

Design Proposal for the New Restatement of the Law of Property — Servitudes

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This is a design proposal for the servitudes part of the new *Restatement of the Law of Property*. The proposal's scope is limited to restating the law governing the devices used to implement private land use arrangements by tying rights and obligations to ownership or occupancy of interests in land. It includes the law of profits, easements, real covenants, and equitable servitudes. It does not include, however, the law of mortgages or other real property security interests.

Servitudes law governs arrangements that vary or adjust the rights and obligations of land owners and occupiers if the arrangements create interests that run with land. It does not include the law that determines the underlying rights and obligations of land owners or occupiers. Nor does it include the law of zoning or other public land use regulation. Prescription is included, as a method of creating servitudes, but the law of adverse possession is not.

This proposal has five parts. Part I discusses the history and nature of servitudes, their usefulness, and the doctrines that developed to control the social and economic risks they pose. From this discussion emerges a proposal for the attitude that the new *Restatement* should take toward servitudes. Part II sets forth the traditional doctrinal approach to servitudes and discusses recent scholarly criticism of that approach. It concludes that the *Restatement* should adopt a uniform concept of servitudes to simplify and clarify the law.

Part III, under the heading "Scope and Focus," addresses the appropriate transactional focus of the new *Restatement*, and the range of transactions creating servitudes it should cover, particularly the question whether servitudes created in leases should be included. Part IV proposes a structural basis and vocabulary for working with the unified servitudes concept and Part V concludes with the proposed outline.

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I. NATURE OF SERVITUDES: WHAT ATTITUDE SHOULD THE
Restatement ADOPT?

Private arrangements that bind particular burdens or benefits to land ownership or occupancy have been known to the law since ancient times. Rights to cross land belonging to another, to draw water, to pasture cattle, and to take sand were recognized in Roman law. Early common law recognized similar rights, as well as rights in the nature of profits to use common lands. In the sixteenth century, English law established that the burdens and benefits of lease covenants could run with the estates in land held by the parties to the lease.¹ The Industrial Revolution precipitated a great increase in the variety and scope of servitudes. Development of railroads and canals required rights of way, demands for energy produced water rights arrangements to run mills and factories, and demands for protected residential areas led to creation and widespread use of the restrictive covenant.

Until the Industrial Revolution greatly increased the use of servitudes, the common law did not develop a general theory of easements or servitudes. Specific servitudes were recognized and classified as incorporeal hereditaments along with many other interests unrelated to land use. In the nineteenth century, English law developed four servitude concepts. The easement concept described interests in land that gave rights to make affirmative uses of the land of another or gave rights to uninterrupted flows of light, air, support, and water from the land of another. Profits *a prendre* permitted servitudes to exploit natural resources on another's land. The covenants category included contractual undertakings in leases binding successors to the term and to the reversion. The final category, equitable servitudes, permitted restrictive covenants enforceable in equity at the behest of neighboring land owners against anyone taking restricted land with notice of the covenant. Although American law began to develop a single servitude concept in the first half of the nineteenth century, it later shifted to the English pattern.²

The common feature of easements, profits, covenants, and equitable servitudes is that they create interests running with the land. They create nonpossessory rights in the land of another, which pass with ownership or occupancy of the benefited land or estate, and corresponding

¹ The Statute of Henry VIII, c. 34 (1540), established that lease covenants ran with the reversion; *Spencer's Case*, 77 Eng. Rep. 72 (K.B. 1583) set forth the conditions under which the covenants could run with the term.

² Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1185 (1982).

duties, which pass with ownership or occupancy of the burdened land or estate. A change in ownership does not require an assignment, delegation, or assumption of the rights or duties to perpetuate the arrangement. Because these arrangements bind successive owners or occupiers of the land, servitudes often provide the stability needed for investments dependent upon maintenance of particular uses of land. Servitudes promote efficient land use because they allow an investor to purchase only the degree of control needed to maximize the investment, rather than the entire fee.

The value of private land use arrangements lies mainly in their permanence — their ability to survive changes in ownership without renegotiation of the arrangement. However, the permanence of servitudes also poses economic and social risks. Servitudes can freeze land uses and distort patterns of development. They can impose burdens that become unreasonable and depress land values. Although the parties are free to renegotiate the terms of the arrangement at any time, transaction costs and free-rider and bilateral monopoly problems may prevent the most efficient use of land.³ In addition, the existence of servitudes can clog the title and diminish the marketability of the land.

In part because of these risks and in part because of an inadequate public land records system in England, nineteenth century courts responded ambivalently toward servitudes. Courts recognized the validity of servitudes, but hedged them in with limiting doctrines. When the restrictions of easements and covenants doctrine became too limiting, courts created equitable servitudes, which avoided some limits but created others. In the fashion of the day, courts seldom explained the exact nature of the problem they were attacking or the precise manner in which the limit they created would solve the problem. Thus were created the rules of privity,⁴ the rules against interests in gross,⁵ and the rules about touching and concerning⁶ — rules that have confounded so many twentieth century students of the law.

