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Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes

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Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes

Ben W.F. Depoorter and Francesco Parisi

Abstract

This Article argues that recent developments in economic theory provide a new rationale for the dichotomous approach of land use arrangements in the law of servitudes that is almost universal in the modern Western legal tradition. The treatment of certain land-related promises as enforceable contracts between parties, rather than real rights that run with the land in perpetuity, can be explained as an attempt to minimize the transaction and strategic costs resulting from dysfunctional property arrangements. As demonstrated by the Authors, benchmark doctrines such as ‘touch and concern,’ and the civil law principles of ‘prediality’ and *numerus clausus*, have served as instruments to limit excessive or dysfunctional fragmentation of property rights. Section I of this Article describes the dichotomous approach of land use arrangements in the law of servitudes in Common Law and Civil Law systems. Section II provides a functional explanation of the legal rules in this area. Section III documents and explains the changing approach to land use law in both Common Law and Civil Law jurisdictions. Section IV discusses the role of property law in a changing economy. Section V reflects on the appropriate scope of freedom of contract in the law of servitudes. Section VI concludes.

KEYWORDS: servitudes, property, economics

INTRODUCTION

When two parties agree to preserve trees on a piece of property, they may intend this agreement to last beyond the involvement of the original contracting parties.¹ If one of either contracting parties should sell his land, the other party can rely on the continued duration of the agreement for the preservation of the trees. The same logic applies to covenants that grant owners of land within a village the right to use the roads, maintained by the owner, subject to a maintenance charge payable to the owner.² Similarly, imagine a community that imposes a covenant scheme that restricts land use to single-family residential uses, prohibiting all commercial uses.³

¹ See for example, *City of New York v. Delafield 246 Corp.*, 662 N.Y.S. 2d 286, 294 (N.Y. App. Div. 1997), where a current owner of a tract of land, originally bequeathed to Columbia University, refused to preserve existing trees on the property and restore any trees damaged during construction of a 38 unit residential development. The court held that the covenant ran to the successor: “the greater the degree the covenant obligations unique to the covenanter, which can not exist independently from them, the less likely the covenant...touches and concerns the land. Conversely, the greater the effect of the covenant on the land itself, without regard for who owns it, the more likely it will be binding on successor owners.” (*City of New York v. Delafield City of New York v. Delafield 246 Corp.*, 662 N.Y.S. 2d 286, 294 (N.Y. App. Div. 1997).

² Covenants granted a private right to the owner of each lot within a village to use the roads shown on the plat of the Village. These covenants provided that “said roads ... shall be ... maintained by the Owner, subject to a reasonable maintenance charge that may be made by the Owner, its successors or assigns, as condition to the exercise of such privilege of use....” Its purpose is to separate those covenants that are personal and unrelated to the covenantor's ownership of land, from *those that are "connected with" the land*. [footnote omitted]. The court held that to touch and concern the land, a covenant must be related to the land so as “to enhance [the land's] value and confer a benefit upon it.”, referring to *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wash.2d 565, 575, 295 P.2d 714 (1956): maintenance commission for the costs of improving a street. *In purpose and effect it substantially altered the rights connected with the land conveyed.* (*Rodruck*, 48 Wash.2d at 568-69, 295 P.2d 714.)

³ Today, the most prevalent types of real covenants are those employed in common interest communities. Communities often impose covenant schemes that restrict land use to single-family residential uses, prohibiting all commercial uses. For instance, in *Bluffs Div. II Park Protection Ass'n v. Radich*, 91 Wash.App. 1036, 1998 WL 341963 (Wash.App. Div. 2, Jun 26, 1998) (NO. 21693-1-II) NO CITING) the court restricts 10 lots in a subdivision to a park, where the covenants' relation to the aesthetic value of the entire subdivision is decided by

