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Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification

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SERVITUDES REFORM AND THE NEW RESTATEMENT OF PROPERTY: CREATION DOCTRINES AND STRUCTURAL SIMPLIFICATION

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Servitudes provide the means to tie rights and obligations to land ownership or occupancy so that, without any further agreement, successors to the land take it with the benefits and burdens of the servitude arrangement. By using servitudes, land owners can make permanent changes in the default allocations of rights and obligations to their land. Used extensively today in residential and commercial development, as well as for transportation and natural resource exploitation, servitudes are a central contribution to the world of private ordering.

The concept of interests running with the land is elegantly simple, but the law governing servitude devices is a mess. I have described it previously as "the most complex and archaic body of American property law remaining in the twentieth century."[1] Others have described it more colorfully "as an unspeakable quagmire,"[2] "confounding intellectual experiences,"[3] and an area of the law full of "rigid categories, silly distinctions, and unreconciled conflicts over basic values."[4] George Lefcoe went so far as to say that "[s]ince the first English case interpreting the first English statute on the subject, commentators have doubted that the courts understood the law, and a study of judicial opinions, from *Spencer's Case* on, is bewildering at best."[5]

Ultimately, the complexity in servitudes law is due to courts' view that unchecked enforcement of servitudes is dangerous. From the beginning, courts have controlled servitude use by refusing to enforce a variety of arrangements freely entered into by land owners and occupiers.[6] Without such judicial controls, servitudes law could

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

2 E. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 480 (2d ed. 1982).

3 Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711, 717 (1975).

4 C. HAAR & L. LIEBMAN, PROPERTY AND LAW 909 (2d ed. 1985).

5 G. LEFCOE, LAND DEVELOPMENT LAW 768-69 (2d ed. 1974) (footnote omitted).

6 Both Roman and English law refused to permit servitudes that imposed affirma-

be very simple. As Richard Epstein has suggested, it could consist of one rule with two exceptions: enforce the servitude arrangement as agreed to by the parties, except against successors without notice and except where the arrangement is illegal.[7]

A secondary cause of the complexity in servitudes law is that the judicial controls have evolved in true common law fashion over many centuries.[8] To escape controls that had become too restrictive, lawyers cast transactions in different forms and drew arguments from different areas of the law. Judges accommodated the demands for development by accepting these new forms and arguments, and by designing or using new types of controls made available by developments in other areas of the law. However, the old forms and controls did not disappear, and as the old continued alongside the new, the gradually accreting layers of doctrine became ever more complex.

The earliest forms of control were bright-line and categorical, like the prohibitions on holding benefits in gross and on placing affirmative burdens on the land owner. Later, when affirmative burdens were permitted, another categorical control, the horizontal privity requirement, restricted their use to lease transactions. Gradually, the law developed more open-ended controls, like the touch and concern and the changed conditions doctrines. Since the mid-nineteenth century,[9] servitudes law has evolved from primary reli-

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tive burdens or created benefits in gross. M. KASER, ROMAN PRIVATE LAW 144-45 (3d ed. 1980); Sturley, *The "Land Obligation": An English Proposal for Reform*, 55 S. CAL. L. REV. 1417, 1428-29 (1982).

American courts have refused to enforce a variety of servitude arrangements. Two recent cases from New York illustrate the point. In Estate of Thomson v. Wade, 69 N.Y.2d 570, 509 N.E.2d 309, 516 N.Y.S.2d 614 (1987), the court refused to enforce an easement because it had been created in the same instrument which conveyed the servient estate to another. In Eagle Enters., Inc. v. Gross, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976), the same court refused to enforce an agreement in which a landowner agreed to buy water from a particular water company.

7 Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982).

8 Servitudes law has ancient roots. Rights of way appear in the Twelve Tables of Rome. W. BUCKLAND, THE MAIN INSTITUTIONS OF ROMAN PRIVATE LAW 152 (1931). Later Roman law recognized a variety of land use servitudes that we would classify as easements and profits. They included rights of way, rights to draw and conduct water, dig gravel, pasture cattle, burn lime, discharge water, and to encroach on a neighbor's airspace, as well as rights to light, view, and support. W. BUCKLAND, A MANUAL OF ROMAN PRIVATE LAW 155-57 (2d ed. 1947). English law recognized running covenant benefits as early as Pakenham's Case, Y.B. 42 Edw. 3, fo. 3, pl. 14 (1368) (also known as Prior's Case) and running covenant burdens in Spencer's Case, 5 Co. 16a, 77 Eng. Rep. 72 (Q.B. 1583). For the record of Pakenham's Case, see Woodbine, *Pakenham's Case*, 38 YALE L.J. 775 (1929).

9 The mid-nineteenth century marked a major milestone with development of the equitable servitude which eliminated the horizontal privity requirement. The leading cases in England and the United States were Barrow v. Richard, 8 Paige Ch. 351 (N.Y.

ance on ex ante, categorical controls to primary reliance on ex post, open-ended controls. This evolution is nearly complete, but husks of the old ex ante controls remain, generating the clutter and confusion of current servitudes law.

The American Law Institute's new servitudes restatement project[10] is designed to shake servitudes law free from the old controls and forms, and to restate the law as a coherent integrated body of doctrine. Although simplification and clarification of the law are its major goals,[11] the project is not designed to provide the ultimate simplification that would result from adopting a laissez-faire attitude toward servitudes. The project is not designed to change the fundamental premise that servitude enforcement must be subject to certain controls imposed by the legal system, but rather, to restate the law in modern, functional terms.[12]

Once the obsolete and unnecessary controls on servitudes are eliminated, we will be faced with the formidable tasks of setting forth the doctrinal bases of the remaining controls and of laying the

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Ch. 1840); Hills v. Miller, 3 Paige Ch. 254 (N.Y. Ch. 1832); Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

10 The Restatement project got underway in the spring of 1986 after I was named Reporter. As Reporter, I bear the initial responsibility for shaping the Restatement's form and content, but my work is only the beginning. Under the Institute's procedures, drafts are submitted first to a group of Advisers, then to the Council, and, after approval by the Council, to the membership. Only after approval by the membership does a draft become a Restatement. We are still in the early stages of the servitudes project. As of this writing, in January 1988, I have met three time with the Advisers to hammer out the scope and approach of the project, the organizational implications of adopting an integrated approach to servitudes law, and the extent to which we can streamline servitudes law by eliminating obsolete and unnecessary doctrines and redundant servitude devices. This Article reflects much of the work that has gone into that process but the conclusions presented here are strictly my own and do not necessarily represent the views of the Advisers or the Institute.

I am currently working on the chapter on Creation of Servitudes which I hope to complete in 1988.

11 French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213 (1988).

12 I do not believe that it would be appropriate for a Restatement to make such a fundamental departure from existing law, even if the departure would be "good."

Fortunately, I do not believe that adoption of a laissez-faire approach would be a good idea. I disagree with Richard Epstein's contention that the market should or can be relied on to avert the dangers of unchecked servitude enforcement. *See* Epstein, *supra* note 7. Even if it were possible to force parties to structure their servitudes to provide long-range flexibility and methods of avoiding hold-out problems—a premise I think dubious—I would oppose forcing parties into that kind of front-end investment. Of course, if they do make such an investment, their contract should be given effect; but if they do not, the law should provide them an alternative, by way of future judicial modification and termination of arrangements that for one reason or another have become unworkable or counter-productive.

For an excellent discussion of the problems inherent in the laissez-faire approach, see Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985).

groundwork for development of new controls. In the process of examining what controls are needed and where, the restatement will make an important contribution by identifying clearly the problems that demand control and the conflicting values involved in determining whether to enforce servitude arrangements.[13] Much servitudes doctrine was developed by courts that did neither, and some of the confusion in servitudes law can be blamed on that approach. The touch and concern doctrine provides a prime example: it identifies neither the problems addressed[14] nor the value choices that must be made in determining whether to apply it.

In this Article, I discuss the principles I have followed and the results I have reached in constructing a simplified doctrinal foundation on which to restructure the law of servitudes. Part I sets out the basic approach I have taken to simplifying servitudes law. Part II discusses the old doctrines that limit servitude creation and the reasons why they can be eliminated. Part III discusses the traditional servitude categories and the differences that remain among them after the old limiting doctrines are eliminated; based on that discussion, I propose a taxonomy for a modernized servitudes law. Part IV sets forth my concept of how to restate the law of servitudes as an integrated body of doctrine. The Appendix contains my current working outline of an integrated servitudes law.