To provide more enforceable servitudes, American courts modified the English precedents by permitting affirmative covenants between

³ See, Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985) (containing an excellent analysis of reasons why the market may fail to eliminate inefficient servitudes).

⁴ *Keppell v. Bailey*, 2 MV&K 517, 39 Eng. Rep. 1042 (Ch. 1834).

⁵ *London County Council v. Allen*, 3 K.B. 642 (1914), applies the easement rule to equitable servitudes. The easement rule traces back to Roman law. M. KASER, *ROMAN PRIVATE LAW* 144-45 (3d ed. 1980).

⁶ *Spencer's Case*, 77 Eng. Rep. 72 (K.B. 1583).

grantor and grantee to run at law⁷ and affirmative burdens to run in equity.⁸ These two modifications permitted American law to accommodate the demand for permanent private land use arrangements. However, the courts maintained a facade of restrictive rules and grudging rhetoric that made it appear they held free alienability of land more important than implementing privately created land use arrangements.

The first *Restatement*⁹ reflected the courts' ambivalence toward servitudes. If anything, it magnified the risks servitudes posed to free alienability of land and took a more grudging attitude toward running burdens than that found in the court opinions. However, like the opinions, the *Restatement's* rhetoric obscured the fact that the law freely enforced all servitudes for which there was any substantial demand by granting injunctive relief.¹⁰ Only when the benefit was in gross did the law impose a real limit on enforcing servitude arrangements.¹¹ Even

⁷ American courts found horizontal privity of estate between the grantor and the grantee of a fee interest. *See generally* D. CUNNINGHAM, W. STOEBOCK & D. WHITMAN, *THE LAW OF PROPERTY* § 8.18, at 477-81 (1984).

⁸ *Neponsit Property Owners' Ass'n. v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E.2d 793 (1938).

⁹ *RESTATEMENT OF PROPERTY, Servitudes* (1944).

¹⁰ *See, e.g., id.* §§ 537 comment f & 543 comment c (1944), which explain at some length that the burden of a covenant not to compete will not run with land because performance of the promise does not produce a reciprocal benefit to land. This result is said to be based on "a social policy adverse to the placing of undue restrictions upon the freedom of alienation of land 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" However, under § 539 comment k, such a covenant can be enforced against a successor in equity.

¹¹ American law on the enforceability of servitude benefits held in gross is not consistent. Affirmative easements and profits in gross are enforceable. Negative easements, equitable servitudes, and covenants may or may not be enforceable depending on the purpose of the servitude and the jurisdiction. Covenants not to compete and covenants to purchase petroleum products from a particular supplier are usually enforced. *See, e.g., Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 97-99, 390 N.E.2d 243, 246-50 (1979); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 344 N.Y.S.2d 30 (1973). Property owner associations normally may enforce covenants even though they own no land. *See, e.g., Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 136 N.E.2d 556, 559 (1956). Grantor-covenantors who retain no land in the vicinity, however, often may not enforce the covenants. *See, e.g., Stegall v. Housing Auth. of Charlotte*, 178 S.E.2d 824 (N.C. 1971). *Contra Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913).

Restatement § 537 stated that the burden of a covenant would not run at law unless performance of the promise would benefit either the covenantee or the covenantor in the physical use or enjoyment of the land she possessed. No such limit was stated for enforcement of equitable servitudes under § 539. *See Roberts, Promises Respecting*

this limit was of little importance until the environmental movement of the 1960s created demand for conservation and historic preservation servitudes.¹²

In the years since publication of the first *Restatement*, the demand for enforceable servitudes has increased. Traditional servitudes have been joined by new and more complex uses as patterns of residential, commercial, and industrial development have changed and as the interest in conservation and historic preservation efforts has grown.

Most residential development since World War II has occurred in subdivisions, cluster or planned unit developments, condominiums, and cooperatives. In all of these developments, servitudes impose use restrictions. In many, servitudes create community governance structures and impose obligations to provide and pay for maintenance of common facilities. Restrictive covenants, architectural control, unit owner associations, and dues and assessments have become a familiar part of the American scene.¹³ No longer is there any reason to believe that the average American buying into a residential development would “protest vigorously against being compelled to perform promises he has never made.”¹⁴ Since financial viability of the community depends on continued covenant compliance by all, the average buyer is more likely to protest if others in the development are permitted to escape performance of the covenants made by their predecessors.¹⁵

In commercial development, elaborate land use control and community governance schemes have also come into common use during the

Land Use — Can Benefits Be Held In Gross?, 51 MO. L. REV. 933 (1986) (recent exhaustive treatment of the subject).

¹² See Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540 (1979), for a thorough analysis of the obstacles common-law doctrine put in the way of conservation and preservation servitudes. See also Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984).

