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# NOTICE AND FREEDOM OF CONTRACT IN THE LAW OF SERVITUDES

RICHARD A. EPSTEIN\*

The two principal articles of this symposium exhibit a remarkable unity of purpose in their treatment of the law of easements, real covenants, and equitable servitudes. Both authors recognize—and Professor Reichman masterfully chronicles—the history by which three separate institutions have emerged in our law to regulate the ways in which one person may have nonpossessory rights in land owned and occupied by another. Both authors identify a host of nineteenth century concerns that have influenced the development of the law.<sup>1</sup> Finally, both advance a unified theory of servitudes to govern all nonpossessory interests, a theory which covers their creation, interpretation, transfer, extinction, and enforcement.

With this much I am in complete agreement, and to it I can add little. My concerns instead go to the *normative* question of what legal rules should be applied to the unified structure. This inquiry in turn leads us back to a theme persistent in all legal discourse: the tension between private volition and social control.<sup>2</sup> When should the law de-

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1. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1281-1304 (1982); Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1186-1211 (1982).

Two illustrations show the magnitude of the problem. The rules concerning the assignability of real covenants seem odd at first glance, but they are explainable in historical terms as an exception to the common-law rule which prohibited the assignment of contract rights. In a legal environment in which the benefits of ordinary contracts as a matter of law are not assignable, rules which permit the assignment of certain covenants running with land are a marked improvement over the older order.

In similar fashion, the traditional requirement that restrictions between neighbors must be included in a conveyance in order to be binding upon assigns may be attributed to the absence of an effective system of recordation: naked covenants could not be discovered by subsequent purchasers through a reasonable inspection of title.

2. See, e.g., F. KESSLER & G. GILMORE, *CONTRACTS: CASES AND MATERIALS* 2 (2 ed. 1970).

fer to the intentions of the various parties, and to what extent should the law limit individual freedom of action? The purpose of this Comment is to propose 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.<sup>3</sup>

The defense of this thesis begins with a familiar distinction. In any system of property law, a complete specification of rights and duties raises two separate questions. The first question concerns the allocation of rights and duties *between* the parties to the original transaction, grant, or conveyance. The second question concerns the rights and duties of those participants *against* the rest of the world. In general, there is a very strong case for applying the doctrine of freedom of contract to the rights and duties between the parties: a grant is, after all, a completed contract, which often imposes obligations after title is transferred—for example, warranty of title. The rest of the world, however, is not a party to the transaction, and by ordinary contract rules cannot be bound by it. For example, a conveyance that states that a prospective purchaser shall not be liable for nuisances caused to third parties will have no effect upon the right of any third party to maintain a cause of action for nuisance.

The real problem does not concern possible tort law complications, but arises when a third party wishes to acquire an ownership interest in the subject property. The initial problem he must face is to determine with whom he should deal. The natural answer to this question is the owner. A buyer of personal property, for example, acts at his peril if he negotiates a purchase with a nonowner in possession of the goods. The original owner can recover by an action for conversion the chattel or its value, and the buyer's good faith is no defense. A system of recordation reverses this general rule and requires the owner to take steps for his own protection by giving notice of his interest to the world at large.

One central question concerns the circumstances under which it is appropriate to impose a recordation requirement on the owners of various forms of property. Land is an obvious candidate for recordation because it is permanent and in one location. Simple rules can require filing in the county where the land is situated. In addition, there are strong pressures to divide land into multiple interests and, as questions

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3. The question of whether antitrust or antidiscrimination principles should apply to the law of servitudes is beyond the scope of this Comment. The Comment's primary concern is the limitations upon freedom of contract that are unique to various land transactions.

of title become more complex, recordation becomes all the more necessary. Who will be prepared to buy a remainder interest, or to accept property as security for a loan, if faced with the specter of having to authenticate title in a subsequent proceeding brought by a disappointed rival claimant to the fee?

To be sure, one may try to accommodate multiple interests in land without recordation. In the days before recordation, the buyer could protect himself by requiring a physical transfer of title deeds with purchased land, thereby preventing the original seller from showing the deeds to a second purchaser as evidence of retained title. That method, however, was effective only with total conveyances of land. It did not work where the original seller retained a part interest in land such as a life estate, and under it so simple an arrangement as a second mortgage placed innumerable pressures upon the legal system.