I

SIMPLIFYING THE LAW OF SERVITUDES

In setting about the task of simplifying the law of servitudes, I started from the proposition that servitude arrangements should be enforceable unless there is a demonstrable reason to the contrary.[15] As I wrote in the Design Proposal for the Restatement:

> The shift from judicial control of servitude dangers by cate-

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13 Servitude enforcement sometimes pits strongly-held values against one another. Values of freedom of contract, freedom from dead-hand control, values of freedom of association and freedom from discrimination, values of autonomy in choice of lifestyle, freedom from restraints on trade and alienation, and democratic values may all be challenged by servitude enforcement. Cleaning up the old doctrinal tangle should enable us to see more clearly the real questions posed by servitude enforcement and to address them more directly.

14 Why does it matter whether a covenant burden or benefit touches and concerns the land? We are never told. The major contribution of recent scholarship in the servitudes field is to penetrate the old doctrines to explore the possible functions they serve. My own contribution to that effort can be found in French, *supra* note 1; citations to the works of others can be found *id.* at 1262 n.3. Since I wrote this Article, Professor Stake has essayed an economic defense of the touch and concern doctrine Stake, *Toward an Economic Understanding of Touch and Concern*, DUKE L.J. (forthcoming November 1988).

15 The old ex ante restrictions on servitude creation have given way sufficiently to make this a justifiable starting point. The analysis that led me to this conclusion is set forth in French, *supra* note 1.

> gorical limits on the types of servitudes that can be created and the transactions in which they can be created permits a major shift in attitude toward servitudes. . . . [People] should be able to create any servitudes they find useful. The basic approach of the law should be to ascertain and give effect to the intent of the parties. If what is intended violates constitutional or statutory norms or doctrines expressing public policy, the arrangement should be declared invalid. If the servitude arrangement is valid, it should be permitted to bind successors and continue until it becomes obsolete or unduly burdensome.[16]

From this proposition, I derived two basic principles. First, no doctrine restricting the creation of a servitude should be retained unless it can be justified by current or future needs, or unless it is a doctrine of general application.[17] Second, servitude doctrines addressing particular problems should give way to doctrines of more general application that satisfactorily address the same problem. The Statute of Frauds and the recording acts, for example, provide satisfactory solutions to problems addressed by earlier servitude doctrines requiring writings and notice, and should displace them. As I demonstrate in Part II, none of the old servitude-specific doctrines restricting creation of servitude arrangements survive application of these two principles.

A third major principle I have followed in simplifying and restructuring the law of servitudes is that the same rule should apply to all servitudes unless there is a demonstrable reason why different rules should apply.[18] After applying all these principles, several of the traditional servitude classifications become redundant and can be eliminated, as I show in Part III.

There are two final principles that I have tried to follow in proposing to retain certain servitude classifications and doctrines. First, the language of a restated law of servitudes should reflect the normal usage of lawyers and judges to the extent this is consistent with the project's other goals.[19] Second, the problems created by

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16 French, *supra* note 11, at 1221.

17 By doctrines of general application I mean doctrines that restrict creation of other arrangements as well as servitudes, such as prohibitions of unreasonable restraints on trade and alienation, and prohibitions of racial discrimination.

Application of this principle leads to the conclusions that the horizontal privity requirement should be eliminated but that the Statute of Fraud's writing requirement should not; likewise, that the prohibition of benefits in gross should be eliminated but the prohibition of unreasonable restraints on alienation and of racial discrimination should not.

18 Professor Lawrence Berger has pointed out a number of areas where differences among servitudes do justify applying different rules. Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 (1986).

19 For example, I have chosen to use the word "covenant" rather than the phrase "promises respecting the use of land" not only because it is shorter but also because it

servitude arrangements should be stated as clearly as possible and doctrinal solutions should tackle them as directly as possible. The touch and concern doctrine is a prime offender of this principle. I believe courts should retain their discretionary power to terminate servitude arrangements if enforcement would be harmful.[20] However, I firmly believe that courts should state why the enforcement would be harmful, rather than hide behind the rubric of touch and concern.

II
ELIMINATING UNNECESSARY CONSTRAINTS ON SERVITUDE CREATION

Depending on how you count, American law recognizes between five and fourteen different servitude devices. The primary categories are profits, easements, irrevocable licenses, real covenants, and equitable servitudes. Additional categories result from classifying benefits and burdens as appurtenant or in gross, and as negative or affirmative. While there are some functional differences among these various devices, many are equivalents *because* they were developed to circumvent controls imposed on others, rather than to meet demands for different types of arrangements.[21] If the unnecessary servitude control doctrines are eliminated and the same rules are applied to all servitudes, except where there are real differences among them, then several servitude categories can be eliminated as redundant.

In this Part, I will present the old doctrines limiting creation of servitudes that I think can be eliminated: horizontal privity, limits on third party beneficiaries, prohibitions of affirmative burdens, touch and concern, seal and writing requirements apart from the Statute of Frauds, notice requirements in addition to the recording acts, and prohibitions of benefits in gross. I conclude with what I think should be the requirements continuing to govern the creation of servitudes.

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reflects normal usage. I have dropped the term "equitable servitude" even though it reflects normal usage, however, because it leads to confusion in a world where there are no actual differences between actual covenants and equitable servitudes.

20 This is the effect of the touch and concern doctrine. Although it is stated as an ex ante control—that the burden or benefit will not run unless it touches and concerns—the doctrine is so vague that it in fact tends to terminate servitude arrangements. Except when faced with a few settled covenants like mortgage covenants, courts can characterize easily a covenant as one which does or does not touch and concern land. This characterization is generally made after the fact when the covenant's long range effects have become apparent. *See generally infra* pages 21-23.

21 Equitable servitudes, for example, circumvent both the purpose limitations imposed on negative easements and the privity requirements imposed on negative covenants.

A. Horizontal Privity

The horizontal privity requirement applies only to real covenants. In its original English form,[22] it restricted the use of real covenants to lease transactions. As developed in the United States,[23] the relationships creating horizontal privity expanded until a real covenant could be created in any transaction involving conveyance of some other interest in land.[24]

In this American form, the only possible function of the horizontal privity requirement is to insure that covenants appear in recordable instruments.[25] This function is more simply served by the

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22 R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 742-43 (4th ed. 1975). Tenurial privity is rarely required in the United States. In McIntosh v. Vail, 126 W. Va. 395, 28 S.E.2d 607 (1943), the court purported to adhere to the English view but also cited with apparent approval several West Virginia cases that had found sufficient privity in the conveyance of a right of way or fee in the burdened land.

23 The first expansion of the English rule in the United States occurred in Massachusetts. The "Massachusetts Rule" added to the persons enjoying a relationship sufficient to create horizontal privity the owners of the benefit and burden of an easement. Hurd v. Curtis, 36 Mass. (19 Pick.) 459 (1837); Morse v. Aldrich, 36 Mass. (19 Pick.) 449 (1837). This type of privity is variously called "simultaneous," "substituted," "mutual," or "continuing" privity. 5 R. POWELL, REAL PROPERTY, ¶673[2][c], at n.104 (1986); Note, *Covenants Running With the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 145 n.36 (1978).

The rule may have lost its force in Massachusetts. In Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979), an action to enforce a covenant not to permit the grantor's retained land to be used in competition with the discount store of the grantee, the court stated that the deed granted mutual easements sufficient to satisfy the requirement that the parties be in privity of estate. The opinion states that the deed contained numerous, detailed reciprocal restrictions and covenants designed to assure the harmonious development of a shopping center but does not specifically mention any easements. One commentary suggests that this seriously undercuts *Hurd* and *Morse*, although the court may not have intended that result, or may have intended to limit it to reciprocal covenants. R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, PROPERTY 479 (1984).

24 *See, e.g.*, Carlson v. Libby, 137 Conn. 362, 77 A.2d 332 (1950) (conditional easement); Albright v. Fish, 136 Vt. 387, 394 A.2d 1117 (1978) (warranty deed). This type of privity is sometimes called "instantaneous" privity. Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 21 (1978). *Contra*, Wheeler v. Schad, 7 Nev. 204 (1871) (no privity of estate between owners of adjacent mill sites even though one party had conveyed the mill site to the other only six days earlier).

25 Requiring the simultaneous grant of an estate tends to insure that the covenant will be included in a deed but serves no other apparent function. It imposes no durational limit on running covenant burdens and no practical limit on transaction costs. Since a covenant can be imposed in the conveyance of a fee interest in the property, there is no assurance that the original parties or their successors will have any continuing contact with each other or any shared economic incentives to keep the burdened property productive.

The English horizontal privity requirement, limiting affirmative covenants to those created in leases, performs at least two functions: First, it increases the likelihood that a successor to the covenantor will receive notice of the obligation. Second, it limits the covenant burden's potential to make the property unmarketable or unproductive by limiting transaction costs, requiring that both parties have economic interests in continued productivity of the burdened land, and tending to assure that the covenants have limited

Statute of Frauds and the recording acts. Since the doctrine has little support in modern case law[26] and none among scholars of servitudes law,[27] its elimination should not prove controversial.

