theory played such a major role in the development of servitude law during the nineteenth century. *See id.* at 1404 n.8.

III
Two Debates in Servitude Law

Two issues in American servitude law have been most controversial in recent years; first, whether to retain the traditional touch and concern rule; and, second, whether to recognize a doctrine for terminating or modifying all types of servitudes on the basis of changed conditions. I critique the free choice/coercion dichotomy by demonstrating that both sides claim that their position enhances freedom of choice on each of these issues. I contend that most legal discourse continues to commit the formalist mistake of attempting to derive determinate solutions from an abstract principle, in this case, the principle of individual freedom of property owners.

A. The Touch and Concern Debate

Suppose that a promisor and promisee created a restrictive covenant, indicating clearly their intent to bind all successors, based on their mutual belief that some negative externality would exist if the land were unbounded and that the harmful externality would be of equal concern to all subsequent owners. It turns out, however, that the promisor's successor does not see things the same way and prefers that the land be unbounded. If the successor nevertheless buys the land, should he be bound by the servitude because he has chosen it? Or is there room in the concept of individual choice for a filtering device like touch and concern?

1. *The Problem of Indeterminacy in Freedom of Choice*

Recent arguments over whether to retain the common-law touch and concern requirement illustrate how the liberal freedom/coercion dichotomy leads to stalemate. On behalf of retaining the rule, Uriel Reichman has argued that the rule enhances individual free choice. He states: "Servitudes are a kind of private legislation affecting a line of future owners. Limiting such legislative powers to an objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom."[21] This familiar argument appears in virtually every instance where the question of dead hand control appears.[22] It supposes that the problem of justice between generations can be resolved by enforcing the freedom of choice principle.[23] Unless we have some device like

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21 Reichman, *Unified Concept*, *supra* note 3, at 1233.

22 For a critique of this argument in the context of another instance of the dead hand problem, see Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 Stan. L. Rev. 1189 (1985).

23 Professor Epstein regards the problem of inter-generational justice as implicated only by the changed conditions doctrine. Epstein, *Covenant and Constitutions*, *supra* note 7.

touch and concern, the argument goes, the dead hand of past generations will deny future generations the same freedom enjoyed by their ancestors, just as feudal institutions like the fee tail (at least before the invention of common recovery) made it possible for fathers to lock their sons' ownership interests in servitude.

On the other side of the ledger, Professor Epstein offers another familiar argument. He attacks the libertarian defense of the touch and concern requirement as standing freedom on its head. The touch and concern requirement, like the Rule Against Perpetuities and the doctrine against restraints on alienation, is a collective restriction on the current owner's freedom of choice. Epstein argues:

> To say . . . that particular covenants must be struck down in the name of freedom is to confound the usual understanding on which freedom claims are based. . . . Insistence upon the touch and concern requirement denies the original parties their contractual freedom by subordinating their desires to the interests of future third parties, who by definition have no proprietary claim to the subject property.[24]

Both arguments present plausible interpretations of the notion of securing freedom of choice for land owners. Reichman's interpretation seeks to maximize the liberty interests of all owners, present and future. Epstein's interpretation maximizes the freedom of the only owner at the time the servitude is created.

The choice between these two contradictory interpretations cannot be based on an abstract commitment to freedom of choice itself; both choices are simultaneously freedom-enhancing and coercive. Epstein and Reichman want to sanctify a subjective political choice—the allocation of power between generations of owners—by

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In my view, arguments for the touch and concern requirement and the changed conditions doctrine apply to different aspects of inter-generational justice. Touch and concern operates in the same fashion as the common law Rule Against Perpetuities—it applies retrospectively, voiding the interest ab initio. Its justification is simply to maximize the principle of freedom of use and disposition by preserving that freedom for each generation. In theory, this justification does not depend on the exogenous changes that affect future generations. By contrast, the changed conditions doctrine does rest on such changes. Unlike touch and concern, changed conditions regards the servitude as valid when initially created, but rendered burdensome to subsequent generations by alterations in the environment in which the servitude operates, and therefore negatible.

24 Epstein, *supra* note 3, at 1359-1360. Professor Stewart Sterk's article, *supra* note 3, provides a trenchant critique of Epstein's contractarian theory of servitudes.

Professor Susan French takes something of a middle position. Agreeing with Reichman that touch and concern properly protects private intentions, she nevertheless supports Epstein's call to abolish the requirement. She prefers to deal with the problem of unreasonable burdens through an expanded changed conditions doctrine of termination. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 939-40, 951 (1988).

a linguistic gambit, namely, objectifying their political preference as choice maximizing and therefore more consistent with the general policy of servitude law.