One response to this problem would be to limit the nature of the interests which can be created, thereby reducing the need to seek out the proper parties with whom to transact. This is in essence what happened in the law of personal property, where, as a general rule, the creation of life estates and similar limited interests in chattels is prohibited. Similarly, a system of real estate law that allowed only a fee interest would be far simpler than one which allowed all complex forms of life estates and remainders. But an enormous cost would be incurred through such a Draconic measure: it would preclude voluntary transactions by competent individuals who in principle should have as much right to sell a future interest in Blackacre as they have to sell its back forty acres.

With land, therefore, powerful institutional incentives work to reverse the traditional presumption of *nemo dat quod non habet*—that no one can convey what he does not own—applicable in conversion cases. Instead, the law allows a nonowner to convey good title to a second purchaser unless the first purchaser, by giving record notice to the world, takes steps to protect his interest. The genius of the recordation system is that it allows a purchaser to determine with whom he must deal, without restricting the richness and variety of possible transactions. Once recordation becomes an accepted social institution, it is possible to dispense with the entire ancient learning on the difference between legal and equitable interests, and the complicated rules of priority which they generate.<sup>4</sup> Record notice becomes the uniform coin of

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4. The priority rules are somewhat complicated. First, the holder of an equitable interest will prevail only over a subsequent purchaser of the legal estate who has notice of his interest.

the realm. It is superior to actual notice and to any alternative form of constructive notice, e.g., notorious possession, because of the greater certainty it creates. And while it imposes upon prospective purchasers the affirmative duty of search, it channels the search so required, and thereby protects those who make the search with a completeness that the common-law rules could not provide.

It might be argued that requiring interests in land to be forfeited if not registered allows the taking of private property by the state. But takings themselves are allowed if just compensation is provided; the enormous reduction in uncertainty that recordation offers every participant within the system serves to justify the possibility of forfeiture. There are no exclusions from the system, no disproportionate costs of participation, and no efforts to favor select members of a certain social or commercial class.<sup>5</sup> The universal adoption of the system is justified for the happiest of reasons. It leaves everyone better off than the older rule of *nemo dat quod non habet*.

There are small, and unimportant, differences among the various types of recordation statutes. Yet all recordation statutes, whether race,

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(On a separate point, the prior equity holder will prevail over a subsequent donee. This rule generally is left unchanged by recordation statutes.) Recordation supplies notice and thus provides equitable interests with the security of the classical legal estate. Second, the holder of a prior legal estate takes priority over any subsequent taker claimant, legal or equitable, whether or not the second taker has notice of the first estate. With recordation, however, there is no reason why future purchasers should be prejudiced by undisclosed prior interests. Recordation is required, thereby reducing the protection given prior legal interests to that given prior equitable ones. No protection is afforded without notice (at least against subsequent purchasers); complete protection is afforded with notice.

5. The proposition that it is "within the undoubted power of state legislatures to pass recording acts, by which the elder grantee shall be postponed to a younger, if the prior deed is not recorded within the limited time" withstood constitutional attack under the impairment of contract clause, *Jackson v. Lamphire*, 28 U.S. (3 Pet.) 280, 290 (1830), at a time when the eminent domain clause was held inapplicable against the states. *Barron v. Mayor and City Council of Baltimore*, 32 U.S. (7 Pet.) 243, 250-51 (1833). The only serious challenges to recordation statutes have been with regard to their retroactive application. *See Texaco, Inc. v. Short*, 102 S. Ct. 781, 793-94 (1982) (upholding such a statute in connection with mineral interests, but only by a five to four vote).

It is possible to ask whether these statutes satisfy the "public use" requirement found explicitly in the eminent domain clause, but not in the impairment of contracts clause. Here the argument is that the property taken is not put to a public use if it ends up in the hands of the second taker, a private party. In response it can be urged that the requirement is satisfied because in the frequent case of compliance, recordation benefits the public at large, as everyone has access to the information so recorded. Since the only way to procure the public benefit is through private enforcement, i.e., the loss of priority, the ultimate private ownership should be tolerated as a proper means to achieve the ultimate end. Whatever the theoretical soundness of the position, it should be clear that the recordation system meets the current constitutional standards for public use. *See infra* note 29.

race-notice or pure notice share one vital feature: where recordation of an interest is properly filed, it binds all subsequent takers.<sup>6</sup> Actual notice typically is provided by, and properly may be inferred from, proper recordation. The purchase of land, when combined with a system of recordation, provides constructive consent on the part of a purchaser to the previous state of affairs between the immediate seller and any other person who holds a servitude over the land.