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life. French, *supra* note 1, at 1292-93. The Massachusetts privity rule also tends to limit the transaction costs of modifying or terminating covenants but does not provide the same protection against obsolete or uneconomic covenant burdens because the economic well-being of the parties is not necessarily intertwined and the life of the covenant is not limited.

26 *See, e.g.*, Roche v. Ullman, 104 Ill. 11 (1882); Pillsbury v. Morris, 54 Minn. 492, 56 N.W. 170 (1893); Shaber v. St. Paul Water Co., 30 Minn. 179, 183, 14 N.W. 874, 875 (1883); Reichert v. Weeden, 618 P.2d 1216, 1220 (Mont. 1980); Bolles v. Pecos Irrigation Co., 23 N.M. 32, 38, 167 P. 280, 283 (1917); Horn v. Miller, 136 Pa. 640, 20 A. 706 (1890); Newman & Losey, *Covenants Running with the Land and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1328-29 (1970).

The Field Civil Code, adopted in California, Montana, and a few other states, appeared to include a horizontal privity requirement for covenants that run with the land. *See, e.g.*, MONT. CODE ANN. § 70-17-203 (1985). California eliminated the horizontal privity requirement with the enactment of CAL. CIV. CODE § 1468 (West 1982), and Montana appears to have ignored it in the *Reichert* case.

In New York, the privity requirement has been applied inconsistently. 5 R. POWELL, *supra* note 23, ¶673[2][c], at 60-63 n.113. Now, it appears to have been eliminated. Orange and Rockland Utils., Inc. v. Philwold Estates, Inc., 52 N.Y.2d 253, 263 418 N.E.2d 1310, 437 N.Y.S.2d 291, 295 (1981) ("now the party seeking to enforce the covenant need show only that he held property descendant from the promisee which benefited from the covenant and that the owner of the servient parcel acquired it with notice of the covenant"). Even those courts that recite horizontal privity as a requirement may express doubts about its viability, Moseley v. Bishop, 470 N.E.2d 773 (Ind. App. 1984), or find horizontal privity where it once did not exist, Leighton v. Leonard, 22 Wash. App. 136, 589 P.2d 279 (1979).

The only recent cases refusing to enforce covenants against successors for lack of horizontal privity are Johnson v. Myers, 226 Ga. 23, 172 S.E.2d 421 (1970) and Clear Lake Apartments, Inc. v. Clear Lake Utils. Co., 537 S.W.2d 48 (Tex. Civ. App. 1976), *aff'd as modified sub nom.* Clear Lake City Water Auth. v. Clear Lake Utils. Co, 549 S.W.2d 385 (Tex. 1977). In Muldawer v. Stribling, 243 Ga. 673, 256 S.E.2d 357 (1979), the court said that it would have denied an injunction against violation of a covenant among neighbors were it not for an express assumption of the obligation by the successor to the covenantor. The neighbors were entitled to enforce the assumption agreement as third party beneficiaries. Refusal to issue an injunction for lack of horizontal privity reflects English law prior to Tulk v. Moxhay, 2 Ph. 774, 41 Eng. Rep. 1143 (Ch. 1848).

27 Dean Oliver Rundell, Reporter for the first Restatement of Property Law, Servitudes, was probably the last scholar to mount a serious defense of the horizontal privity requirement. His insistence on including it in RESTATEMENT (FIRST) OF PROPERTY § 534 (1944) sparked an acrimonious debate with Judge Clark. *See* Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699 (1943); Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 YALE L.J. 312 (1944); Clark, *A Note on Professor Rundell's Comment*, 53 YALE L.J. 327 (1944); *see also*, Sims, *The Law of Real Covenants: Exceptions to the Restatement of the Subject by the American Law Institute*, 30 CORNELL L.Q. 1, 30-33 (1944) (although not entirely in accord with Clark, Sims also criticized Rundell's inclusion of the horizontal privity requirement). Holmes had argued earlier that there was no historical foundation for the horizontal privity requirement. O. HOLMES, THE COMMON LAW 401 (1881).

Professors Berger and Browder are representative of current scholars in viewing the horizontal privity requirement as useless and absurd. Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 195 (1970); Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 25 (1978).

B. Third Party Beneficiaries

Some remnants of ancient prohibitions on creating benefits for strangers—persons who are not immediate parties to the transaction—remain in current servitudes law.[28] In both easement and covenant law, there are rules prohibiting the grantor of land from creating servitudes to benefit his neighbors or other third parties.[29] A related limitation in covenant law formerly prevented earlier purchasers in residential subdivisions from enforcing covenants against later purchasers.[30] These rules prevented intended beneficiaries from enforcing easement and covenant rights.

Real property law developed partial solutions to these problems. Easements reserved in favor of third parties were treated as exceptions to the grantor or as exceptions of pre-existing rights in third parties.[31] Development of the general plan doctrine permit-

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28 2 AMERICAN LAW OF PROPERTY § 8.29 (A. Casner ed. 1952); 3 R. POWELL, *supra* note 23, ¶407, at 34-39 to 39-40 (1987).

29 The majority of states still appear to follow the rule that the grantor of an estate in land cannot reserve or except an easement in favor of a third party. Wessells v. State Dep't of Highways, 562 P.2d 1042 (Alaska 1977) (dictum); Guaranty Loan & Trust Co. v. Helena Improvement Dist., 148 Ark. 56, 228 S.W. 1045 (1921); Dade County v. Little, 115 So. 2d 19 (Fla. Dist. Ct. App. 1959) (dictum); Allingham v. Nelson, 6 Kan. App. 2d 294, 627 P.2d 1179 (1981); Town of Manchester v. Augusta Country Club, 477 A.2d 1124 (Me. 1984); Fitanides v. Holman, 310 A.2d 65 (Me. 1973); Herbert v. Pue, 72 Md. 307, 20 A. 182 (1890); Hodgkins v. Bianchini, 323 Mass. 169, 80 N.E.2d 464 (1948); Hazen v. Mathews, 184 Mass. 388, 68 N.E. 838 (1903); *but see* Haverhill Sav. Bank v. Griffin, 184 Mass. 419, 68 N.E. 839 (1903) (treated as reservation to grantor); Ellison v. Fellows, 121 N.H. 978, 437 A.2d 278 (1981); Estate of Thomson v. Wade, 69 N.Y.2d 570, 509 N.E.2d 309, 516 N.Y.S.2d 614 (1987); Owen v. Holzheid, 335 Pa. Super. 231, 484 A.2d 107 (1984) (dictum); Lauderbach-Zerby Co. v. Lewis, 283 Pa. 250, 129 A. 83 (1925) (treating reservation as exception of pre-existing rights); Fusaro v. Varrecchione, 51 R.I. 35, 150 A. 462 (1930); Brace v. Van Eps, 21 S.D. 65, 109 N.W. 147 (1906); Joiner v. Sullivan, 260 S.W.2d 439 (Tex. Civ. App. 1953), Guilbault v. Bowley, 146 Vt. 39, 498 A.2d 1033 (1985); Pitman v. Sweeney, 34 Wash. App. 321, 661 P.2d 153 (1983); Simmons v. Northern Pac. R.R., 88 Wash. 384, 153 P. 321 (1915).

Authorities prohibiting the grantor from imposing restrictions on the land conveyed in favor of her neighbors include: Hays v. St. Paul M.E. Church, 196 Ill. 633, 63 N.E 1040 (1902); Brown v. Fuller, 347 A.2d 127 (Me. 1975); S.K. Edwards Hall Co. v. Dresser, 168 Mass. 136, 46 N.E. 420 (1897); Equitable Life Assurance Soc'y of United States v. Brennan, 148 N.Y. 661, 43 N.E. 173 (1896); Master v. Hansard 4 Ch. D. 718 (1876); Renals v. Cowlishaw, 9 Ch. D. 125 (1876).

30 *See, e.g.*, Doerr v. Cobbs, 146 Mo. App. 342, 123 S.W. 547 (1909); McNichol v. Townsend, 73 N.J. Eq. 276, 67 A. 938 (1907); Keates v. Lyon, L.R. 4 Ch. Div. 218 (1869).

31 The reservation in favor of a third party was treated as an exception retained by the grantor in the following cases: Jackson v. Snodgrass, 140 Ala. 365, 37 So. 246 (1903); School District v. Lynch, 33 Conn. 330 (1866); Deaver v. Aaron, 159 Ga. 597, 126 S.E. 382 (1925), *but cf.* Harrell v. Harrell 250 Ga. 797, 300 S.E.2d 806 (life estate); Davis v. Gowen, 83 Idaho 204, 360 P.2d 403 (1961); Cook v. Farley, 195 Miss. 638, 15 So. 2d 352 (1943); Schmidt v. City of Tipton, 89 S.W. 2d 569 (Mo. App. 1936); Burns v. Bastien, 174 Okla. 40, 50 P.2d 377 (1935).