¹³ A recent study estimates that 1,400,000 units in common interest developments and between 12,000 and 16,000 common interest community associations existed in California in June 1986. S. BARTON & C. SILVERMAN, *Common Interest Homeowners' Associations Management Study 3*, California Department of Real Estate (Oct. 1987).

¹⁴ RESTATEMENT OF PROPERTY, Intro. Note at 3156 (1944).

¹⁵ North Carolina recently seems to have changed its formerly hostile attitude toward covenants to pay maintenance assessments. See *Figure Eight Beach Homeowners' Ass'n, Inc. v. Parker*, 62 N.C. App. 367, 303 S.E.2d 336, *disc. rev. denied*, 309 N.C. 320, 307 S.E.2d 170 (1983); Note, *Restrictive Covenants—Enforceability of Assessments Against Property Owners in Residential Developments*, 7 CAMPBELL L. REV. 33 (1984).

past forty years. Industrial and commercial development has increasingly taken place in planned centers dependent on private arrangements to control land use and the character of the development. These arrangements may include design control, limits on competition, assessments for advertising, maintenance or other purposes, and unit owner or tenant associations with governing boards.

The market situation as portrayed by the drafters of the first *Restatement* has been reversed. Today, in both the residential and commercial contexts, the average purchaser or tenant is unlikely to object to the enforceability of the servitudes undergirding the development. The prospect that servitudes may not be enforceable is probably a more significant deterrent to marketability of land than their enforceability.

Although servitudes have gained widespread public and judicial acceptance in the United States, they are not without their dangers, including dangers to civil rights and individual liberties. Some of these dangers are endemic to servitudes, arising out of their indefinite duration. Others are common to many types of arrangements and transactions. Dangers lurk in all servitudes, but are difficult to isolate by servitude category.

Servitude arrangements are often designed without a clear end-point and without a prescribed method of modifying or terminating the arrangement.¹⁶ Without a special agreement, all interested parties must consent to any modification or termination. If all parties do not agree, the arrangement may continue after it has become inefficient or otherwise undesirable. Thus, servitudes may depress land values, impair marketability, distort development patterns, and prevent efficient land use.

Servitudes can threaten civil rights by excluding certain groups from particular areas or allowing only those users who meet particular criteria. Minimum size requirements, construction standards, and design controls exclude people below a particular income level; age restrictions exclude people with children or limit users to senior citizens. Single-family restrictions may exclude group homes for the developmentally disabled or for nursing care. Rights of first refusal may be used to

¹⁶ That servitude arrangements often do not include a termination date is not surprising since the useful life of the arrangement is often impossible to predict at the time of the initial transaction. That termination methods are not spelled out may be explained by failure to anticipate that the arrangement will ever become undesirable, or unwillingness to invest in the negotiations and drafting necessary to create modification and termination schemes. Many modern servitude arrangements do, of course, contain express provisions governing modification and termination.

screen out any prospective users uncongenial to current users.

Servitudes also can threaten individual liberties. Community governance arrangements for residential developments often grant rule making authority to a board elected by a majority of members. These rules may prohibit pets or alcohol use, or dictate personal lifestyles. Design controls also limit individual freedom of expression. The dangers that servitudes pose to personal autonomy have been recognized only recently, since widespread use of extensive community governance arrangements began after the end of World War II.

Courts have developed and applied a number of doctrines to control the dangers servitudes pose. Early legal doctrines limited these dangers by recognizing servitudes for particular purposes only. English law, for example, recognized negative easements for only four purposes. Nineteenth century English law recognized general purpose servitudes, but limited the kinds of transactions in which they could be created. Servitudes imposing affirmative burdens on the possessor of land could be created only in leases; restrictive covenants and easements could be enforced only if the benefit ran to the possessor of other land. Most of these controlling doctrines were aimed at the problems inherent in servitudes and the land records system: their potentially unlimited duration and their ability to bind subsequent parties without notice.

The touch and concern doctrine, first mentioned in *Spencer's Case*,¹⁷ imposed a somewhat different kind of control on servitudes. It was similar to the old purpose restrictions in imposing limits on the content of the servitude agreement. However, because of its vagueness, the touch and concern doctrine did not really operate as a categorical limit on servitude arrangements. It gave courts greater flexibility to assess the risks posed by the parties' particular arrangement. It was also different from the other doctrines in that it was used to address problems that were not servitude specific. It provided the vehicle through which courts applied control doctrines of more general application to servitudes. Cases refusing to enforce covenants not to compete on the ground that the benefit did not touch and concern land reflect this application.

American modifications of the English servitudes doctrines removed most of the categorical controls imposed on servitudes. The nineteenth century brought recognition of easements in gross and the ability to create running covenant burdens in any transfer of property, not just leases. The twentieth century brought the enforcement of affirmative burdens in equity. Another significant change in American law was the

¹⁷ 77 Eng. Rep. 72 (K.B. 1583).

almost complete shift to dependence on recording acts to handle notice problems.