The effects of notice through recordation, however, are not confined to parties who claim through owners of the land subject to the servitude. Notice also functions to stake out a claim of partial ownership in lands possessed by another that, under the usual rules of temporal priority, will prevail over that of any subsequent party who claims the burdened land by adverse possession. Without a recordation system, it would be very difficult for the holder of a servitude to give notice of his claims to parties outside the chain of title. This is especially true for negative easements and restrictive covenants, where the land itself bears no trace of the asserted servitude. The same difficulty can arise in the case of ordinary easements where the tangible evidence of user rights neither defines the scope of the interest nor distinguishes between use as of right and use by mere license. Notice eliminates these ambiguities and makes it possible to insist upon the very simple rule of prescription noted by Professor Reichman: prescription starts to run against the holder of the servitude, not with occupation of the subject land, but with its use by the adverse possessor in a fashion inconsistent with the terms of the recorded servitude.<sup>7</sup>

The protection of strangers, then, is assured by record notice. The only remaining question, therefore, is what limitation upon freedom of contract should be imposed upon consenting parties, including parties to the original grant and subsequent takers with record notice. In this context the major task of the courts should be: (1) to interpret the terms in the various grants; and (2) to supplement the terms by judicial or legislative rule when the grant in question is silent on certain key points. This principle is largely accepted by Professors French and Reichman.<sup>8</sup>

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6. On the relevant differences between the statutes, see Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231, 231-33 (1962).

7. Reichman, *supra* note 1, at 1248.

8. For example, courts are frequently called upon to interpret the rules governing subdivisions made in accordance with a common plan. Developers typically insert covenants in the early deed that are designed to benefit subsequent purchasers of the remaining lots, while similarly inserting parallel covenants in the later deeds that indicate that the lots previously sold are to be benefitted as well. Sensible rules of construction make it possible for any member of the subdivi-

My disagreement with the authors—and it is one that I express with some caution—is directed to the question of whether there is any room whatsoever left for public intervention once third party interests are fully protected by record notice. Both authors argue for additional public intervention. Professor Reichman wants to extend the touch and concern requirement, drawn from the law of real covenants, to all servitudes,<sup>9</sup> a conclusion from which Professor French shrinks because she believes that other forms of intervention are more effective.<sup>10</sup> In addition, both authors believe that courts should intervene either to destroy or to modify servitudes that, because of changed conditions, have become wasteful, obsolete, or unreasonable.<sup>11</sup> My thesis is simple: with notice secured by recordation, freedom of contract should control. Neither of the restrictions upon freedom of contract proposed by Professors Reichman and French should be accepted.

#### A. TOUCH AND CONCERN

The touch and concern requirement, as Professors Reichman and French correctly note,<sup>12</sup> is not simply a redundant guarantee that the original parties intended subsequent takers to be either benefitted or burdened by a covenant. Instead, the requirement, whatever its precise contours, serves as an independent substantive constraint that must be satisfied before a covenant or other servitude can run with the land. Professor Reichman defends the traditional treatment of real covenants and urges its extension to all servitudes upon several grounds:

This 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.

In the first place, obligations not related to actual property use are highly individualized. They tend, therefore, to become inefficient in the short run following a transfer. Consensual termination of such rights might not occur because of prohibitive transaction costs. The best way to insure efficient termination of such arrangements is to

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sion to sue any other member, wholly without regard to the sequence in which the lots are conveyed. As this is the clear intention of the parties, no clever rule of privity should prevent, for example, the buyers of the earlier lots from suing the purchasers of the later ones. Both Reichman and French agree. French, *supra* note 1, at 1305-06 & nn. 216-17; Reichman, *supra* note 1, at 1246-47.

9. Reichman, *supra* note 1, at 1232-33.

10. French, *supra* note 1, at 1308-10.

11. French, *supra* note 1, at 1316-18; Reichman, *supra* note 1, at 1258-59.

12. French, *supra* note 1, at 1289; Reichman, *supra* note 1, at 1233.

shift the burden of negotiation; instead of making the transferee negotiate for a release, the aspiring beneficiary will have to reach agreement with each new owner. Personal contracts remain the subject of personal bargains.