The reservation in favor of a third party was treated as an exception of pre-existing rights in the third party in the following cases: Board of County Commrs v. Anderson,

ted enforcement of subdivision covenants by all lot owners against all other lots in subdivision.[32] Although they work reasonably well, these solutions are doctrinally awkward and not completely satisfactory. In the contracts area courts have developed the simpler and more comprehensive third party beneficiary doctrine[33] which provides a complete theoretical solution to the problem. Since there is no apparent reason why servitude benefits should not be created directly in third parties,[34] the third party beneficiary doctrine is now being carred over into servitudes law,[35] where it should supplant the older doctrines.

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34 Colo. App. 37, 525 P.2d 478 (1974) *aff'd subnom.* Anderson v. Union P.R. Co., 188 Colo. 337, 534 P.2d 1201 (1975); Williams v. Babcock, 121 N.H. 185, 428 A.2d 108 (1981); Tallarico v. Brett, 137 Vt. 52, 400 A.2d 959 (1979); Toussaint v. Stone, 116 Vt. 425, 77 A.2d 824 (1951); Beckley Nat'l Exchange Bank v. Lilly, 116 W. Va. 608, 182 S.E. 767 (1935) (dictum).

A different approach was used in Williams v. Stirling, 40 Colo. App. 463, 583 P.2d 290 (1978), where a reservation of an easement in favor of the grantor was held to create rights in a third party by virtue of a trust imposed on the grantor because of his fiduciary relation to the third party.

32 2 AMERICAN LAW OF PROPERTY, *supra* note 28, § 9.30. Bristol v. Woodward, 251 N.Y. 275, 167 N.E. 441 (1929) contains a discussion of the implied reciprocal servitude theory used to explain the general plan result. *See also* Sailor v. Podolski, 82 N.J. Eq. 459, 88 A. 967 (1913).

33 The doctrine originated with Lawrence v. Fox, 20 N.Y. 268 (1859). *See* 4 A. CORBIN, CONTRACTS §§ 772-855 (1951 & Supp. 1971); RESTATEMENT (SECOND) OF CONTRACTS ch. 14 (1981).

34 Cases in a growing minority of jurisdiction recognize that easements may be directly created in third parties. Willard v. First Church of Christ Scientist, 7 Cal. 3d 473, 498 P.2d 987, 102 Cal. Rptr. 739 (1972); Application of Kelley, 50 Haw. 567, 445 P.2d 538 (1968); Enderle v. Sharman, 422 N.E.2d 686 (Ind. Ct. App. 1981); Townsend v. Cable, 378 S.W.2d 806 (Ky. 1964); Mott v. Stanlake, 63 Mich. App. 440, 234 N.W.2d 667 (1975) (assumed to have been an exception to benefit a third party, not a reservation, since an exception to benefit a third party is permissible); Medhus v. Dutter, 184 Mont. 437, 603 P.2d 669 (1979) (intent to create easement in stranger must be clearly shown); Borough of Wildwood Crest v. Smith, 210 N.J. Super. 127, 509 A.2d 252 (1986); Zurn Indus., Inc. v. Lawyers Title Ins. Co., 33 Ohio App. 3d 59, 514 N.E.2d 447 (1986); Hollosy v. Gershkowitz, 88 Ohio App. 199, 98 N.E.2d 314 (1950); Garza v. Grayson, 255 Or. 413, 467 P.2d 960 (1970); Badger State Agri-Credit & Realty, Inc. v. Lubahn, 122 Wis. 2d 718, 365 N.W.2d 616 (1985); Simpson v. Kistler Investment Co., 713 P.2d 751 (Wyo. 1986). RESTATEMENT (FIRST) OF PROPERTY § 472 (1944) rejected the common law prohibition and recognized creation of an easement in a third person if the deed adequately expressed the grantor's intent.

35 *See, e.g.*, Nicholson v. 300 Broadway Realty Corp., 7 N.Y.2d 240, 164 N.E.2d 832, 196 N.Y.S.2d 945 (1959) (affirmative covenant); Vogeler v. Alwyn Improvement Corp., 247 N.Y. 131, 136-37, 159 N.E. 886, 888 (1928) (restrictive covenant); Snow v. Van Dam, 291 Mass. 477, 197 N.E. 224 (1935); Rodgers v. Reimann, 227 Or. 62, 361 P.2d 101 (1961).

RESTATEMENT (FIRST) OF PROPERTY § 541 (1944) adopts third party beneficiary theory to explain enforcement of subdivision covenants against prior grantees. Section 472 reaches the same result with respect to easements but not on third party beneficiary grounds. It simply states that a single instrument of conveyance can create an estate in one person and an easement in another without stating a theoretical basis for the departure from the old rule. *Id.* at § 472.

C. Prohibitions of Affirmative Burdens

Roman law refused to recognize land servitudes that imposed affirmative burdens on the landowner.[36] English law contained the same restriction but created a category of "spurious easements" to accommodate obligations to maintain fences and common walls.[37] Real covenants were permitted to impose affirmative burdens but were restricted to lease covenants by the horizontal privity requirement. After elimination of the horizontal privity requirement for enforcement of covenants in equity, it appeared that affirmative covenant obligations created outside of leases or the spurious easement categories would be enforceable. However, by the late nineteenth century, English law determined that affirmative burdens would not be enforced in equity.[38]

Because American law broadened the horizontal privity requirement so that most land transactions could meet it, courts did not develop the concept of spurious easements. Real covenant doctrine met the demand for most affirmative obligations. However, as affirmative covenants have became more common in residential subdivisions, some demand has arisen for enforcement of affirmative covenants in equity. It is doubtful that the English rule prohibiting affirmative burdens in equitable servitudes was ever in force in this country, but if it was, recent cases are disclaiming it.[39] Since the horizontal privity rule has no force in this country, there is no reason to maintain a rule that would permit enforcement of affirmative burdens as covenants but not as equitable servitudes.[40]

Enforcement of affirmative burdens as servitudes does raise some concerns about the possibilities for impairing the marketability of land, the same concerns that probably led to development of the English rule restricting the transactions in which they could be imposed to leases. American law cannot deal effectively with these concerns in the same way that English law did because it has eliminated the horizontal privity requirement. Instead, the touch and concern doctrine has been used to address these concerns, and they will be further discussed in connection with that doctrine.

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36 M. KASER, *supra* note 6, at 119.

37 Sturley, *supra* note 6, at 1429 n.92.

38 Haywood v. Brunswick Bldg. Soc'y, 8 Q.B.D. 403 (1881).

39 Petersen v. Beekmere, Inc., 117 N.J. Super. 155, 283 A.2d 911 (1971); Fitzstephens v. Watson, 218 Or. 185, 344 P.2d 221 (1959).

40 There is no reason why easements should not be used to impose affirmative burdens either, except usage. As discussed below, I favor retaining both covenants and easements as descriptions of servitude devices so I will not pursue the idea of using easements to impose affirmative obligations on land owners.

D. Touch and Concern

The touch and concern doctrine has traditionally been stated in the form of an ex ante limit on the creation of servitudes.[41] If the benefit or burden of the covenant does not touch or concern the land, then it does not run with the land. As it applies to benefits, I continue to regard the requirement as such an ex ante control, and I have treated it as a prohibition on benefits in gross.[42] As it applies to burdens, however, I think the touch and concern requirement is more in the nature of an ex post control, operating after the fact to give the court a discretionary power to terminate a servitude. The concept is so difficult to pin down that it can rarely be used as a basis for predicting the enforceability of a particular covenant. Each covenant must be litigated to determine whether it touches and concerns or not.

To the extent that the burden side of the touch and concern requirement does operate as a limit on covenant creation, I propose that it be eliminated along with the other old ex ante controls. Its only significant operation is in the realm of affirmative covenants, where it serves to prevent the creation of particular types of covenants. Why it prevents them, however, remains a mystery. Some have suggested that it only prevents creation of covenant obligations that people would expect not to be bound by if they bought the land.[43] But why would they expect not to be bound? If there is notice of the covenant, and the intent that it run is clear, the only basis for such an expectation is precedent.

When a court invalidates a covenant obligation on the ground that it does not touch and concern the land, it makes a substantive judgment that the obligation should not be permitted to run with land.[44] Such judgments have been passed with respect to mortgage

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41 The doctrine is sometimes treated under the heading of succession rather than creation. I prefer to treat it as a matter of creation, however, because unless some interest runs with land there is no servitude.