The same problem besets the law-and-economics analysis of the touch and concern requirement. Some legal economists argue that the purpose of running covenants is to effectuate intent by enforcing promises that, absent transactions costs, would have survived successive rounds of bargaining among subsequent generations of owners.[25] The touch and concern requirement function filters out those restrictions that subsequent owners would not have agreed to had there been actual negotiations.[26] This analysis reconciles touch and concern with freedom of choice to the extent that restrictions that would not have survived subsequent negotiations are not chosen.

But one can also see this rationale as choice-denying rather than choice-enforcing. This is, I take it, the thrust of Professor Epstein's attack on the touch and concern rule. If the subsequent owner of a parcel burdened with a servitude bought the land with notice of the term, she has chosen it. Moreover, so long as there was notice, the subsequent owner who takes land subject to an unwanted servitude presumably has been compensated for that term by an appropriate discount in the purchase price. Presumably, the promisor initially received the discount from the promisee and simply passed it on to his successor. This discount must have been equal to the servitude's worth to the promisee or else he would not have agreed to it. Hence, the touch and concern filter is unnecessary because there was no coercion in any of the relationships.

2. *Notice and Consent*

I now examine Professor Epstein's argument deriving consent from notice. Several reasons make notice alone an insufficient guarantee of choice. One immediate reason, the purchaser who acted without actual notice that the land she purchased was affected with an obligation may still be held to have had notice. The legal notion of constructive notice, provided by the land recording system,[27] or

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25 R. POSNER, ECONOMIC ANALYSIS OF LAW 58-59 (3d ed. 1986); Krier, *Book Review*, 122 U. PA. L. REV. 1664, 1678-80 (1974).

26 *See* Krier, *supra*, note 25, at 1678-80.

27 The quality of notice provided by the recording system, of course, depends upon how each jurisdiction defines the "chain of title" concept. One version of that concept holds the purchaser to have received record notice of a servitude even though the servitude did not appear in her direct chain of title. The familiar case for this view is Finley v. Glenn, 303 Pa. 131, 137, 154 A. 299, 301 (1931) ("The purpose in recording is to give notice and the notice given is not only of the land conveyed but 'concerning' any lands. Certainly a restriction concerns the lands restricted.").

by the surrounding circumstances, which may place on the purchaser a duty to inquire about the existence of restrictions[28] creates this notice. If we base an inference of consent on this type of notice we greatly diminish the meaning, and the normative power, of consent. Ordinary understandings tell us that consent so inferred looks remarkably similar to the sort of collectively-imposed decision that Professor Epstein and others worry about.

The phenomenon of distortion in the formation of preferences presents a second and more serious objection to the equation of consent with notice. Enforcement of servitudes raises familiar questions about when and on what basis it is appropriate for legal regulators to interfere with private preferences.[29] Professor Epstein believes that the legal system should enforce preferences unless they generate harms (externalities) to other people. Because Epstein believes servitudes create few externalities, he concludes that courts should rarely interfere with servitudes. This general attitude towards the preferences expressed in servitudes leads him specifically to oppose the touch and concern requirement, which prevents servitudes from running with the land ab initio, and the changed conditions doctrine, which terminates initially enforceable servitudes some time after their creation. In Epstein's view, so long as purchasers from the original contracting parties had legal notice of the servitude they chose to accept it and courts should therefore not interfere with that expressed preference.[30]

Several serious problems arise with the view that the only valid ground for collective interference with the enforcement of private preferences is to prevent negative externalities. First, the concept of externalities itself notoriously is ambiguous.[31] This objection would hardly be worth mentioning but for Professor Epstein's emphasis on the importance of legal certainty *ex ante* to facilitate private planning. A legal norm whose operation depends on whether a negative externality exists is unlikely to achieve the certainty that Professor Epstein regards as indispensable to private ordering.

More importantly, externalities do not represent the only justificatory basis for legal interference with private preference. Paradoxically, pathology in the process of preference formation may also

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28 For an extreme example of binding subsequent land purchasers by inquiry notice, see Sanborn v. McLean, 233 Mich. 227, 206 N.W. 496 (1925)(subsequent purchaser bound by inquiry notice despite the fact that the servitude was "implied" from a common plan which itself was not expressed in any of the paperwork).

29 For a particulary clear summary of the general problem, see Sunstein, *Legal Interference with Private Preferences*, 53 U. CHI. L. REV. 1129 (1986).