There is another reason for the "touch and concern" rule. Private property is sanctioned by society not only to promote efficiency, but also to safeguard individual freedom. Servitudes are a kind of private legislation affecting a line of future owners. Limiting such "legislative powers" to an objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom. There might be nothing objectionable in personal agreements concerning personal labor, adherence to ideologically prescribed modes of behavior, or promises to buy from a certain supplier. When such obligations, however, become permanently enforced against an ever-changing group of owners, the matter acquires different dimensions.<sup>13</sup>

This argument resonates with familiar themes of liberty and efficiency. On both scores, however, I think it wrong. Insistence that the attachment of merely personal obligations to land is likely to frustrate, rather than enhance, the objectives which a private land holding system seeks to realize presupposes that we have some collective vision of what that system is supposed to do. Yet one traditional argument for both freedom of contract and private property is that they define domains in which individuals may establish both the means and the ends for themselves, to pursue as they see fit (so long as they do not infringe upon the rights of third parties). Private property is an institution that fosters individualized, if not eccentric, preferences; it does not stamp them out. We may not understand why property owners want certain obligations to run with the land, but as it is *their* land, not ours, some very strong reason should be advanced before *our* intentions are allowed to control.

There is no need to filter the private arrangements that should be respected from those that should not. Parties who wish to create a servitude can just as easily enter into personal arrangements as real property arrangements; in other words, they can negate the intention to make the servitude run. The very fact that parties unambiguously tie a servitude to the land suggests that they think it should touch and concern the land. To say, therefore, that particular covenants must be struck down in the name of freedom is to confound the usual understanding on which freedom claims are based. It will not do to argue

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13. Reichman, *supra* note 1, at 1233.

that freedom of alienation with respect to real property does not refer to the freedom of the individuals who own the land, but instead to the condition of the land itself and its amenability to further disposition. It is precisely this misconception of freedom that has allowed the courts to take an aggressive stance in striking down consensual restraints on alienation as being against public policy,<sup>14</sup> or worse, inconsistent with the "inherent nature" of the fee.<sup>15</sup> Insistence upon the touch and concern requirement denies the original parties their contractual freedom by subordinating their desires to the interests of future third parties, who by definition have no proprietary claim to the subject property.

Further, it is not possible to justify the touch and concern requirement on economic grounds by arguing that under some independent test of welfare, servitudes fail to promote efficient land use. One objection to this argument is that it does not explain why the original parties cannot take into account future transaction costs and incentive effects in drafting their original agreement. If a seller insists that a personal covenant bind the land even though it works to the disadvantage of the immediate or even future purchasers, then the seller will have to accept a reduction in the purchase price to make good his sentiments. If he is prepared to accept that reduction, does there exist an independent theory that measures the strength and worth of his preferences—be they for consumption or investment—or that condemns his choice as unwise or irrational?

The bankruptcy of the touch and concern requirement is borne out when we examine more closely the two relevant classes of costs: transaction costs and incentive effects.

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14. The same point holds true for the traditional restriction that affirmative covenants cannot run between the buyers and sellers of land. *See, e.g.*, *Miller v. Clary*, 210 N.Y. 127, 132, 103 N.E. 1114, 1116 (1913). This restriction might have made sense in an earlier era when contract rights were generally nonassignable, but should play no role once these rights are assignable. With notice given, a prospective purchaser of the burdened land can reduce his purchase price to reflect the expected costs of the obligation, require that some fund be placed in escrow to protect him, or renegotiate the terms of the covenant with the original covenantee. That such covenants may be unwise is one point; that they should be banned on conceptual grounds is quite another.

15. *See, e.g.*, *Northwest Real Estate Co. v. Serio*, 156 Md. 229, 144 A. 245 (1929), where a Maryland court voided a covenant which prevented the grantee from selling or renting a parcel of land without the consent of the grantor, stating that:

The authorities agree that conditions or limitations in restraint of alienation or essential enjoyment of an estate in fee cannot be validly annexed to the deed or devise by which the estate is created, because they are repugnant to the inherent nature and qualities of the estate granted and tend to public inconvenience.

*Id.* at 233, 144 A. at 246.