42 Although there is some mushiness in the question whether a benefit touches and concerns land if the arrangement benefits a business, I view the appurtenance requirement as relatively clear-cut. It is usually not difficult to tell whether a covenant is intended to run with an interest in land or to be held by a person or business independently of any interest in the land owned or occupied by the covenantee at the time the covenant was made.

43 *See* Berger, *supra* note 27.

44 Reichman essentially takes the same view, although he expresses it as exercising a power to fix the boundaries of servitudes and apparently is not troubled by permitting courts to exercise this power without articulating what they are doing or why. In his view, "[t]his somewhat unusual interventionist theory is justified because the permanent attachment to land of merely personal obligations is likely to frustrate the objectives of a private land holding system." Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1233 (1982).

However, in explaining what he means, Reichman expresses the concern that obli-

covenants, a variety of lease covenants, and a few other covenants. The real reasons for the invalidation are seldom, if ever, given. Sometimes it appears that the covenant restrains trade or competition;[45] sometimes it appears that the covenant takes unfair advantage of a consumer;[46] sometimes it simply appears that conditions have changed and the agreement no longer produces the benefits that the original covenantor expected.[47]

In my view, servitudes law should separate initial-validity questions from modification and termination questions, and should tackle both directly. The vice of the touch and concern doctrine is that it permits commingling of the two types of questions and treats both behind such a screen of hocus-pocus that we have to guess at the reasons for a decision. It is often difficult to know whether the arrangement was invalidated because it violated some important public policy, or whether it was terminated because it was unfair in the beginning or had become obsolete or unduly burdensome later on.

We will make a major advance in improving the quality of servitudes law if we abandon the rhetoric of touch and concern. Servitudes law should address separately and directly the questions whether an arrangement would violate a constitutional, statutory, or public policy norm if permitted to operate as a servitude, and whether the arrangement, while valid as a servitude, should be terminated because it has become obsolete, unduly burdensome, or something else.

E. Formalities Required to Create Servitudes

In an earlier era, the law distinguished between the writing requirements imposed by the Statute of Frauds and those that existed independently because they predated the Statute. Some importance was also given to the question whether a seal might still be required

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gations not related to actual property use tend to become inefficient but may be difficult to terminate because of transaction costs and that servitude obligations might be used to create modern variations of feudal serfdom. *Id.*

45 *See, e.g.*, Eagle Enters., Inc. v. Gross, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976); Clear Lake Apartments, Inc. v. Clear Lake Utils. Co., 537 S.W.2d 48 (Tex. Civ. App. 1976), *aff'd as modified sub. nom.* Clear Lake City Water Auth. v. Clear Lake Utils. Co., 549 S.W.2d 385 (Tex. 1977). In both cases the courts permitted land owners to escape from covenant obligations to buy water from a particular source after a cheaper or better water supply became available from another source. In neither case did the court justify the loss to what would appear to have been investment-backed expectations of the covenantee water companies involved. It is possible that the courts viewed the initial contracts as extortionate or believed the investments well repaid but they do not say so.

46 *See* French, *supra* note 1, at 1290-92.

47 *See, e.g.*, Eagle Enters. v. Gross, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976).

to create a valid easement or covenant. Today, it seems obvious that all servitudes should be treated as interests in land subject to the conveyancing sections of the Statute of Frauds and that seals are obsolete. I would not expect this position to be controversial.

F. Notice

Equitable servitude doctrine traditionally has stated notice as a requirement for creation. In this it differs from all the other servitude devices, particularly covenants. Although the distinction was significant in England because that country had no adequate recording system, it has meant little in the United States. Despite variations in wording, American recording statutes everywhere should protect the unknowing against unrecorded servitudes of all types.[48] I cannot think of any reason to give more protection against equitable servitudes than against other kinds of servitudes.

The only place where a notice requirement in addition to recordation conceivably could make a difference is to protect a donee, or to protect a purchaser in a race-notice jurisdiction who bought before recordation of the servitude but recorded her deed after recordation of the servitude. It seems obvious that it would not make sense to protect such purchasers or donees of property burdened by an equitable servitude while refusing to extend the same protection to the purchaser or donee of land burdened by a real covenant, easement, or profit. The same rule should apply to all: they are all entitled to the protection of the recording acts, but no more.

G. Prohibition of Benefits in Gross

The law once generally refused to recognize the creation of servitude rights in gross. Prohibitions on creating benefits in gross appear in Roman law as well as in English law, where the prohibition has survived, at least nominally, into modern times.[49] American law has cast off the limitation with respect to easements, but retains remnants of it with respect to covenants and equitable servitudes.[50] American case law is not consistent in applying prohibitions on benefits in gross and does not provide any compelling basis for retain-

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48 Servitudes that leave visible marks on the burdened land would be excepted in most states because inspection of the premises would give notice.

49 *See supra* note 6. Although English common law has refused to recognize easements in gross, Parliament has created a host of statutory easements in gross for railroads, pipelines, and the like. It has also granted local authorities powers to enforce restrictive covenants under some circumstances, a power the courts had denied in London County Council v. Allen, 3 K.B. 642 [1914]. Sturley, *supra* note 6, at 1423.

50 2 AMERICAN LAW OF PROPERTY, *supra* note 28, § 9.13, at 375-76; R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 23, § 8.2.

ing such a restriction in a modern law of servitudes.[51]

In determining whether the remnants of the prohibition should be retained or discarded, we must look at the functions performed by the prohibition. The prohibition may be invoked in several different situations, and its role may vary in each.[52] In discussing the

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51 *See* Roberts, *Promises Respecting Land Use—Can Benefits Be Held in Gross?*, 51 Mo. L. REV. 933 (1986) for a recent extensive treatment of the subject.

52 First, conservation and historic preservation servitudes will normally be held in gross unless local law forces acquisition of an anchor parcel. Anchor parcels were used in creating scenic easements under the highway beautification program. Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 168 (1968). Statutes have been enacted in many jurisdictions to avoid the common law strictures against benefits in gross. *See, e.g.*, CAL. CIV. CODE §§ 815-16 (West 1982).

Second, governmental bodies may acquire servitude interests for a variety of purposes. *See, e.g.*, Park Redlands Covenant Control Comm. v. Simon, 181 Cal. App. 3d 87, 226 Cal. Rptr. 199 (1986) (for waivers of violations of density restrictions in exchange for covenants to restrict number and age of occupants); Inhabitants of Middlefield v. Church Mills Knitting Co., 160 Mass. 267, 35 N.E. 780 (1894) (for exchange of right to build a dam that would flood out existing bridge maintained by town for covenant to build and maintain new bridge for benefit of town); Wilmurt v. McGrane, 16 A.D. 412, 45 N.Y.S. 32 (1897) (for waivers of violations of density restrictions in exchange for covenants not to build in certain areas); Johnson v. State, 27 Or. App. 581, 556 P.2d 724 (1976) (for preventing development of lands intended for future public uses).

Third, covenants in restraint of trade and competition generally are upheld against challenges that their benefits are in gross even though the benefit is to the business, rather than the land, of the covenantee. *See, e.g.*, Trosper v. Shoemaker, 312 Ky. 344, 227 S.W.2d 176 (1949); Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 97-99, 390 N.E.2d 243, 246-50 (1979); Staebler-Kempf Oil Co. v. Mac's Auto Mart, Inc., 329 Mich. 351, 45 N.W.2d 316 (1951); Pratte v. Balatsos, 99 N.H. 430, 113 A.2d 492 (1955), *aff'd*, 101 N.H. 48, 132 A.2d 142 (1950); Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp., 41 A.D.2d 950, 344 N.Y.S.2d 30 *appeal dismissed*, 33 N.Y.2d 656, 348 N.Y.S.2d 980, 303 N.E.2d 705 (1973); First Nat'l Bank v. Klock Produce Co., 85 Or. 403, 414-16, 166 P. 955, 958 (1917); Ball v. Rio Grande Canal Co., 256 S.W. 678 (Tex. Civ. App. 1923).

Fourth, party wall cases can also involve benefits in gross if the subsequent user is required to pay the original builder of the wall a share of the construction expense. A leading case is Conduitt v. Ross, 102 Ind. 166, 26 N.E. 198 (1885) (holding that the burden runs even though the benefit is in gross). Clark strongly approved its result, where consistent with the parties' intentions. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 150-51 (2d ed. 1947).