As a result of the removal of significant categorical limits on the creation of servitudes, the twentieth century brought development of the changed conditions doctrine, which dealt directly with the problem of obsolescence in covenant servitudes. Another major change, increasingly apparent in the second half of the twentieth century, is that courts directly apply doctrines of general application to servitude arrangements without masking them behind the touch and concern doctrine.¹⁸ Such doctrines include unreasonable restraints on trade and alienation as well as constitutional and statutory limits on racial and religious discrimination.

Whether the law should exert any control over servitudes in the name of freedom of land use and alienation has recently been called into question. In an article published in 1982,¹⁹ Professor Richard Epstein called for abandonment of all doctrinal limits on servitudes, except for those applying antitrust and antidiscrimination principles. He proposed "that under a unified theory of servitudes, the only need for public regulation, either judicial or legislative, is to provide notice by recordation of the interests privately created."²⁰ Others, however, defend the need for continuing judicial or legislative control of servitudes.²¹

American courts have shown no signs of abandoning their efforts to control the harmful effects of servitudes in favor of freedom of contract and operation of the market. Although their ardent defense of freedom of alienation and land use has cooled as courts have recognized the utility of servitude arrangements, their approach remains one of balancing societal interests in freedom of land use and freedom of contract. Epstein's concerns should certainly be considered in the discussions about the appropriate scope of the changed conditions doctrine, but these concerns should not be determinative. The inability to make accurate predictions as to the useful life of a land use arrangement and the transaction costs involved in changing or terminating an inefficient or unfair servitude fully justify the changed conditions doctrine. If its application

¹⁸ See, e.g., *Taormina Theosophical Community, Inc. v. Silver*, 140 Cal. App. 3d 964, 190 Cal. Rptr. 38 (1983). The direct approach has not completely displaced the older touch and concern approach, however. See, e.g., *Eagle Enter., Inc. v. Gross*, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976).

¹⁹ Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1354 (1982).

²⁰ *Id.* at 1354.

²¹ See, e.g., Korngold, *supra* note 12; Sterk, *supra* note 3.

is to be changed, it probably should be extended to all servitudes, rather than cut back.

The shift from judicial control of servitude dangers by categorical 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. Parties wishing to create servitudes should not be forced into particular forms, but instead 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. This should be the basic attitude taken in the new *Restatement*.

II. DOCTRINAL APPROACH: SIMPLIFICATION, CLARIFICATION, AND A UNIFIED LAW OF SERVITUDES

Nineteenth century doctrine divided servitudes into four basic categories: easements, profits, real covenants, and equitable servitudes. The first *Restatement of Property* effected some simplification by collapsing profits into easements and treating real covenants and equitable servitudes as subsets of a category it labeled promises respecting the use of land.²² It also included a separate chapter on licenses even though licenses can be considered servitudes only when they become irrevocable.

The first *Restatement* emphasized the conceptual differences among the three categories it selected, rather than their functional similarities. Easements were treated as property rights created by executed transactions, while covenants and equitable servitudes were treated as property rights arising out of contracts. Tort law protected interests in easements, contract law covered covenants. Easements could create only rights “capable of creation by conveyance,” whereas covenants could

²² RESTATEMENT OF PROPERTY § 450 Special Note, at 2901-02:

In this Restatement the term “easement” is so used as to include within its meaning the special meaning commonly expressed by the term “profit” In phrasing the rules applicable to each of these interests it has been found, however, that in no case was there a rule applicable to one of these interests which was not also applicable to the other [I]t is much more convenient to use a single term to designate both interests rather than to use to the extent of annoying repetition the cumbersome phrase “easements and profits.”

create rights relating to "most if not all conceivable" uses of land.²³

Running real covenant burdens were considered the most dangerous servitudes and were singled out for special treatment. Emphasizing the dangers they posed to unencumbered titles and free alienability of land, the first *Restatement* carefully refined and elaborated the technical obstacles that could be used to block them from running at law. It did nothing to simplify this part of the servitudes law. Indeed, the requirements of section 537, that the benefit be tied to the physical use of land, and that the burden bear a reasonable relation to the benefit received for the burden, added to its complexity.

As Judge Clark predicted, the first *Restatement's* treatment of covenant burdens had very little impact. Indeed, the law has kept "on its way much as before, even though it remains muddy, ill-defined, and confused," and "[v]ery few more covenants" have been "actually held invalid as a result of this *Restatement* than had been held so before."²⁴ However, roadblocks to enforcing real covenants at law may have had more impact than is thought. These roadblocks have driven the enforcement of covenant transactions into an equitable servitude mold, a mold in which injunctive relief is routinely sought and granted. This may have slowed or prevented the development of more flexible and less drastic remedies for covenant violation, a move which should be considered for the remedies sections of the new *Restatement*.