### 1. *Transaction Costs*

In the passage quoted above, Professor Reichman insists that the touch and concern requirement will reduce transaction costs. To the contrary, it will increase them, both at the time of the original sale and in subsequent transactions. At the time of original sale the touch and concern requirement creates additional transaction costs by imposing one more external constraint for the parties to satisfy. The touch and concern requirement will have to be evaluated in every case; some covenants will have to be redrafted, and some transactions restructured. These costs will be incurred at the time that the servitude is created, not in the future when they can be discounted to their current value. They are pure deadweight losses, for there are no analagous costs generated under the freedom of contract alternative.

Even if current costs are ignored, there is no reason to believe that the retention of the touch and concern requirement will minimize future transaction costs. Professor Reichman argues that transaction costs are reduced because the rule permits the alienation of land without the consent of the holder of a servitude. Yet there is nothing about a rule which reverses the burden of transacting that necessarily minimizes costs. So long as the original holder of a covenant or his successor(s) in title are free to repurchase the servitude in question, the rule (apart from denying the original seller of the land the benefit of a bargain) only changes the identity of the party that must initiate the transaction. There is no assurance that the number of transactions, and their complexity, will be reduced by placing the burden anew on the original seller. The original transaction provides some evidence that the original seller wanted the servitude to run against subsequent transferees. Why assume that his desires are not stable with the passage of time given that the land to which they were annexed is permanent? Nor in these circumstances does the subsequent failure of the seller to reimpose the servitude provide evidence that the parties originally did not intend for the servitude to run with the land. The re-creation of the servitude may not take place solely because of the high transaction costs of the new negotiations. The original owner has lost not only his leverage in future transactions, but also his ownership interest without compensation.

The transaction costs argument for the retention of the touch and concern requirement is dubious from yet another perspective. As frequent cases reveal, there is often an honest dispute as to whether a

given servitude touches and concerns the land.<sup>16</sup> The *Restatement* provisions covering this subject are hardly a source of clarity,<sup>17</sup> and the commentators, most notably Charles Clark,<sup>18</sup> have struggled "without noteworthy success"<sup>19</sup> to define the line between covenants which can run with the land and those which cannot. The rule itself complicates many transactions whose validity should go unchallenged. For example, assume that *A* and *B* want to build a party wall<sup>20</sup> and that *A* is to have charge of its maintenance. In assessing the right of *A* (or his assignee) to collect the necessary money from *B*'s assignees, why should we be forced to inquire whether "the promisor's legal relations in respect to the land in question are lessened—his legal interests as owner rendered less valuable by the promise"?<sup>21</sup> Professor Clark in his treatment of the subject shows considerable ingenuity in bringing the party-wall case within the doctrine of touch and concern.<sup>22</sup> A better solution is to enforce the promise and dispense with the theory.

The same point is applicable to all other covenants. To be sure, there will be certain covenants that are manifestly personal. Yet these are the ones which are the least likely to occur in real estate transactions, because *ex ante* they are the least likely to work to the mutual benefit of the original contracting parties. Generally, the transactions

16. See Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 158-69 (1978).

17. The *Restatement of Property* reads as follows:

The successors in title to land respecting the use of which the owner has made a promise can be bound as promisors only if

- (a) the performance of the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him, or
- (b) the consummation of the transaction of which the promise is a part will operate to benefit and is for the benefit of the promisor in the physical use or enjoyment of the land possessed by him,

and the burden on the land of the promisor bears a reasonable relation to the benefit received by the person benefited.

RESTATEMENT OF PROPERTY § 537 (1944).

18. Clark's conception of the test for determining whether a covenant satisfies the touch and concern requirement is that, "If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns the land." C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH LAND* 97 (2d ed. 1947). This test, described by Clark as "scientific," borrows from Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645-46 (1914), 30 LAW Q. REV. 319, 325-26 (1914). The test has the virtue of being circular. Any covenant which is held to run with the land will lessen its value; any which does not, will not.

19. This judgment is found in C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY—AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 1124 (1974).

20. For a discussion of party-wall agreements, see C. CLARK, *supra* note 18, at 149-57.

21. *Id.* at 97.

22. C. CLARK, *supra* note 18, at 152-57.

which come closest to the line will be of greater importance because of their greater likelihood of making business sense.<sup>23</sup> Yet, they also will be the ones most often litigated if the touch and concern requirement were retained.