Finally, the benefit of covenants in residential neighborhoods usually run to other lots in the neighborhood but occasional in gross problems arise where enforcement rights are given to a property owners' association that owns no land, the developer retains enforcement rights after selling all lots, or an individual grantor imposes a restriction and then seeks to enforce it after moving away. The property owners' association is normally permitted to enforce covenants despite holding the benefit in gross. *See e.g.*, Merrionette Manor Homes Improvement Ass'n v. Heda, 11 Ill. App. 2d 186, 192, 136 N.E.2d 556, 559 (1956); Neponsit Property Owners' Ass'n v. Emigrant Indust. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 *reh'g denied*, 278 N.Y. 704, 16 N.E.2d 852 (1938). The developer, too, should be able to enforce covenants after selling out if intended to be able to do so. *See, e.g.*, Riverbank Improvement Co. v. Bancroft, 209 Mass. 217, 223, 95 N.E. 216, 219 (1911); Christiansen v. Casey, 613 S.W.2d 906 (Mo. Ct. App. 1981).

If the individual grantor intended to retain enforcement rights after moving away she, too, should be able to exercise them, although, in this case, she should probably be required to show some damage from the violation or other legitimate interest in the

kinds of cases in which it may be used, I have laid aside the cases where it is not clear who the intended beneficiary is or whether the benefit is intended to be appurtenant or in gross. Those are questions of interpretation, not questions of the strictures imposed on permitted servitudes.[53]

Assuming, then, that the intended beneficiary is clear, three types of cases may arise. In the first, all intended beneficiaries of the covenant are holders in gross.[54] In the second, the intended beneficiaries include both holders in gross and holders appurtenant.[55] In the third, all intended benefits are appurtenant to land.[56] Application of the prohibition produces different effects in the three cases. In the first, it gives the holder of the burdened property power to terminate the arrangement at will, disregarding the intended servitude obligation. In the second, it reduces the group of people entitled to enforce the servitude to the appurtenant holders. In the third, it has no effect because no in gross rights were created. In

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enforcement. Courts have refused enforcement in this situation, usually without addressing the question whether the grantor has a legitimate interest in enforcement after parting with the land. *See, e.g.*, Kent v. Koch, 166 Cal. App. 2d 579, 333 P.2d 411 (1958); Genung v. Harvey, 79 N.J. Eq. 57, 80 A. 955 (1911); Graham v. Beermunder, 93 A.D.2d 254, 462 N.Y.S.2d 231 *appeal denied in part, dismissed in part*, 60 N.Y.2d 630, 467 N.Y.S.2d 353, 454 N.E.2d 936 (1983); Stegall v. Housing Auth., 278 N.C. 95, 178 S.E.2d 824 (1971). *Contra*, Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913). *See* 2 AMERICAN LAW OF PROPERTY, *supra* note 28, § 9.32; Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 474 (1984) (arguing that Van Sant v. Rose need not be read to take the position that the covenantee should be able to enjoin violation of a covenant without regard to damage); Stone, *The Equitable Rights and Liabilities of Strangers To A Contract*, 18 COLUM. L. REV. 291, 313 (1918).

53 Similarly, the question whether a developer retains enforcement rights in subdivision covenants after selling out all lots in the development may be a question of interpretation of the covenants rather than a question as to the developer's power. The only question that concerns us here is the developer's power to retain enforcement rights after disposing of her land in the area.

54 For example, the owner of a service station covenants to purchase all gasoline to be sold on the premises from the covenantee, an oil distributor. The agreement clearly states that the benefit of the covenant is not intended to run with land of the oil distributor and that the burden is intended to run with the land of the covenantor. As another example, the owner of wild land covenants with a conservation organization not to develop the property. The agreement states that the benefit is not intended to run with land of the organization and the burden is intended to run with the land of the covenantor.

55 For example, subdivision covenants impose building restrictions. The declaration clearly states that all lot owners and the developer are intended to have enforcement rights and that the developer's rights are to continue after all the lots have been sold.

56 For example, subdivision restrictions provide that the benefits run to all lots in the subdivision and that the developer retains no enforcement rights after it no longer owns land in the subdivision. As another example, the seller of a view lot imposes a restriction to protect the view from a neighboring lot owned by someone else. The deed provides that the benefit runs to the neighboring lot and the grantor retains no enforcement rights.

both of the first two cases, the prohibition operates to frustrate the intent of the original parties.

The traditional justification advanced for continuing to apply this ancient prohibition on benefits in gross is that it frees land from obligations, thus promoting free alienability.[57] Several assumptions underlie this justification. The basic assumptions are that servitude obligations interfere with alienability of land, and that this is a bad thing. The further assumptions are either that benefits in gross hinder alienability more than benefits appurtenant or that the benefit to other land from appurtenant servitudes counterbalances the harm of the servitude. The traditional justification does not take into account the interference with freedom of contract occasioned by the prohibition, which is also a bad thing.[58]

At this level of abstraction, it is difficult to assess the reality and gravity of the claims that servitudes interfere with alienability and that servitudes in gross are worse than others. But even if we accept for the moment the claim that servitudes in gross do interfere to an unacceptable extent with alienability of land, we must ask whether the prohibition is effective. The prohibition will be effective only if the transaction cannot be restructured to avoid it, or if such restructuring would be prohibitively expensive.

The prohibition on benefits in gross does not apply to easements[59] or to defeasible fees. If either of these forms is appropriate to the transaction, the prohibition can be avoided.[60] Even if the covenant form must be used, there are several alternative ways to avoid the prohibition. One is to include an additional covenant obligating the burdened party, upon any conveyance of the land, to extract a new covenant for the benefit of the original parties from his

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57 "If the burden of a promise runs with land, the freedom of alienation of that land is to some extent restricted. The resulting restriction is permitted only when there is a countervailing benefit in the use of either the burdened land or of some other land." RESTATEMENT (FIRST) OF PROPERTY § 543 comment c (1944).

58 Recent scholarship recognizes the tension between interests in maintaining alienability of land and in permitting private ordering by consensual arrangements. *See, e.g.*, Korngold, *supra* note 52, at 448-50; Roberts, *supra* note 51, at 936-38; Sterk, *supra* note 12, at 616-17.

59 Whether it applies to negative easements is not absolutely clear. There is very little authority on the question.

60 Using defeasible fees will not be an effective alternative in many cases because courts increasingly treat them as covenants. *See* Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 MO. L. REV. 695, 731 (1984).

If the prohibition on benefits in gross does not apply to negative easements—a doubtful proposition—the easement form could be substituted for restrictive covenants. Whether this would work would also depend on whether the ancient purpose limitations on negative easements had been lifted. For restrictive covenants, it probably is safer to acquire an anchor parcel to which the benefits can be tied.

grantee.[61] Another is to use a long-term lease instead of a fee conveyance, tying the benefit to the reversion.[62] Finally, in some cases, it will be possible to acquire an anchor parcel to which the benefit can be tied.[63]

Using these methods, it appears that in most cases the prohibition on benefits in gross can be circumvented with relative ease. Before concluding that the prohibition should be eliminated, however, we need to inquire whether the utility of forcing the transactions into these other molds outweighs the transaction and frustration costs of doing so.

If the prohibition does not apply to negative easements and if the use of negative easements is not limited to providing light, air, support, and water in artificial streams,[64] then there is no utility to the prohibition as it applies to restrictive covenants or equitable servitudes. Without those purpose limitations on negative easements,[65] the three devices are fungible. For the prohibition to have any utility, it must be applied to negative easements as well. For the balance of this discussion, let us assume that it is.

Turning first to the alternative of forcing parties to acquire anchor parcels to which the benefits of servitudes can be tied, what utility does it have? If the benefit holder is the owner of an identified parcel of land, then she can be identified (and probably located) through the land records. If the property is taxable, the demise or disappearance of the owner will eventually provoke a tax sale which will again produce an identifiable and locatable benefit holder.[66] The importance of having identifiable and locatable benefit holders lies in enabling the party owning the burdened land to negotiate a release or modification of the servitude. The concern here is that the holder of a benefit in gross will be difficult to identify and locate

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61 This is used in England to circumvent the prohibition on imposing affirmative burdens by equitable servitudes. R. MEGARRY & H. WADE, *supra* note 22, at 762-65. This solution might be the appropriate one for party wall covenants.

62 This also is used in England to circumvent the lack of horizontal privity in residential subdivisions. This solution might be appropriate for gasoline supply arrangements and anti-competitive covenants.

63 This solution works for conservation servitudes and homeowners' associations where the association is to be given power to enforce covenants.

64 English common law recognized only these negative easements. Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 959 (1942).

65 In accord with the new Restatement's overall goal of simplifying servitudes, I will propose eliminating all differences among negative easements, restrictive covenants, and negative equitable servitudes. I see no reason to retain as a separate device a servitude whose use is limited to providing light, air, support, and water in artificial streams.