The muddiness and confusion of the traditional servitude doctrines is due to the functional overlap among the servitude devices as they have developed in the United States, and the accumulated layers of doctrine designed in different eras to address the dangers servitudes created. These doctrines, or their remnants, have persisted even when functionally replaced by new doctrines. Thus, the horizontal privity requirement remained after its function of controlling running affirmative burdens had ceased to be important. Touch and concern has lingered even though courts can attack an uneconomic tying arrangement directly. The murkiness of the law is compounded by obsolete terminology and by old doctrines whose functions now seem completely mysterious.²⁵

Recent scholarship has taken a functional approach²⁶ to servitudes

²³ *Id.* Part III, Intro. Note at 3148-50.

²⁴ C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* 247 (2d ed. 1947).

²⁵ See French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1281-1304 (1982), for a functional analysis of all the traditional doctrines.

²⁶ Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167 (1970) (one of the first commentators to take a functional approach).

law and commentators unanimously agree that it should be simplified and clarified. No contemporary writers argue that technical roadblocks to servitude creation are appropriate, although most still believe that a need exists for some form of judicial or legislative control. Nearly all recent scholarship agrees that the law can be simplified by recognizing easements, covenants, and equitable servitudes as functionally overlapping devices that can be conceptualized under a single body of legal doctrine. The conceptual identity between real covenants and equitable servitudes, and the courts' practical fusion of the two has been recognized for at least a quarter of a century.²⁷ Recognition of the functional overlap of easements and covenants, while more recent, is now widely accepted.

In 1982, the *Southern California Law Review* published a symposium on the law of servitudes featuring two articles calling for the unification of the law of easements, real covenants, and equitable servitudes.²⁸ Approaching the problem, respectively, from historical and functional standpoints, Professor Uriel Reichman²⁹ and I³⁰ independently concluded that the nineteenth century's division of servitudes into separate doctrinal bodies no longer serves a useful purpose. Rather, the separation engenders confusion, encourages litigation, and unduly complicates drafting of private planning documents. Other symposium participants agreed with our conclusion, although some disagreed as to the details of reform.

Professor Curtis Berger fully supported the idea of doctrinal merger:

A decade ago, I made some notes on a unified law of servitudes, thinking that some day I should like to urge (outside the classroom) that the threefold division of private land-use arrangements into easements, real covenants and equitable servitudes no longer made sense, and that doctrinal merger was both needed and inevitable. Now that Professors French and Reichman have placed *their* ideas in print, the case for merger has been persuasively made, not once, but twice.³¹

Professor Richard Epstein completely agreed with the proposed uni-

²⁷ Cross, *Interplay Between Property Law Change and Constitutional Barriers to Property Law Reform*, 35 N.Y.U. L. REV. 1317, 1327 (1960) (pointing out that the real covenant had practically disappeared into the equitable servitude); Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts or One*, 21 HASTINGS L.J. 1319 (1970) (elaborating on Cross' point).

²⁸ 55 S. CAL. L. REV. 1179 (1982).

²⁹ Reichman, *supra* note 2, at 1177.

³⁰ French, *supra* note 25, at 1261.

³¹ C. Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323 (1982) (footnote omitted).

fied theory of servitudes,³² although he disagreed about the need for limits on individual freedom of contract. He proposed the recording of servitude interests as the only necessary public regulation. Professor Bernard Jacob agreed that the unified reformulation was long overdue and that as “a matter of conceptual housekeeping, the reformulation does not require legislation.”³³ He added that:

great strides toward unification have already been made through the use of drafting procedures that make the vast majority of land use arrangements enforceable as all three interest forms at once. When academic discussion has completed laying the foundation for reformulation, the courts should have little trouble sweeping away confusing language and decisions engendered by the coexistence of three complex and duplicative formal structures.³⁴

Professor Dunham agreed that substantive integration of the legal rules governing land obligations was needed, but suggested that statutory reform would provide a more reliable vehicle than case law and could provide a better solution to title examination problems.³⁵

Professor Reichman made the case that the traditional servitude classifications lack substance and engender confusion:

Employing several concepts where one concept is sufficient has practical shortcomings. Arbitrary categorization of servitudes enables the courts to reach intuitively desired results by resorting to dated technical rules. . . . The fictional distinctions reduce predictability, encourage litigation, and unduly complicate the drafting of private planning documents. The complexities of the subject make it the domain of experts. This is particularly unfortunate at a time when many Americans live in horizontal or vertical developments and are directly affected by servitudes.³⁶

Professor Lawrence Berger cautioned that some of the differences between easements and covenants justified different rules and that these differences should not be lost sight of in the reformulation process. As he put it:

I would agree that the law of servitudes should be “unified” (however that word is defined) where that would mean the elimination of unnecessary or irrational differences in the rules (as in privity of estate at law) but the variances should be maintained in those many areas where the law, as it

³² See Epstein, *supra* note 19, at 1353.