When the status of a servitude is uncertain, the touch and concern requirement merely introduces an additional transactional barrier to subsequent transfers of real estate. For example, the purchaser of a dominant estate may refuse to go forward because his fastidious lawyer tells him that title is not marketable. Should we expect parties to entertain a lawsuit to establish the validity of a servitude before a sale takes place or to negotiate with the holders of servient tenements to eliminate residual uncertainty? These things can be done, but only with high transaction costs. The touch and concern requirement, under this analysis, serves only to increase transaction costs and to block transactions.

## 2. *Incentive Effects*

The transaction costs associated with the touch and concern requirement are magnified when we consider the incentive effects that it produces. The typical servitude is created by a person who owns an entire parcel of land and wishes to divide it into several parts. If the original seller fears judicial nullification under the touch and concern requirement, he will take evasive action. He may not sell the land at all, fearing that his servitudes will not run; he may be cautious in selecting his buyers, although the possibility of transfers at death or by gift will dissipate the security afforded by personal trust; or he may try to frame the transaction in a way that gives him the right to control future disposition of the land without the use of servitudes. For example, he may sell the land with an option to repurchase or a right of first refusal. These devices allow the original seller to intervene before a sale to a third party is completed, and thereby to achieve as much as or even more than servitudes running with the land could accomplish.

But there is a lurking danger: these alternative devices impose restrictions that are far more intrusive than simple servitudes, which essentially make clear the permitted uses of land. The scope of the alternative restrictions renders them less desirable from an economic point of view than the more tailored restrictions that a robust law of

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23. See *Dewar v. Goodman*, 1909 A.C. 72, in which the landlord of a sublease covenanted with his tenant to perform certain work on other lands covered by the headlease. The work in question had to be done in order to prevent the forfeiture of the headlease, and hence the termination of the sublease. It was held that this lease did not touch and concern the land. The decision may be wrong, as Clark suggests, *supra* note 18, at 98 n.18, but why tempt fate?

servitudes can foster. Who will develop land if he knows that he is in peril of losing his gain? How does one value an option to repurchase or determine the time period for rights of first refusal? There is no reason to insist upon the touch and concern requirement when its adoption will foster the use of clumsier devices for land-use control.

Here, as elsewhere, regulation not only frustrates individual liberty, but diminishes overall wealth as well. Perhaps the costs in question will be small because so few servitudes will fall to the touch and concern requirement; certainly, one can imagine more intolerable restraints upon the use and disposition of property. Yet this is not an affirmative argument for retention of the requirement. If the costs in question are small, the importance of the matter is reduced, but its proper resolution remains unchanged. Record notice obviates the need for the touch and concern requirement.

#### B. CHANGED CONDITIONS

The second restriction I want to address is the changed conditions doctrine. The basic insight on this subject, shared by Professors French and Reichman, is that under a unified theory of servitudes, courts must retain some residual power to set aside, even between the original parties, those encumbrances that over time prove obsolete, costly, or wasteful.<sup>24</sup> In making this argument, they propose to extend a general rule of covenants to easements at law that were traditionally considered to be of infinite duration. The authors were correct to argue for equivalence of treatment, but incorrect to undermine the rule governing traditional easements. Essentially, their proposition is that servitudes should be treated like possessory ownership interests. This equivalence of treatment, however, should extend to the doctrine of changed conditions. Possessory interests, like the fee simple absolute, are not defeasible because of changed conditions. Servitudes of infinite duration should be recognized as well.

The argument in favor of expanding the scope of the changed conditions doctrine contains three familiar elements. First, it is said that the original parties cannot anticipate changed circumstances and, therefore, cannot guard against them.<sup>25</sup> Second, it is asserted that servitudes that persist over time give their holders the power to "black-mail" others long after their servitudes have become obsolete.<sup>26</sup> Third,

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24. French, *supra* note 1, at 1313, 1316-18; Reichman, *supra* note 1, at 1258-59.

25. See Reichman, *supra* note 1, at 1259 (courts impute intent that promise expire if changed circumstances render the promise valueless).