66 The anchor parcel may, of course, be exempt from taxation if it is held by a conservation or historic preservation organization. *See, e.g.*, CAL. REV. & TAX. CODE § 214 (West 1987).

and may even disappear.[67] Since acquiring anchor parcels is most likely to be used in connection with conservation and preservation servitudes and homeowners' associations, the factual premise that the benefit holder will be difficult to track down may be questionable.[68]

The second alternative, the lease arrangement, would most likely be used to facilitate enforcement of covenants to buy the supplies for sale or use on the premises from a particular source.[69] The concern here is not that the benefit holder may be difficult to locate; on the contrary, the problem will arise because the benefit holder is insisting on payment and the holder of the burdened land finds the price too high. The underlying problem is that the parties' original bargain has not worked out to provide the expected benefits to the holder of the burdened parcel. The only advantages I can imagine of forcing the parties to use a lease are, first, they are more likely expressly to limit the duration of the covenant obligation, and second, the holder of the benefit will conceivably have more incentive to be reasonable in negotiating modification or termination.

The third and final avoidance device suggested is that of including a covenant requiring the burdened party to include a similar set of covenants for the benefit of the covenantee upon any transfer of the burdened property. The only utility of this form of transaction is assuring that successors to the burdened land take with knowledge of the obligation—a utility already served by the recording system. The transaction serves to free land from servitude obligations only if drafters forget to include it or if courts refuse to enforce it. If such a freeing is desirable, it would seem equally desirable for all servitudes—or, at least, all affirmative covenants. There is no reason that I can see to limit it to those whose benefits are in gross.

The only significant advantage of using these alternatives instead of the simple covenant with benefit in gross is that they tend to assure that the benefit holder can be identified. If identifying or lo-

67 The underlying concern, common to easements, profits, and restrictive covenants, is that the land will become more valuable for a use that is not permitted by the servitude. Only by modifying or terminating the servitude can alienability and highest valued use of the land be assured. The assumption is that if the burdened party can locate the benefited party, they will negotiate to efficient results. This is only one possible outcome of their interaction, however. *See* Sterk, *supra* note 12, at 629-30.

68 Current limits on assignability of benefits in gross would also tend to contain the difficulty of locating benefited parties. However, as I believe these, too, should be eliminated—a subject for another day—I would not rest my case on this point.

69 Since the prohibition on benefits in gross does not apply to covenants not to compete, I will not discuss the likelihood that a lease arrangement would be used to tie the benefit to land. The prohibition is seldom applied to supply arrangements either, but since an occasional court has done so, the lease substitute may be in use. The lack of recent cases on this subject may indicate that some substitute for the covenant with benefit in gross is in use.

cating holders of benefits in gross is likely to be a problem, then less costly solutions than the current prohibition on benefits in gross should be available. Equally effective solutions would be providing parties who want to terminate servitudes with procedural methods to foreclose the interests of those who cannot be located or requiring periodic filing of a notice of claim to keep in gross servitudes alive.

The prohibition against benefits in gross arguably performs a second useful function in those transactions where it operates to prevent parties who do not own land in the vicinity from enforcing covenants. In these cases, the prohibition tends to assure that the plaintiff has a legitimate interest in enforcing the covenant—acting in effect as a substitute for a standing requirement. This avoids the need for the plaintiff to show quantifiable damage from a covenant violation as a prerequisite to enforcement—but it does so only erratically and at too high a cost. A better solution would be simply to require that a plaintiff holding the benefit of a covenant and seeking to enforce it show some stake in the outcome of the litigation, whether that be land ownership in the area or some other interest.

Against these weak advantages of the prohibition on benefits in gross must be weighed the transaction costs of forcing parties into the alternative devices and the demoralization costs associated with frustrating the expectations of parties who mistakenly use benefits in gross. The danger of the prohibition of in gross benefits is well illustrated by *Minch v. Saymon*[70] where the grantor, conveying the last parcel she owned in the area, imposed restrictions intended to protect the view from land that she had previously conveyed to her daughters. The daughters had transferred their land to a family corporation, which then built an apartment house on the land. The grantor had an interest in the family corporation and lived in the apartment house. Nevertheless, she was not entitled to enforce her covenant against a successor to the burdened land because she did not own land in the vicinity.

My conclusion is that the remnants of the ancient prohibition of benefits in gross should be eliminated. These prohibitions apply in too few areas and are too easily circumvented to do much good; they trap the poorly represented and frustrate expectations; and the real problems that the limitation tends to solve can be addressed in less costly and equally (if not more) effective ways.

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70 96 N.J. Super. 464, 233 A.2d 385 (Ch. Div. 1967).

H. Conclusion: Requirements That Should Continue to Govern Creation of Servitudes

Following the analysis set forth above, I have concluded that the remnants of the old categorical controls on servitude creation can be eliminated without any real loss to the functionality of servitudes law. Having eliminated them, I arrive at the proposition that all that is required to create a servitude is a contract or conveyance intended to create a servitude that complies with the Statute of Frauds.[71] Interests that run with the land can be created in transactions between neighbors and in favor of strangers to the transaction. Servitude benefits can be held either appurtenant or in gross.

Removal of the old categorical controls does not mean that all servitudes are valid. Servitude arrangements will still be invalid if they violate constitutional, statutory, or public policy norms. Nor does removal of the old controls mean that all servitudes have infinite or uniform duration. What it does mean is that questions of validity and duration are no longer treated as matters of creation. Validity questions will be addressed directly in a separate chapter of the restatement. Duration questions, too, will be addressed directly, either as matters of interpretation and construction, or as matters of modification and termination.

This straightforward approach permits substantial simplification of the servitude structure because it renders redundant many of the traditional categories and permits their elimination.

III
TAXONOMY OF A MODERNIZED LAW OF SERVITUDES

The recognized servitude devices are profits, easements, irrevocable licenses, real covenants, and equitable servitudes. In the following section, I describe the normal use of each and the characteristics that differentiate them. In several instances, the only differentiating characteristics are the old doctrines imposing limits on their creation and use. After weeding out those doctrines, we are left with profits, easements, restrictive covenants, and affirmative covenants, which I propose to retain as the basic categories of the restated law of servitudes.

Profits give someone the right to enter on the land of another and to remove some physical substance like sand, gravel, soil, timber, or coal. Profits can also be used to create rights for hunting or fishing and removal of the captured game. Although profits can be appurtenant to some other interest in land, they are usually held in

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71 Of course, the contract or conveyance should also be enforced despite noncompliance with the Statute of Frauds if it falls within an exception to the Statute.

gross. Profits differ from all other servitudes in authorizing the removal of physical substances from land in the possession of another. They are always affirmative in that they give rights to make active use of the land of another.

Easements come in two fundamentally different categories, affirmative and negative. Affirmative easements, like profits, create rights to make active use of the land of another. The only difference between affirmative easements and profits is that easements do not authorize removal of any substance from the land.[72] The first restatement conflated profits with easements because there is no difference in the rules governing them.[73] I propose to continue the use of both terms because it does not cause any confusion and they usefully describe rights to do different kinds of things.

Affirmative easements differ from affirmative covenants in that easements are not used to impose affirmative duties on the holder of the burdened land[74] and traditionally require no privity between the creating parties. In addition, easement benefits can be held in gross but cannot be created to benefit third parties.[75] If these differences are eliminated, there are still substantial differences between affirmative easements and affirmative covenants. They are used for quite different kinds of transactions and they impose quite different kinds of obligations. These differences are not relevant in terms of creation requirements but may become important in considering questions of succession to burdens[76] and in determining questions of modification, termination, and remedies.

Negative easements impose restrictions on the uses that can be made of the burdened land creating rights in the holder of the easement that the land not be developed in violation of the restrictions. English law limited the purposes for which negative easements could be created to securing rights to light, air, support, and water in an artificial stream.[77] If those purpose limitations are eliminated,

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72 Rights to draw water from the land of another may be classified as easements even though they involve removal of a substance. Their classification as easements may reflect the treatment of water as not owned by the land owner. This idea might cause classification of hunting rights as easements too, rather than as profits.

73 RESTATEMENT (FIRST) OF PROPERTY § 450 special note (1944). Easements and profits may in fact differ in the matter of implication. Easements are much more likely to be implied from the circumstances of a conveyance, or from the parties' conduct, than are profits.

74 Easements impose a duty to avoid interfering with the use authorized by the easement, of course, and easements for common fences and drives may impose duties to contribute to maintenance but they are not used to impose other kinds of duties.

75 *See supra* notes 28-35 and accompanying text; *supra* note 50 and accompanying text.

76 Allocating the burden of performance between present and future interest holders, for example, is resolved differently for easement and covenant burdens.

77 *See supra* note 64.

negative easements are functionally identical to both negative covenants and equitable servitudes. Once the artificial constraints on creating these three devices are eliminated, there is no reason to continue more than one of them.