30 Epstein, *supra* note 7, at 910 (touch and concern), 919-24 (changed conditions).

31 *See, e.g.*, Kennedy, *Cost-Benefit Analysis of Entitlement Problems: A Critique*, 33 STAN. L. REV. 387 (1981); Sunstein, *supra* note 29, at 1131.

justify legal intervention as necessary to protect the autonomy of individual preferences. In other words, the purchaser's expressed preference for the servitude may not be the product of autonomous choice. For example, one of the phenomena that social choice theorists have observed as distorting individual preferences is the adaptation of preferences to what people think (correctly or incorrectly) they can get.[32] Most residential developments today include a variety of restrictions of owner use and behavior. The pervasive inclusion of restrictions in residential developments may reflect not the similarity of preferences held by thousands of purchasers but the purchasers' belief (based on the widespread use of detailed restrictions) that ownership in a residential development without a particular restriction is unavailable. The consequence of this pervasive belief is that one cannot simply assume that restrictions are included in deeds because purchasers want them there. Maximizing the autonomy of purchasers' preferences may therefore require legal interference with their nominal preferences.

The argument that pathological preference formation justifies non-enforcement of preferences, unlike Epstein's argument, recognizes and responds to the possibility that individual preferences as expressed through the act of purchase with legal notice of an encumbrance may be defective. Rather than taking preferences as exogenous givens, this argument recognizes that preferences are social constructs.[33]

Related to the problem of distorted preferences is what Mark Kelman has called the "bundling" problem.[34] The promisor's successor may have bought the land even though she did not want it with the restriction because she was unable to control all of the theoretically available terms. The familiar argument at this point runs that if she was aware (perhaps meaning that she had actual, as opposed to constructive notice) of an unwanted restriction and nevertheless purchased the package offered by the promisor, then she must have been compensated for the unwanted servitude by a discount in the purchase price. But we should not be too quick to make that assumption. In a complex transaction the successor (S) may not have adequately focused on the servitude term. S might have demanded a higher level of compensation for the servitude

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32 This is the behaviorial phenomenon that Jon Elster has labelled "sour grapes." *See* J. ELSTER, SOUR GRAPES *passim* (1983); Elster, *Introduction*, in RATIONAL CHOICE 1, 15 (J. Elster ed. 1986) [hereinafter Elsler, *Introduction*]; Sunstein, *supra* note 29, at 1146-58. *See also* March, *Bounded Rationality, Ambiguity, and the Engineering of Choice*, in RATIONAL CHOICE 142 (J. Elster ed. 1986).

33 *See* Sunstein, *supra* note 29, at 1133 ("private preferences are . . . entitled at most to presumptive respect . . . they are social constructs.").

34 M. KELMAN, A GUIDE TO CRITICAL LEGAL STUDIES 107-09 (1987).

term, had that term been negotiated individually rather than as part of a package containing many items.

A predictable reaction to this argument is that S's failure adequately to discount the price she pays for the land burdened with the servitude represents irrational behavior. But that is just the point; people *do* engage in irrational behavior.[35] How can contractarians reconcile shrugging off irrational behavior with the principle of maximizing individual choice? Does not the commitment to maintaining servitude law as a realm of uncoerced activity require that we take such behavior into account? Why is it any less a form of coercion to enforce a restriction against an individual who was inadequately compensated for it, simply because we say his deficient evaluation of the entitlement represented by the servitude was "irrational"?

Contractarians might argue that the behavior just described is exceptional and that rules should be based on the typical case rather than on aberrations. But this argument fails to respond to my point. The significance of the bundling problem is not the level of its incidence (although I am prepared to argue that it is not aberrational at all) but its undermining effect on the model of free choice and coercion as located in separate, mutually exclusive spheres of activity. It casts doubt on our ability to make easy distinctions between legal options that are choice-enhancing and those that are coercive.

3. *Objective Tests and Denial of the Self*

Before leaving the touch and concern requirement debate I want to address one additional argument to illustrate how choicelessness intrudes upon the discourse of individual freedom in mainstream legal reasoning. Reichman argues that the touch and conceru rule is, and should be, used to enforce those promises that are "objectively intended to promote land utilization."[36] He contrasts this with Charles Clark's subjective test according to which benefits and burdens should run to assignees if the servitude affects

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35 That Epstein takes me to task for observing that people sometimes act foolishly is surprising. The observation is common with the literature on rational choice theory. *See, e.g.*, March, *supra* note 32, at 165 ("Not all behavior makes sense; some of it is unreasonable. Not all decision technology is intelligent; some of it is foolish."). And recent social science scholarship has emphasized the desire of systematic error in individual decision-making. *See .e.g*, JUDGMENT UNDER UNCERTAINTY: HEURISTICS AND BIASES (D. Kahneman, P. Slovic & A. Tverski eds. 1982). The real question is what implications the irrational choice phenomenon should have for the legal role. My view is that it should affect that legal system's willingness to interfere with preferences, the realm of private ordering. Insofar as these differences among reasons for choices being nonautonomous are themselves unpredictable, legal doctrine must maintain an openness to interpretations of specific preferences as nonautonomous.