26. French, *supra* note 1, at 1316; Reichman, *supra* note 1, at 1233.

it is argued that such servitudes generate excessive transaction costs.<sup>27</sup> Eliminating obsolete servitudes or allowing their modification is said to be beneficial on all three counts. A changed condition doctrine indeed is superior to a doctrine that strikes down many servitudes *ab initio* because its proponents are fearful of the future. But, even a limited doctrine of the sort advocated here is inferior to a complete denial of public intervention based on changed conditions.

The argument that parties who wish to create a servitude are incapable of providing for future contingencies presumes that such parties rarely, if ever, consider changed conditions in the course of their negotiations. The argument continues with the additional presumption that, even if the parties had considered the possibility of changed conditions, they would have agreed to apply the doctrine and allow for the modification or termination of the servitude in question. The analogy to frustration of purpose in contract law is clear. But this justification is one of construction, not one of public policy. Viewed from this perspective, its weaknesses become apparent. It is very difficult to collect evidence of supposed intention years after negotiations are concluded. That is why most real estate transactions (especially for the protection of third parties) rely on written agreements which are not supplemented or modified by terms not contained on the face of a document. This rule should apply with some force in the case of servitudes. One can never be sure of the outcome of litigation over implied terms. At the same time, most servitudes are not casual affairs. If they are recorded, there is a strong likelihood that the property in question is of sufficient value that both sides have been represented by lawyers. As a matter of construction, therefore, there is much to be gained by demanding that the parties to a transaction deal with the contingency of future uncertainty, just as they must deal with all other contingencies. Doubts that might exist in the event of contractual silence are eliminated when the parties have addressed the issue one way or another.

The parties involved in a transaction can be expected to shape their joint future in a way that promotes their mutual benefit. They may choose to create discretionary powers in anticipation of changed conditions. For example, in the case of planned unit communities, discretionary interests granted to the developer or the homeowners' association commonly function as a device for continuous corporate

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27. French, *supra* note 1, at 1314 (implying that transaction costs are high because of the difficulty of locating parties and the need for unanimous consent); Reichman, *supra* note 1, at 1233.

governance.<sup>28</sup> The fact that discretion is often a good thing, however, is no justification for imposing it from without by terminating servitudes that are deemed obsolete. With discretion comes uncertainty, and this parties may rightly (and expressly) fear. A rigid future legal position eases the strain of renegotiation by allocating property interests at the outset. Fixed rules relieve the enormous burden on both courts and parties of deciding what conduct constitutes an abuse of discretion. The point is not that certainty is always bad or always good when time horizons are long. The point is that, given the pervasive ignorance over the trade-off between the virtues of flexibility and certainty, and between the vices of indefiniteness and rigidity, there is simply no persuasive reason to embrace one extreme to the exclusion of the other.

Professor Reichman suggests that courts should be permitted to modify as well as terminate servitudes that are considered obsolete because of changed conditions. While a richness of remedies might serve as a check on overly broad intervention, the confusion that Professor Reichman's proposal would bring to the litigation and settlement of actual cases would be unjustifiably great. Long temporal horizons make *any* present determination of utility imperfect by definition. The relevant question, therefore, is whether judicial determinations are superior to private ones. The original parties can provide for changed conditions if they so desire at the time when servitudes are created. And when disputes arise there is no apparent reason to consider judicial coercion superior to consensual renegotiation.

The second argument, that permanent easements encourage the holders of servitudes to extort large sums from those who wish to buy them out, is misplaced in principle. Here it is worth taking note of what ownership means in the context of the fee simple absolute in possession, i.e., the right to hold out. Suppose that *A* owns land which he does not wish to develop and that *B* wants this land as part of a larger parcel assembled for the most modern and productive use. *B* cannot simply take the land and escape all payment by showing the social superiority of his own plans and intentions. Nor can *B* take the land from *A* even if he is prepared to pay him some reserve price, reflective of its value in current use. Ownership is meant to be a bulwark against the collective preferences of others; it allows one, rich or poor, to stand alone against the world no matter how insistent or intense its collective

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28. For a discussion of the discretionary powers retained by developers and homeowners' associations, see R. ELLICKSON & D. TARLOCK, *LAND-USE CONTROLS: CASES AND MATERIALS* 633-34, 639-47, 649-51 (1981).

preferences. To say that ordinary ownership presents a holdout problem is not to identify a defect in the system; it is to identify one of its essential strengths. If a holdout is adamant, no private party can *force* him to sell the land in question at any price. The state may intervene under its eminent domain powers, but only when it acts for "public use," and not for the narrow interests of *B* (or those whom he wishes to serve).