Although it is commonly understood that land use arrangements demand a certain degree of permanence to encourage optimal investment in the long term, the law of property is extremely selective in granting property right effect to these agreements between parties. That is to say, the law conservatively grants property-type remedies for the enforcement of these types of agreements. Of the land use arrangements listed above, under current law, only the latter agreement will unambiguously run with the land to bind successive owners.⁴ The question as to why certain private arrangements are denied the parties' intended property right effect is puzzling. Indeed, the law's distinction between promises that attach to the land and land-related agreements that are considered personal has produced considerable scholarship. The discussion continues today. Most recently, the latest Restatement of Property Law has reinforced a far stretching judicial discretion of land use arrangements.⁵

reference to *Mountain Park Homeowners Ass'n, Inc. v. Tydings*, 72 Wash.App. 139, 145, 864 P.2d 392 (1993) (citations omitted). Also, a court considered touch and concern fulfilled when "by restricting the use of one parcel, it enhances the value of another," *City of Olympia v. Palzer*, 107 Wash. 2d 225, 728 P.2d 135 (1986) (holding that a greenbelt area within a park was an integral part of a subdivision, which benefited all of the homeowners); see also *Rodruck v. Sand Point Maintenance Comm'n*, 48 Wash.2d 565, 575, 295 P.2d 714 (1956), where the court wrote that "whether the covenant in question is so related to the land as to enhance its value and confer a benefit upon it."

⁴ Although one speaks in terms of covenants that run with the land, in fact, covenants run with an *estate* in land. This is of crucial importance where the exact estate is not conveyed to the new possessor, for instance when a part of the land is devised by the owner to several people and none of these receive the entire estate (fee simple).

⁵ The Restatement has removed the age old requirement of touch and concern. It has introduced a new, broader test for the running of covenants. The restatement did, however, implement a more open standard for judicial invalidation. Judicial intervention is now restricted to violation of "public policy," unconscionability, unreasonable restraints on trade, or changed circumstances. This is situated within the Restatement's focus away from the technical categorization towards ascertainment and effectuation of private intentions. Moreover, the Restatement reflects the change in modern social reality. See further at note 24. Although historically the "dominant servitude paradigm has been a private two-party use sharing regime" (Dan A. Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEBRASKA L. REV. 804, 812 (1998) [hereinafter Tarlock]), today's predominant use of servitudes is found in the institutional design of common interest communities. On the role of residential associations, see Clayton P. Gillette, *Courts, Covenants and Communities*, 61

As we will argue in this Article, recent developments in economic theory provide a new rationale for the dichotomous approach of land use arrangements in the law of servitudes that is almost universal in the modern Western legal tradition. The treatment of certain land-related promises as enforceable contracts between parties, rather than real rights that run with the land in perpetuity, can be explained as an attempt to minimize the transaction and strategic costs resulting from dysfunctional property arrangements. As demonstrated below, benchmark doctrines such as ‘touch and concern,’ and the civil law principles of ‘prediality’ and *numerus clausus*, have served as instruments to limit excessive or dysfunctional fragmentation of property rights.

Furthermore, a comparative analysis of the common law requirement of “touch and concern” and other similar restrictions in the civilian law of servitudes reveals a gradual shift in the law of property from an *ex ante* approach of preventing the creation of atypical property arrangements, exemplified by the enumerated rights approach of the early Civilian tradition, to an *ex post* approach of remedial protection from such arrangements, as found in the recent emergence of a “changed circumstances” doctrine in common law and civilian systems.

Section I of this Article describes the dichotomous approach of land use arrangements in the law of servitudes in Common Law and Civil Law systems. Section II provides a functional explanation of the legal rules in this area. Section III documents and explains the changing approach to land use law in both Common Law and Civil Law jurisdictions. Section IV discusses the role of property law in a changing economy. Section V reflects on the appropriate scope of freedom of contract in the law of servitudes. Section VI concludes.

I. THE COMPLEXITY OF SERVITUDE LAW

The freedom of private parties to conceive land use arrangements is severely curtailed by an impressive body of formalistic and substantive requirements. These restrictions on the free creation of land use arrangements add considerably to the tremendous complexity of the law of servitudes.⁶ One esteemed scholar describes the American law of servitudes as “a murky subject burdened with obsolete forms and rules that have caused confusion and uncertainty.” According to another scholar “[t]he law in this area is an unspeakable quagmire. The intrepid soul who ventures in this formidable wilderness never emerges unscarred”.⁷ Without venturing too deep into the “wilderness” of servitude law, this Section will illustrate the dichotomous treatment of the private land use arrangements in Common Law and Civil Law systems.