36 Reichman, *Judicial Supervision, supra* note 3, at 151-52.

the landowner's valuation of his land.[37] To demonstrate the desirability of an objective approach to touch and concern, Reichman contrasts two hypothetical fact situations involving similar restrictions.[38] In one, an owner extracts from his neighbor a promise that the neighbor will not drink alcoholic beverages on the Jewish Sabbath. In the second, a developer imposes in all deeds within a neighborhood a restriction against running a tavern in the neighborhood. Reichman asserts that only in the second case does the servitude touch and concern because the restriction against alcohol in that situation is objectively associated with the owners' use and enjoyment of their land. Conversely, the restriction against alcohol consumption in the first case, according to Reichman, was imposed only for "ideological" reasons. Viewed objectively, such restrictions are not connected with the effective use of land. They do not touch and concern, and therefore should not be considered servitudes.

Professor Epstein has pointed out that Reichman's analysis begs the question of why the first restriction is unrelated to land development. Any objective test for touch and concern, Epstein states, "presupposes that we have some collective vision of what [the private land system] is supposed to do."[39] According to Epstein, then, Reichman transparently has stuffed the proverbial rabbit into the hat.

Here, Epstein is clearly right. Requiring that a restriction be "objectively" intended to promote land utilization creates choicelessness under the guise of respecting private intentions. The objective perspective constructs private intentions from a set of beliefs which are supposedly generally held in the community. This conception of private intention, however, reduces the subjective individual will to the collective will. By supposing that each person has the tastes of everyone else, this conception subordinates individual autonomy to the forces external to the self.[40] It is a particularly insidious form of coercion because it purports to effectuate private intentions rather than acknowledging that private volition is being sacrificed for the sake of some collective good. Here, again, free

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37 C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 111 (1929).

38 Reichman, *Judicial Supervision, supra* note 3, at 51-52.

39 Epstein, *supra* note 3, at 1359.

40 The same problem occurs in doctrines based on the theory of imputing intention from conduct, such as creation of easements by implication. *See* Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55, 57 (1987) ("Because not every member of the society will be identically socialized, a rule that presumes intent from conduct will frequently sacrifice intent to other objectives—reinforcement of social norms, or the efficiency-related goal of effectuating party intent in the greatest number of cases.") *See also* M. KELMAN, *supra* note 34, at 86-113 (discussing intentionalistic and deterministic descriptions in liberal discourse).

choice and coercion represent contradictory discourses that are simultaneously deployed in mainstream legal argumentation.

The touch and concern controversy belies the attempt to depict servitudes as a noncollective, nonpolitical (and therefore, in liberal ideology, presumptively more legitimate) instrument by which to resolve social disputes among landholders. The easy availability of the notions of free choice and coercion in the arguments establishes as an impossible dream the vision of a purely private, uncoercive regime of servitude law.

Thus far, I have used the touch and concern controversy to undermine the view that servitude law is, or can be, a realm of private ordering, a legal regime that enables conflicting preferences for the use of land to be made without the intrusion of substantive public norms. With respect to the issue itself, I favor retaining the touch and concern requirement as a discretionary norm, the purpose of which is to protect subsequent purchasers who have behaved foolishly and to prevent promisors and their successors from behaving opportunistically. However, we should resist the temptation to lapse into the familiar imagery that would describe touch and concern as a limited instance of collective regulation that somehow compatibly coexists with a general body of doctrine constructed on the foundation of individual freedom of choice. That account (like its counterparts in contract law depicting the unconscionability and promissory estoppel doctrines as collectivist "exceptions" that coexist with the *grundnorm* of private ordering) represses the pervasive presence within legal thought and practice of "irreducible, irremediable, irresolvable conflict."[41] The standard doctrinal imagery of an individualistic core with collectivistic exceptions lulls us into supposing that only a limited number of doctrines engenders painful and embarrassing conflicts of social visions. However settled the doctrinal practice appears to be, such conflicts only lie beneath the surface. We would be better off acknowledging those conflicts and trying to work them out openly and continuously rather than freezing doctrinal practices that entrench power arrangements. Touch and concern represents, as its critics fear, a destabilizing doctrine, but that is why it should be embraced, not spurned.