The public use requirement is attenuated when the state itself wants to initiate changes. But it is of special importance when, in effect, a forced purchase is demanded by one private party of another.<sup>29</sup> In the hypothetical case outlined above, *B*'s quest for development may be shared by many. But in an age of environmental concerns, it may be opposed by many as well. It hardly matters which is the case, as there is no justification for granting any individual the power to act as the self-appointed guardian of the public at large or to undermine the stability of existing legal rights.

This basic argument has specific application to the law of servitudes. One illustration is that under the traditional law of nuisance, a private party could not create a nuisance, and thus obtain a servitude, simply by paying another party damages.<sup>30</sup> The objection to such an arrangement was quite simple: a private party does not possess "a private power of eminent domain," which would allow him to force an exchange on terms capturing all of the gain for himself.

The unified servitude proposed by Professors Reichman and French should be on an equal footing with possessory interests. The power of the original party to hold out, to maintain his servitude against his neighbor, marks the vitality of nascent ownership. The power of eminent domain (subject to serious public use limitations) should remain the only way for the state to extinguish property inter-

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29. See, e.g., Berger, *The Public Use Requirement in Eminent Domain*, 57 OR. L. REV. 203 (1978), where it is proposed that the public use requirement in 'private takings,' as when landowners need to acquire access to their real property, should be allowed only if 50% excess compensation is paid. *Id.* at 236-37, 243. In general, the public use limitation has little, if any, constitutional bite today, except in cases involving the condemnation of excess land. See generally Comment, *The Effect of the Public Use Requirement on Excess Condemnation*, 48 TENN. L. REV. 370, 372-81 (1981) (documenting the current trend toward giving public use a broad definition).

30. See, e.g., *Holman v. Athens Empire Laundry Co.*, 149 Ga. 345, 359-60, 100 S.E. 207, 214 (1919). See generally Epstein, *Defenses and Subsequent Pleas in A System of Strict Liability*, 3 J. LEGAL STUD. 165, 198-201 (1974) (arguing that courts should have a greater interest in protecting individual rights than in protecting the profits of individuals who invade those rights); McClin- tock, *Discretion to Deny Injunction Against Trespass and Nuisance*, 12 MINN. L. REV. 565, 569-76 (1928) (criticizing refusal of some courts to "balance the equities").

ests. Public intervention should not be allowed to supplant consensual arrangements in private disputes. Bilateral monopolies arise whenever the law gives someone—owner, creditor, claimant—an exclusive right to anything against someone else. In the context of servitudes, holdouts should be treated with respect for their autonomy as persons. Holdouts are not, by definition, a problem ripe for solution by judicial intervention.

My response to the third argument, that the changed conditions doctrine reduces transaction costs, parallels the analysis previously made of the touch and concern rule. In ideal form, a changed conditions doctrine would reduce the number of parties between whom negotiations must take place in order to transfer title to a fee. In practice, however, the rule would not have that effect. As with the touch and concern requirement, legitimate doubt as to whether the doctrine applied would always exist. If Professor Reichman's position were adopted, it might only serve to change and not to eliminate the dominant tenement. In any event, the legal restraint on private negotiations imposed by the doctrine would make original transactions more costly to negotiate, and force parties into legal arrangements avoiding its restrictions. Because of the fragmentation of interests caused by servitudes, the transaction cost problem will always exist. Government intervention, uncertain by nature, can do little to alleviate that problem.

### CONCLUSION

The purpose of this Comment is wholly normative. It is to show that once we remove the historical fetters which have so long bound the law of servitudes, there is no strong reason not to take a fresh view of the entire subject. We should accept as a basic proposition that contract terms shall be binding on the original parties and on all third parties who take land with record notice of the restrictions in question. There will, of course, be complications involving fraud, duress, estoppel, and modification, as there are in any contractual situation. There will also be a host of interpretative questions to be answered: servitudes are deceptive in their apparent simplicity and real estate lawyers typically do not appreciate the myriad of problems that are raised and left unresolved by their creation. While none of these problems can be solved prior to any particular case, matters can be kept simpler by removing doctrinal restrictions that both complicate the basic analysis and limit the effectiveness of servitudes.