A. *Restrictions under Common Law*

Historically, the common law doctrine of promissory servitudes running with the land was shaped in response to developing needs of residential landowners for innovative private land use arrangements.⁸ Chancery courts were increasingly faced with the limitations of the old institutions of contract law⁹ as

⁶See e.g. French, *infra* note 16, 928-929 (listing as contributing factors to today’s complexity in servitude law: the courts’ fear for unchecked enforcement of servitudes and the typical common law fashion by which this judicial control has developed over many centuries).

⁷French, *infra* note 16, citing E. RABIN, *FUNDAMENTALS OF MODERN REAL PROPERTY LAW* 489 (1974).

⁸The doctrine can be traced back to the law of warranties in Henry VIII’s Statute of 1540 that redistributed the Catholic Church’s land holdings in England. See Holdsworth’s history of english law, Volume 7 (The Common Law and its Rivals), 288-290; A.W.B. SIMPSON, A.W.B., *A HISTORY OF THE LAND LAW*, 255-265 (2d. ed., 1986); SIR MATTHEW HALE, *HISTORY OF THE COMMON LAW: AN ANALYSIS OF THE CIVIL LAW PART OF THE LAW* 66 (6th ed. 1820).

⁹Under traditional common law, the rights and duties associated with contracts were not

they invalidated the small number of recognized negative easements¹⁰ from Roman law which no longer met the increasing demands of allowing land use among persons other than the original contracting parties.¹¹ Due to the perceived net benefits of having the rights and burdens of a land use-related promise attach to the title of property (*i.e.* “run” with the land), courts gradually created a new body of law to overcome the obstacles posed by traditional property and contract theories. As such, *real covenants* which ran with the land developed as a special class of promises enforceable in law, as an exception to the principle that promises are personal to the makers. In addition, on the basis of “equitable consent,” such as formulated in *Tulk v. Moxhay*,¹² equity would enforce agreements preventing the use land in a particular manner against subsequent purchasers.¹³ At the same time, courts have traditionally limited the number and variety of new types of servitudes. In this process, the freedom of private parties to conceive binding land use arrangements was severely curtailed by a manifold of legal requirements.

Courts require of both real covenants and equitable servitudes that the original grantee and grantor have intended that the covenant run with the land (there must be clear intention of the original parties). With regard to real covenants, there must be “privity of estate” (a grantor-grantee relationship)

assignable (Arthur L. Corbin, *Assignment of Contract Rights*, 74 U. PA. L. REV. 207 (1926)) because parties to the original agreement did not have the right to bind third parties to adhere to their arrangement. Accordingly, the benefits and burdens of the original covenants did not transfer with the interest in the land. In many situations, this frustrated the purpose of creating a real covenant in the first place.

¹⁰ On a base level, negative covenants such as building restrictions could be enforced as negative easements of light and air. See Comment, “*Equitable Restrictions*” in *Louisiana*, 33 TUL. L. REV. 827 (1959).

¹¹ On the foundation of land uses, the role of the Court of Chancery and the impact of land uses on the feudal system, see JENKS, EDWARD, A SHORT HISTORY OF ENGLISH LAW 96-101(4th ed. 1928).

¹² See CLARK, COVENANTS AND INTERESTS RUNNING WITH THE LAND (2d ed. 1847) [hereinafter CLARK I], citing *Tulk v. Moxhay*, Phil. 774, 41 Eng Rep. 1143 (Ch. 1848); 5 RICHARD R., POWELL ON REAL PROPERTY 161 (1962) [hereinafter POWELL]; CLARK, COVENANTS RUNNING WITH THE LAND 3-4 (2d ed. 1947) [hereinafter CLARK II].