While the substance of touch and concern ought to be retained, I find it impossible to justify preserving its metaphysical packaging. The phrase "touch and concern" continues to beguile even astute property specialists into believing that it has some objective meaning. Imagine how many ordinary non-lawyers similarly have been tricked. I favor finding a new bottle for the old wine, preferably a

41 M. KELMAN, *supra* note 34, at 3.

bottle whose label indicates its discretionary and normative character.

B. The Changed Conditions Debate

Perhaps the most controversial issue facing the new restatement is whether to recognize a general changed conditions doctrine for terminating servitudes. Professor French supports such a doctrine, but several other scholars, including Professor Epstein, have argued strongly against it. As in the case of the touch and concern rule, the debate has been framed by the free choice/coercion dichotomy.

The changed conditions doctrine responds to the problem of obsolescence in servitude law. The obsolescence problem is not peculiar to servitudes; it is a function of duration, and it exists in all legal arrangements that have extended time horizons, including long-term trusts and relational contracts.[42] The dilemma posed by obsolescence for liberal legal thought is how legal intervention that terminates the obsolete property interest can coexist with the basic commitment to private volition.

In one sense, it seems easier to reconcile with the commitment to individual autonomy legal intervention based on changed conditions than legal interference based on a requirement like touch and concern. Personality, identity, and self are constituted by context. As Professor Sterk points out,[43] the self that is affected by subsequent, unforeseeable events differs in significant respects from the self that made the initial commitment to the servitude. Furthermore, these different selves have different preferences. The point here is not that the legal system should always respond to regret. Rather, the argument is that changed conditions have caused preferences to lose their force.[44] By contrast, the touch and concern requirement, insofar as it permits escape from a servitude obligation even though conditions remain unchanged, allows parties to avoid the consequences of a bad choice.

The theory of imputed intent presents a similar argument by which to reconcile this form of legal intervention with individual preferences. Advocates of the changed conditions doctrine and its analogues in other corners of property law (such as the *cy pres* doc-

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42 See, e.g., Hillman, *Court-Adjustment of Long-Term Contracts: An Analysis Under Modern Contract Law*, 1987 DUKE L.J. 1 (1987); Scott, *Conflict and Cooperation in Long-Term Contracts*, 75 CALIF. L. REV. 2005 (1987).

43 Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 958 (1988). *See generally* D. PARFIT, REASONS AND PERSONS 199-347 (1984).

44 Here I am distinguishing inconsistent time preferences from changes in future preferences caused by altered circumstances other than time itself. *See* Elster, *supra* note 32, at 11, 15-16.

trine in the law of trusts) have argued that we should impute to the original contracting parties an intention that the covenant expire if and when it becomes valueless.[45] Posner's analysis of the dead hand problem is a particularly clear example of this transformation of collective interference into private volition:

> [T]he dilemma whether to enforce the testator's intent or to modify the terms of the will in accordance with changed conditions since his death is often a false one. A policy of rigid adherence to the letter of the donative instrument is likely to frustrate both the donor's purposes and the efficient use of resources.[46]

One can plausibly respond, however, that this argument is disengenuous; it stands the notion of private choice on its head. As in the touch and concern context, the argument constructs a conception of the self on the basis of the will of the group. By identifying individual preference with the aggregate preferences of a group at a later time, it denies the autonomy of the self.

At the same time an element of choicelessness arises when servitudes have become obsolete that makes a changed conditions doctrine, or something like it, attractive. The servitude's obsolescence means that those burdened by the servitude have strong incentives to buy the entitlement from the beneficiary. Even assuming that the transaction costs are otherwise low, the exchange may not occur because of strategic behavior by the beneficiary, who knows the burdened landowner has strong incentives, and by the burdened landowner, who knows that the beneficiary can realize the entitlement's value in an exchange with him. A pathology of choice characterizes this familiar situation of bilateral monopoly. Neither side experiences the liberation of an unconstrained market; both sides feel themselves in servitude to each other. Formally, of course, both sides are unconstrained: they are free to walk away. But they do experience constraint. Intervention from an external source, by way of outright termination or, perhaps, as Professor French suggests, through modification,[47] may enable the parties to do what they lack

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45 *See* II *American Law of Property* § 9.22, at 398 (A. Casner ed. 1952); Reichman, *Unified Concept*, *supra* note 3, at 1259.