Licenses may be used to give rights to make active uses of the land of another, including the removal of physical substances. They differ from easements and profits in that they are revocable and, since they do not create rights or obligations that run with land, they are not properly considered servitudes. However, under certain circumstances, licenses become irrevocable and do create interests running with the land. Irrevocable licenses are functionally equivalent to easements and profits. The only difference between them is in the manner of their creation. Licenses are usually easements that fail because the parties have not complied with the Statute of Frauds or easements that are implied from a course of conduct of the parties. They can easily be treated as easement exceptions to the Statute of Frauds.[78]

Covenants impose obligations on the owner or possessor of land to do or refrain from doing something. Affirmative covenants require the land owner or possessor to pay money or to do some other deed; negative covenants require the land owner and possessor to refrain from doing something on the land. Some covenant rights may be held in gross. Affirmative covenants differ from profits and affirmative easements in that they burden a land owner with an affirmative obligation and give their holder the right to receive performance of the obligation rather than the right to make active use of the land of another. Negative covenants are functional equivalents of negative easements imposing use and development restrictions on the burdened land.

Real covenants differ from all other servitudes because they are subject to the horizontal privity requirement. The equitable servitude was developed to avoid that requirement so that covenants could be enforced in equity, even if they lacked horizontal privity. The equitable servitude is the functional equivalent of a real covenant. The only differences between them (apart from horizontal privity) are equitable servitudes' more severe limits on benefits in gross and the possible restriction of equitable servitudes to negative obligations. If these old creation limitations are eliminated, there is no reason to continue the category of equitable servitudes.

Affirmative and negative covenants differ from each other to the

78 The durational difference between irrevocable licenses and easements suggested by RESTATEMENT (FIRST) OF PROPERTY § 519(4) (1944) can be dealt with as a matter of construction of the duration of easements created by different methods and does not require continuation of a separate category of servitude.

same extent as affirmative and negative easements differ. Affirmative covenants impose affirmative burdens on landowners and occupiers, often to pay money or perform obligations that can easily be reduced to the payment of money. Negative covenants, or restrictive covenants, as they are commonly known, limit the uses that can be made of the burdened property. Both pose risks to alienability of the land but the risks are different. The affirmative covenant is often perceived as the more dangerous of the two, and has attracted more judicial controls in the form of privity requirements and the touch and concern doctrine. The differences between the two do not warrant continuing the old privity or touch and concern restrictions on creation of affirmative covenants, but may well warrant different treatment on succession, modification, and termination. The differences are important enough that I will propose treating affirmative and negative covenants as different categories of servitudes.

The taxonomy that I propose to retain, then, recognizes only profits, affirmative easements, affirmative covenants, and restrictive covenants as servitude categories. The irrevocable license, the negative easement, and the equitable servitude will disappear. All of the remaining servitudes can be either appurtenant or in gross, and can be created for any purpose which does not violate constitutional, statutory, or public policy norms.

IV
CONCLUSION

The evolution of American servitudes law from reliance on ex ante controls, like horizontal privity and prohibitions of benefits in gross, to ex post controls, like notice and changed conditions, eroded most of the differences among the traditional servitude devices. Recognizing the change that has taken place in American law allows us to eliminate many of the doctrines limiting servitude creation, which in turn allows us to eliminate as redundant several of the traditional servitude devices.

The first step in reforming servitudes law has been to clear away the clutter of the old doctrinal controls, which has left us with four servitudes: the profit, the affirmative easement, the restrictive covenant, and the affirmative covenant. Although there are differences among these four that justify their separate labels, the most important fact about them all is what makes them servitudes: they create rights and obligations that run with interests in land.

The next step is to restructure servitudes law as an integrated body of doctrine. I have approached this step by treating all four servitudes as part of a single body of doctrine which occasionally breaks out one or more of the servitudes for separate treatment.

Structurally, this means that I have not organized separate chapters or divisions on the law of profits, easements, and covenants. Instead, I have organized it into chapters on creation, validity, interpretation and construction, succession, and the like.[79] I have taken it as a basic principle that a single rule should be stated that would apply to all servitudes, except where there is something about a particular servitude that justifies applying a different rule.

In developing the chapter on creation, for example, I have proposed stating that all servitudes can be created by conveyance or contract and that all servitudes are subject to the Statute of Frauds. Likewise, third parties can be made beneficiaries of any servitude and all benefits can be held in gross. However, only affirmative easements and profits can be acquired by prescription. Different rules, likewise, may apply to finding affirmative easements by implication than apply to profits and different rules apply to implying negative and affirmative covenants. As we work through the remaining chapters, I expect to take the same approach.[80]

By taking the approach outlined in this Article, we can substantially simplify the doctrinal structure of servitudes law which should eliminate much of the confusion that has traditionally accompanied the subject. However, we should not fool ourselves into thinking that servitudes law will become simple. So long as the judicial system exercises some control over the types of arrangements that can be made to run with land, and intervenes to modify or terminate arrangements that have become unfair or uneconomic, the law of servitudes cannot be simple. The major contribution of the new restatement will be to clear away the old doctrinal tangle and allow us to focus on the real questions presented by servitude enforcement.

APPENDIX: SERVITUDES LAW RESTRUCTURED AS AN INTEGRATED BODY OF DOCTRINE

My current working outline of servitudes law, set forth below, is in a constant state of evolution. The outline consists of topic head-

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79 My current working outline of servitudes law is included as an Appendix to this Article.

80 In the succession area, another example of a rule that should not be applied across the board is the rule that successors to possessory interests are bound by servitudes. A different rule probably is justified for affirmative covenants, at least those calling for the payment of money. The fee owner, rather than the tenant, should probably be responsible for performance of the covenant, even though the tenant is bound by profits, easements, and restrictive covenants. The old strict vertical privity doctrine produces this result.

See also Berger, *supra*, note 18 (discussing other areas where different rules should apply to different types of servitudes).

ings which should not be taken as statements of what the law is or should be.

I. Creation of Servitudes
   A. By Contract or Conveyance
   B. Intent to Create Servitudes
   C. No Horizontal Privity Required
   D. Necessary Parties
   E. Estates Burdened and Benefited
   F. Beneficiaries of Servitudes
   G. Required Formalities
   H. Failure to Comply with Statute of Frauds
   I. Exceptions to Statute of Frauds
   J. Creation by Estoppel
   K. Implied Creation
      1. Prior Use
      2. Map or Boundary Reference
      3. Reciprocal Servitude
      4. Necessity
   L. Prescription
      1. Rights That Can Be Acquired
      2. Use Required
   M. Acquisition of Servitudes by the Public
      1. Dedication
      2. Prescription
      3. Condemnation

II. Validity of Servitude Arrangement
   A. Constitutional Challenge
      1. First Amendment
      2. Fourteenth Amendment
      3. Right to Privacy
      4. Other
   B. Statutory Challenge
      1. Fair Housing Act
      2. Other
   C. Public Policy Challenge
      1. Undue Restraint on Alienation
      2. Undue Restraint on Trade
      3. Discrimination
         a) Group Homes
         b) Children
         c) Other
      4. Unreasonableness
   D. Vagueness
   E. Other

III. Interpretation and Construction
  A. Servitude Interest Intended
    1. Appurtenant
    2. In Gross
  B. Identification of Intended Benefited and Burdened Parties and Parcels
  C. Duration
    1. Expressly Created Interests
    2. Interests Created by Implication or Estoppel
  D. Location, Length, Width
  E. Scope or Extent
    1. Maintenance Responsibilities
    2. Extent of Rights Granted
    3. Extent of Rights of Servient Owner
    4. Rights to Change Use or Character of Servitude
    5. Rights to Change Land Burdened or Benefited by Servitude

IV. Succession
  A. By Succession to Land of Original Party
    1. Benefits
    2. Burdens
      a) Apportionability
        (1) Physical Division of Burdened Land
        (2) Temporal Division of Ownership (vertical privity)
  B. By Assignment of Benefit
    1. Assignability of Benefit
    2. Severability of Appurtenant Benefit
    3. Divisibility
  C. By Assumption of Burden

V. Modification
  A. Amendments to Governing Documents
  B. Rule Making by Association Governing Board
  C. Assessments

VI. Termination
  A. Release
  B. Merger
  C. Abandonment
  D. Severance of Appurtenant Benefit
  E. Expiration
  F. Statutory Termination
  G. Condemnation
  H. Prescription Against Servitude Use

VII. Enforcement

A. Standing (Interest Required to Enforce Servitude)
B. Defenses
   1. Notice (Recording Act)
   2. Statute of Limitations
   3. Waiver or Laches
   4. Estoppel
   5. Misuse of Servitude
   6. Changed Conditions
   7. Impossibility
   8. Frustration of Purpose
   9. Obsolescence
C. Remedies
   1. Damages
   2. Injunction
   3. Specific Performance
   4. Lien
   5. Denial of Privileges of Association Membership
   6. Modification