³³ *Id.* at 1369.

³⁴ Jacob, *The Law of Definite Elements: Land in Exceptional Packages*, 55 S. CAL. L. REV. 1369, 1369-70 (1982) (footnote omitted).

³⁵ Dunham, *Statutory Reformation of Land Obligations*, 55 S. CAL. L. REV. 1345 (1982).

³⁶ Reichman, *supra* note 2, at 1182.

has evolved, is supported by sound policy and community expectation.³⁷

In my symposium article, I pointed out that much of the traditional doctrine of servitudes law developed before development of an adequate recording system and the changed conditions doctrine.³⁸ Most of the traditional doctrines served to assure that parties would not be bound by servitudes difficult to discover before purchase and that they not be bound by perpetual servitudes posing a substantial risk of becoming unreasonable or obsolete.

Servitudes law may be simplified substantially because particular rules designed to give notice are no longer needed. The modern technology of record systems and title search procedures, together with the protection recording acts afford, have made these rules superfluous. Likewise, doctrines designed to prune out, in advance, servitudes that might become uneconomic can be eliminated. As I said in the symposium:³⁹

Traditionally, the law of servitudes has focused on the first transfer of the land following the original agreement — the point at which the servitude begins to run. If the servitude will run to the first successor, it will run to all successors who meet vertical privity requirements. Several traditional doctrines, particularly horizontal privity and touch and concern, have been applied to prevent servitudes from running; terminating agreements prematurely because of the risk they create for economic productivity in the future. Development of the changed conditions doctrine permitted a shift in focus from the point of first transfer to the point when the restriction in fact becomes obsolete. Whether the property is in the hands of an original party or the tenth transferee, the changed conditions defense is available against an obsolete restriction.

Early law restricted the creation of running servitudes because it lacked the means to terminate them. Since modern law can terminate servitudes, it no longer needs to restrict their creation. This change makes possible a substantial simplification in the structure of modern servitudes law. Agreements creating servitudes can be treated like other agreements: if the agreement itself is valid, the law should give effect to the parties' intentions, enforcing the agreement until it becomes obsolete or unreasonably burdensome. At that point the law should terminate them.⁴⁰

Scholarly opinion seems united that substantial simplification can be accomplished in the conceptual structure of the law of servitudes and

³⁷ L. Berger, *Unification of the Law of Servitudes*, 55 S. CAL. L. REV. 1339, 1343 (1982).

³⁸ French, *supra* note 25.

³⁹ *Id.* at 1304-05.

⁴⁰ *Id.* at 1305. Dunham takes a similar position, although he would limit running promises to those adjusting the dependency of land uses. *Promises Respecting the Use of Land*, 8 J. L. & ECON. 133, 165 (1965).

that much of the outdated doctrine can be pruned away without doing violence to the living body of servitudes law. The new *Restatement* should approach the subject of servitudes with the objective of eliminating its overlapping doctrines, obsolete terminology, and oblique approaches to problems. It should treat all arrangements designed to bind successive land owners or occupants as part of the category of servitudes, a category governed by a single body of doctrine. The same rules should govern arrangements falling within the category, whether they have been labeled easements, covenants, or equitable servitudes, unless demonstrable differences among the kinds of arrangements justify the application of different rules. This approach would seek the functional similarities among the various servitude devices rather than emphasize their differences.

III. SCOPE AND FOCUS OF THE NEW *Restatement's* COVERAGE

Forty years of changes in the use of servitudes, together with the proposed changes in approach and conceptualization of servitudes, suggest a modification of the scope and focus of the coverage proposed for the new *Restatement*.

The proposed scope would include all private land use arrangement devices—profits, easements, irrevocable licenses, covenants, and equitable servitudes—regardless of the transactional form in which they are created.⁴¹ This is both broader and narrower than the first *Restatement*: broader because it includes lease covenants, and narrower because it excludes revocable licenses.⁴² Revocable licenses are excluded because they do not create interests that run with land and, thus, are not servitudes.

Lease covenants were excluded from the first *Restatement* “because the content and effect of such promises are so affected by the relationship of the parties to them that they cannot well be treated apart from a treatment of that relationship.”⁴³ Although lease covenants are included in the Landlord and Tenant part of the second *Restatement*, they should also be included in the Servitudes Part. Only those covenants implied by law because of the landlord-tenant relationship, like the warranty of habitability, or those covenants unique to leases, like

⁴¹ Mortgage covenants are excluded, however, because of their distinct history and because of the difficulty of incorporating them into a project of feasible scope. Mechanically, this has been accomplished by treating real property security interests as something other than private land use arrangements.

⁴² Chapter 43 of the first *Restatement* was devoted to licenses.