46 R. POSNER, ECONOMIC ANALYSIS OF LAW § 18.3, at 390 (2d ed. 1977). Note how this argument serves the twin goals of respecting private intentions and economic efficiency. Curiously, Posner does not apply the same argument to the touch and concern requirement, which he opposes despite its obvious connection with the problem of obsolescence. He prefers to deal with the problem of obsolete servitudes by switching from, in Calabresian terms, a property rule to a liability rule, i.e., from legal protection through injunction to protecting the entitlement through damages. *See id.* at § 50. But his solution encounters the familiar fairness objection, commonly discussed in connection with the remedial choice in nuisance law between injunction and damages, that it gives the breaching party all of the gains from trade.

47 French, *supra* note 3, at 1317. The law of trusts, which regulates a property ar-

the power to do themselves.

IV
COERCION IN THE PRIVATE SPHERE: THE CASE OF DISCRETIONARY SERVITUDES

One of the most striking things about recent commentary on servitudes is how scholars, in discussing the problem of coercion, tend to focus exclusively on public coercion, while denying or minimizing the phenomenon of private coercion.[48] One familiar objection to the touch and concern doctrine and the changed conditions doctrine, for example, focuses on the fact that they involve judicial discretion. Legal scholars worry that judicial discretion will be a source of coercion of private actors even when the court attempts to act in good faith.[49] Their argument for limiting judicial discretion through abolition of the touch and concern and changed conditions doctrines represents yet another instance of the naive version of the free choice/coercion dichotomy. I do not wish to argue that no reason exists to worry about judicial discretion. Rather, I want to suggest that the problem of discretion is no less worrisome when it appears in the form of private, "discretionary" servitudes than when it appears in a judicial form.

Developers of planned residential communities commonly reserve to themselves or to homeowners' associations discretion in enforcement of restrictive covenants that are included in all of the deeds to lots in the development.[50] The reasons usually given for

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rangement that is structurally similar both to servitude and to relational contracts, permits modification of charitable trusts through the *cy pres* doctrine, and also of private trusts, although much less frequently and less explicitly. *See, e.g.*, Petition of Wolcott, 95 N.H. 23, 56 A.2d 641 (1948) ("authority to describe from the express terms of a gift has been granted in cases of emergency unforeseen [by testor]; Wesley United Methodist Church v. Harvard College, 366 Mass. 247, 316 N.E.2d 620 (1974) (*Cy pres* applies if trust is impracticable and restator shows charitable intent). *See generally* Haskell, *Justifying the Principle of Distributive Deviation in the Law of Trusts*, 18 HASTINGS L.J. 267 (1967). English trust law explicitly permits beneficiaries to modify or terminate trusts despite the settlor's intent. The English Variation of Trusts Act of 1958 authorizes courts to consent to modification or termination on behalf of unborn or minor beneficiaries. A similar statute was enacted in Manitoba recently. *Manitoba Act of 1983 to Amend the Trustee Act*, 1982-83 MAN. REV. STAT. ch. 38.

48 For an exception, see the interesting discussion of regimentation in the contractual sphere, in Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty and Personal Identity*, 1988 WIS. L. REV. (forthcoming 1988).

49 *E.g.*, Epstein, *supra* note 3, at 1366 ("With discretion comes uncertainty, and this the parties may rightly (and expressly) fear.").

50 *See, e.g.*, Rhue v. Cheyenne Homes, 168 Colo. 6, 449 P.2d 361 (1969) (archetectural control committee had authority covenant to reject erection of buildings); Syrian Antiochian Orthodox Archdiocese v. Palisades Assocs., 110 N.J. Super. 34, 264 A.2d 257 (1970) (upholding covenant allowing grantor to determine when prohibition on erection of structures as improvements can be ignored). Owners' association architec-

making servitudes in planned residential developments discretionary are: first, to guarantee flexibility, in effect responding to the problem of obsolescence; and, second, to provide security for the developer's investment, especially while development is still on-going. But, as Professor Reichman has pointed out, the discretionary power of the developer or the homeowners' association creates a serious risk of coercion:

> The residents may regard the facilities as inadequate or overcrowded and consider their investment threatened by commercial and industrial structures or high density and lower income housing. They may vehemently oppose certain standards decreed by the architectural committee or the channelling of their payments to certain projects. Above all, the residents may want the right to structure the environment in which they live and raise their children. Because of his superior legal position, however, the developer is free to ignore these desires when recognition of them would impair his profit-making potential.[51]

The same indeterminacy in the free choice/coercion dichotomy that we identified in the debate over the touch and concern and changed conditions doctrines occurs here. A formally coherent argument can be made that discretionary servitudes create no risk of coercion because, so long as the residents knew or could have known of the reserved discretion term, they freely chose to accept it as a part of the deal. Moreover, if a homeowners' association holds the discretion then the residents' voting rights assure their ultimate control over objectionable terms.

Here again, however, the gap between formal and experienced assent undermines the vision of unconstrained choice in the private sphere. Residents may have evaluated inadequately the discretionary power term.[52] Even if they were fully aware of the term and can demand compensation for it, the residents are at a disadvantage in negotiating with the developer because the unpredictability would make it difficult for them to value the discretionary power term. Moreover, as a practical matter, developers possess considerably more market power than residents. Some development firms are

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tural review boards, for example, are commonly given discretion over both major changes and matters of aesthetic taste and personal behavior. *E.g.*, University Gardens Property Owners Ass'n v. Solomon, 88 N.Y.S.2d 789 (Sup. Ct. 1946) (Association could prohibit construction of dog house); West Hill Colony, Inc. v. Sauerwein, 78 Ohio L. Abs. 340, 138 N.E.2d 404 (Ct. App. 1956) (purchaser bound to restrictions as to architecture, materials, color scheme, etc.).

51 Reichman, *supra* note 14, at 288.

52 One official with the federal Department of Housing and Urban Development estimates that as many as 85% of homeowners in planned residential communities are not aware of applicable servitude restrictions or the existence of homeowners' associations. *See* Winokur, *supra* note 48.

subsidiaries of large diversified corporate firms,[53] and virtually all, whether corporate or individual, are repeat players who enjoy bargaining advantages over purchaser-residents, who engage in such transactions infrequently.

Discretionary power over landowners is no less problematic when it is exercised by a homeowners' association.[54] Robert Ellickson and Gerald Frug debated the coercive or noncoercive character of these institutions in a colloquy several years ago.[55] I will not rehearse all of the arguments of that exchange, but will only point out how here, again, choicelessness intrudes upon the "private" in private volition.

Admirers of the governance structure of homeowners' associations, like Ellickson, emphasize how that structure creates the opportunity for actual participatory democracy in regulating residential life.[56] They contend that this opportunity for participation assures that discretion in this context is noncoercive.

This view of homeowners' association overlooks the coercive nature of membership in these institutions. Developers typically use servitudes to compel purchasers to join homeowners' associations. The purchase of land in planned resident communities is burdened with the obligation of membership; purchasers simply do not have the choice of opting out of the association's decisions while remaining residents of the development. Claiming that the same degree of assent exists in the decision to purchase the parcel of land as in the "decision" to join the association distorts social reality. Claiming that members of homeowners' associations assent to the discretionary power that associations hold over various servitude terms further distorts social reality. If discretion is seen as a threat to individual autonomy, then there is no less reason for us to worry about its dominating effect when exercised in the private sphere than when exercised by courts under the rubrics of touch and concern or changed conditions.

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53 *See* L. GREBLER, LARGE SCALE HOUSING AND REAL ESTATE FIRMS 8-9, 14-15 (1973). *See also* L. GOODKIN, WHEN REAL ESTATE AND HOME BUILDING BECOMES BIG BUSINESS 22-23, 25 (1974).

54 For a description of the practical control that developers exert over homeowners' associations, see Barton & Silverman, *Common Interest Homeowners' Associations: Private Government and the Public Interest Revisited* (forthcoming in PUBLIC AFFAIRS REPORT, March 1988).

55 Ellickson, *supra* note 12; Ellickson, *A Reply to Michelman and Frug*, 130 U. PA. L. REV. 1602 (1982); Frug, *supra* note 13. *See also* Frug, *supra* note 6.

56 *See* Ellickson, *supra* note 12.

V

THE CLARK-RUNDELL DEBATE REVISITED

Edna St. Vincent Millay once wrote in a letter to a friend, "It is not true that life is one damn thing after another—it is one damn thing over and over."[57] One sometimes gets the same feeling about law reform. More than four decades after the American Law Institute produced its first restatement of the law of servitudes,[58] legal scholarship still frames issues of servitudes law through the same discourse that marked the debates surrounding that notorious failure. Then, as now, mainstream scholars argued from the same premise, the free choice/coercion dichotomy, to diametrically opposed conclusions. Comparing those debates with their counterparts forty years later, one is struck by the similarity in the legal discourse surrounding the two projects; the sense of stasis grows as one moves from one period to the next, belying the notion of legal progress.