⁴³ RESTATEMENT OF PROPERTY Part III, Scope Note, at 3147 (1944).

the rent covenant, should be considered beyond the scope of this proposal.

There are several reasons to include lease covenants in the Servitudes Part of the new *Restatement*. One reason is that much of covenant law, particularly the touch and concern doctrine, originated and developed with lease covenants. Excluding leases creates an artificial separation from the context in which the traditional rules developed. In addition, viewing lease and fee covenants together will permit us to observe their commonalities and prevent us from stating different rules for similar situations, at least without a considered judgment.⁴⁴

Another reason to include lease covenants is that the distinctions between lease and fee transactions are not as clear in modern real estate developments as in the past. Residential common interest developments may take the form of cooperatives, condominiums, or subdivisions, with few real differences between the residents with respect to their covenants. Likewise, commercial and industrial developments may use the condominium or some other form of common interest development. As a result, covenants that formerly appeared primarily in leases now appear in fee transactions as well. The use of a different rule for lease covenants is justified only when the form of the transaction creates a real difference.

The fact that a covenant is contained in a lease, rather than the grant of a fee, for example, may create a real difference because the duration of the arrangement is shorter and the parties' financial interdependence is greater than in the usual fee transaction. However, the duration of the arrangement and relationship of the parties should be relevant in the interpretation of all servitudes and should be considered directly, not by categorical inference from the transaction's form. Form should be only one of the factors used in the construction and interpretation of servitudes. Excluding all lease covenants categorically from the servi-

⁴⁴ The treatment of the lease covenant as a singularity in the first and second *Restatements* probably accounts for the fact that different vertical privity requirements are stated for the running of covenant benefits in lease and fee transactions without even a comment remarking the difference, and, without any attempt to rationalize the difference. *Restatement of Property* § 547 requires only relaxed vertical privity (succession to *some* land of the original beneficiary) for the benefit of a fee promise to run; *Restatement (Second) of Property*, Landlord and Tenant, § 16.2(3)(d) comment e (1977) requires strict vertical privity (succession to the *same* interest) for the benefit of a lease covenant to run.

Professor Curtis Berger has suggested that including lease covenants within the scope of the Servitudes Part will give the Institute the opportunity to reconsider its position on the vertical privity requirement. C. Berger, *supra* note 31, at 1332-35.

tudes part of the *Restatement* would unduly hamper the effort to restate the modern law of servitudes as an integrated whole.

Servitudes may also be extensively used in other highly specialized bodies of law, such as oil and gas law, mining law, timber law, and water law. Like lease covenants, profits and other servitudes used in natural resource exploitation are included in the scope of this proposal. Interests and rules unique to these specialty areas are not included, however.

The tremendous increase in the use of common interest developments requires that the focus of the *Restatement* be widened from individual servitudes created in isolated transactions to include interrelated servitudes implementing entire schemes of land use control in both commercial and residential developments. This shift in focus may require the *Restatement* to include the standards governing unit owner associations. Common interest developments typically rely on mandatory membership in unit owner associations to provide financing for common areas and facilities. These associations often have extensive powers over physical design, lifestyles of residents, and financial viability of the community. Most associations exercise their powers through an elected board of directors. Somewhat resembling both municipal governments and corporate boards of directors, the governing boards of unit owner associations do not fit neatly into either category. Courts and legislatures have begun hammering out rules governing the operation of these associations. Together with a growing body of commentary⁴⁵ on these "private governments," the statutory and case authority should provide sufficient basis for a *Restatement* treatment of the subject.

IV. STRUCTURAL BASIS AND VOCABULARY FOR WORKING WITH A UNIFIED CONCEPT OF SERVITUDES

The structural basis for the new *Restatement's* treatment of servitudes should reflect its conceptual basis, emphasizing the doctrinal unity of servitudes, rather than the diversity in the land use arrangements implemented by servitudes. Its vocabulary should reflect the conceptual reformulation, so that "servitude" is the generic description of devices tying rights and obligations to land ownership and occupancy. The unified concept of servitudes, however, should not hide the fact that many different arrangements can be implemented by servitudes. As

⁴⁵ See Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976); Note, *The Rule of Law in Residential Associations*, 99 HARV. L. REV. 472 (1985).

Professor Lawrence Berger pointed out,⁴⁶ good reasons support some differences in the rules applying to different land use arrangements. One goal of the new *Restatement* should be to apply similar rules to similar situations, and to apply different rules only if real differences warrant them.

To some extent the traditional labels, easement, profit, and covenant,⁴⁷ accurately describe different land use arrangements implemented by servitudes. To the extent that they do, they can be useful descriptive shortcuts.⁴⁸ No harm should result from use of these traditional labels so long as the difference in labels does not lead to the application of different rules in similar situations simply because the labels are different. Although there is some risk that using traditional labels will encourage traditional modes of thought, the benefits to be gained from using familiar words justify their continued use.