The most prominent debate over the first restatement of servitudes occurred between Charles Clark, then a judge on the Second Circuit and author of an influential little book on real covenants,[59] and the Reporter, Professor Oliver Rundell, of the University of Wisconsin law faculty. Clark favored allowing both benefits and obligations of promises concerning land use to run freely. Rundell objected to binding any persons other than the original promisor to the promise on the ground that you cannot bind a stranger with the promises of another.

Both sides used the rhetoric of individual freedom of choice and constraint. Clark, like Professor Epstein, thought that freedom of contract necessitated elimination of the requirement of horizontal privity of estate and other obstacles to enforcing obligations against the promisor's successors. Bitterly attacking Rundell's retention of the horizontal privity rule,[60] Clark characterized the rule as resulting from "an unusually uncompromising adherence to the policy of outlawing parties' bargainings contrary to the trend of modern legal thinking."[61] But Rundell, like Professor French and Dean Reichman, insisted that there is no paradox in constraining freedom of contract to preserve freedom of contract. For Rundell the question was not whether freedom of contract should be enforced, but rather, freedom of contract for whom. Thus he stated,

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57 *Letters of Edna St. Vincent Millay*, (A. Macdougal ed. 1952).

58 V RESTATEMENT OF PROPERTY §§ 450-568 (1944).

59 C. CLARK, *supra* note 37.

60 V RESTATEMENT OF PROPERTY § 534 (1944).

61 Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 726 (1943).

"Th[e] problem is not 'What can parties do with their own?' but 'What can parties to a promise do to persons who are not parties?' "[62] He thought that the doctrine of promises running with the land was "anomalous," and as inconsistent with freedom to alienate land. He stated, "[The doctrine] has within it the certainty of increasing the hazards incident to the acquisition of title to land and thus the possibility of interfering with the freedom with which land is alienated."[63]

What I find interesting about this debate is not only how Clark and Rundell developed contradictory arguments even though they drew on the same stock of rhetorical moves, but that probably most legal academics today actually think that the two men fundamentally disagreed with each other. After all, Rundell was the Conceptualist and Clark was the Realist. The Clark-Rundell debate has a dead end quality (although the ad hominem remarks exchanged between the two men are very entertaining), not because they so basically disagreed, but because so little separated them. They never succeeded in really engaging each other.

CONCLUSION

The first restatement on servitudes is now generally regarded as a failure; can the current project avoid the same result? Realizing the Reporter's goal of reducing the technicality of this notorious area of law will certainly be a positive contribution. After all, a project that eliminates the distinction between corporeal and incorporeal hereditament cannot be all bad.

Tidying up the doctrinal messiness of servitude law alone will not, however, guarantee the net success of the new restatement. Like other law reform efforts, simplification of the law of servitudes is likely to have a pacifying effect. It lulls us into supposing that the conflicts between basic social and political visions have, in some meaningful sense, been resolved through careful balancing of all the relevant and competing interests, goals, and values. More importantly, it lulls us into accepting arrangements of social power as (more or less, but acceptably) free from the problem of dominance. Furthermore, to the extent that dominance persists as the basis upon which some disputes among land holders are resolved, despite law reform, the effort at reform can lead to resignation: we say that these reforms are the best that we can do and that dominance is a fact of life.

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62 Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 YALE L.J. 312, 314 (1944).

63 *Id.* at 315.

Charles Clark said that the first restatement was "a prime case study of Institute methodology" and that the result "suggests once more how difficult is the attempt to combine all the varied and fluid developments of all the courts of all the different sovereignties of this country into one uncompromising black-letter statement to represent 'the law'. . . ."[64] Echoing a recurrent Realist theme, he argued that the "real" rules are context-bound and resist reduction to a restatement.

Clark's objections to the first restatement's format was instrumental. He saw different policies at work in different contexts. The point that I want to make, however, is not instrumental in the standard sense of that term. Rather, it concerns social visions. There *are* intractable conflicts among our visions of the proper ordering of society and social relationships. These conflicts are deeply imbedded in our consciousness and are not susceptible to final solutions. This does not mean that settled legal practices do not or cannot exist. They can and do exist, and restatements can succeed in describing them. But settled legal practices are not settlements of fundamental political and social controversies; the claim that they are is just another attempt to trump some opposed normative claim and entrench a particular set of power relationships.

Reflecting, rather than repressing, both our existing doctrinal conflicts and our normative conflicts that remain just beneath the surface of settled doctrinal practices, requires an open-ended restatement. Its norms must be such that they do not stifle attempts to destabilize settled doctrinal practices. To the extent that this restatement project itself is just such an attempt, I welcome it; but to the extent that it becomes yet another frozen structure of rules, I oppose it.

64 Clark, *supra* note 61, at 701.