Structurally, the new *Restatement* should be organized by subject matter rather than by servitude device or land use arrangement. This organizational approach will facilitate a recognition of the similarities and differences among servitude devices and arrangements. With the similarities and differences in plain view, the drafters should be able to state a single rule for equivalent servitude situations and tailor differences in rules to the real differences among servitude situations.

A subject matter organization of servitudes might begin with a chapter on creation of servitudes that would include requirements for creating profits, easements, irrevocable licenses, real covenants, and equitable servitudes. Use of contracts and conveyances to create servitudes, application of the Statute of Frauds, and the need for a special relation between the parties (horizontal privity) would all be considered in this chapter. So, too, would the ability to create benefits in gross and rights in third parties. Creation of servitudes by implication and prescription also belong in this part.

A chapter on the validity of servitude arrangements could follow the chapter on creation of servitudes. This chapter would deal with the question of whether the arrangement violates constitutional, statutory, or public policy norms. The norms may be of broad general application, like rules against discrimination on the basis of race, or they may

⁴⁶ L. Berger, *supra* note 37, at 1343.

⁴⁷ The first Restatement avoided the word covenant because of lingering problems over its older meanings involving sealed instruments. Passage of 40 years has eliminated any possible confusion along those lines and firmly cemented the word "covenant" into the vocabulary of land use arrangements.

⁴⁸ To the extent they do not, descriptions of the actual arrangements can be used.

be servitude-specific, like rules against tying obligations to land unless they touch or concern the land. The validity of arrangements imposing restraints on alienation, restraints on trade and competition, and restrictions on location of group homes and churches belong in this chapter. So, too, does the validity of arrangements that discriminate on the basis of race, religion, age, sex, and marital status, as well as of those that are vague or unreasonable.

The next chapter should address questions of interpretation and construction of servitude arrangements, including questions of location, duration, scope, and adaptability of the arrangement to changes in technology and development of the land. Interpreting the terms used and ascertaining the parties intended to benefit from servitude also belong in this chapter.

The following chapter should treat succession to servitude interests. Assignability, divisibility, and apportionability of benefits and burdens belong here, as well as succession by acquisition of interests in the affected land. Allocation of benefits and burdens as between holders of present and future interests in the land, traditionally determined for covenants by the vertical privity doctrine, would be covered in this chapter.⁴⁹

Another chapter might be devoted to the operation of unit owner associations. This chapter would include the standards imposed on the conduct of governing boards and architectural control committees and the existence and limits on their rule-making powers. Powers to amend bylaws and other governing documents by fewer than 100% of the owners, as well as powers to impose and raise assessments belong in this chapter. Methods of collecting assessments and enforcing compliance with community rules, including forfeiture of privileges, might also be covered in this chapter.

Although this treatment of unit owner associations does not fit very comfortably within the overall organizational scheme, it may be useful to treat them separately because this area of law is so new. However, as the project develops, it may become apparent that only the standards governing conduct of the association boards and committees belong in this chapter. Amendment powers might be dealt with under validity,

⁴⁹ A number of doctrines traditionally included under the heading of succession appear elsewhere in this proposed structural scheme. Because servitudes are defined as devices that create interests running with the land, intent to create running interests is included in the creation chapter. So, too, is horizontal privity. Touch or concern is treated in the chapter on validity. Notice is covered in the chapter on defenses to servitude enforcement.

for example, and compliance might be dealt with in the chapter on enforcement.

Modification, termination, and enforcement provide the subjects for the final chapters. Modification and termination by the parties should be treated separately from judicial and statutory modification or termination. Enforcement should include sections on remedies and defenses. Lack of notice of a servitude should be treated in the chapter on defenses, rather than in the chapter on succession, since it is really a defense available to some but not all persons who succeed to interests in the land that carry servitude obligations. The changed conditions doctrine also belongs in the chapter on defenses. Since enforcement and modification and termination are interrelated, they might be treated in a single chapter, or in separate chapters that make clear the interrelationships.

CONCLUSION

This proposal suggests that the new *Restatement* should be founded on the view that people are free to create servitudes so long as their arrangements do not run afoul of constitutional, statutory, or public policy norms. Once created, the servitudes should continue until they become obsolete or unduly burdensome. The new *Restatement* would be structured to promote integration of the traditionally fragmented bodies of servitudes law. By treating all servitudes together, the *Restatement* would promote the application of similar rules to similar situations and thoughtful consideration of the real differences among various servitude arrangements. This approach should foster development of realistic, policy-based rationales for the rules governing servitude transactions, and would require substantial justification for applying different rules to various servitude arrangements. In conclusion, this is a proposal to restate the law of profits, easements, irrevocable licenses, real covenants, and equitable servitudes as a modern integrated body of law: the law governing private arrangements that tie rights and obligations to interests in land — the law of servitudes.