¹³ Comment, “*Equitable Restrictions*” in *Louisiana*, 33 TUL. L. REV. 827 (1959).

between the party claiming the benefit of the covenant and the right to enforce it and the party upon whom the burden of the covenant is to be imposed.¹⁴ Of both real covenants and equitable servitudes courts require that the covenant must ‘touch and concern’ the land. Each of the above requirements needs to be met simultaneously for a covenant to bind subsequent owners.¹⁵ These requirements on the running of promises and burdens of land use arrangements account for much of the tremendous complexity of the law of servitudes as we find it today.¹⁶ According to some, these restrictions personify rigid formality and are a serious devaluation of freedom of contract.¹⁷ Many scholars have questioned the viability

¹⁴The requirement that the original parties to the covenant need to be in privity of estate was laid down in *Spencer’s Case* (5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583)). Privity of estate was not defined in the case and its meaning was to be assessed by subsequent court rulings. Different views came to the surface: In England, it was understood that the original parties were in a landlord-tenant relationship (*Keppell v. Bailey*, 39 Eng. Rep. 1042 (1834)). Yet some American states established that there was to be an interest in the property other than the covenant held by both parties (*Morse v. Aldrich*, 36 Mass. 449 (1837)). Still others determined that the covenant was contained in a *conveyance* of an interest in land - e.g. a fee simple (*Wheeler v. Shad*, 7 Nev. 204 (1871)) or the reality of a mutual or successive relationship (RESTATEMENT OF PROPERTY, section 534). American courts adopted *Spencer’s Case* but liberalized it by relaxing the horizontal privity requirement and lifting the *prima facie* prohibition on affirmative, as opposed to negative, covenants (with the exception of New York).

¹⁵ For a description of each of these terms, see ELLICKSON, ROBERT C., AND TARLOCK, A. DAN, *LAND-USE CONTROLS : CASES AND MATERIALS*, 620P. (1981); FRIEDMAN, MILTON R. (1998), *CONTRACTS AND CONVEYANCES OF REAL PROPERTY* (6th ed. 1998).

¹⁶ French, Susan F., *Towards a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1265 (1982) [hereinafter French], lists as factors for today’s complexity in servitude law the courts’ fear for unchecked enforcement of servitudes and the typical common law fashion by which this judicial control has developed over many centuries . Uriel Reichman, *Towards a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179 (1982) [herinafter Reichman I] (“The American law of servitudes remains a murky subject burdened with obsolete forms and rules that have caused confusion and uncertainty.”). See also RABIN, EDWARD H., Kwall ROBERTA R. & Kwall JEFFREY L., *FUNDAMENTALS OF MODERN PROPERTY LAW* 475 (2000) (“The law in this area is an unspeakable quagmire. The intrepid soul who ventures in this formidable wilderness never emerges unscarred.”).

¹⁷ Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982) [hereinafter Epstein]. On this latter point see Section V below.

of these restrictions in servitude law, proposing unification¹⁸ and simplification.¹⁹ State legislators have begun implementing changes to these restrictions. Most recently, the American Law Institute has integrated some of these remarks in the latest Restatement of Property Law. Already the latest Restatement has been criticized for these modifications, which illustrates the lack of consensus with regard to this body of law.²⁰

In particular, the requirement of touch and concern is perceived as one of the main obstacles to the liberal creation of affirmative servitudes, equitable servitudes and real covenants - it is also the only rule that requires analysis of the land use arrangement itself.²¹ As such, it has been poorly understood. Scholars have struggled in finding a consensus on the doctrine's rationale,²² while Courts have resorted to various definitions.²³ The most recent Restatement (Third) of Property Law has abandoned the touch and concern requirement and replaced it with a less formal and more open ended test based on "public policy." Under the Restatement a servitude is assumed to be valid unless it determined illegal, unconstitutional or in violation of public policy.²⁴

¹⁸ See e.g., Reichman, *supra* note 16; French, *supra* note 16.

¹⁹ James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1 (1989); Epstein, *supra* note 17.

²⁰ See e.g., Tarlock, *supra* note 5.

²¹ Margot Rau, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139 (1978) [hereinafter Rau].

²² See, *infra* note 29.

²³ See, *infra* note 26.

²⁴ RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES § 2.4 (section 3.1.) Section 3.2 of the Restatement declares that for a covenant to be valid as a servitude, "neither the burden nor the benefit of a covenant is required to touch and concern land." Covenants should thus be permissible, regardless of any substantive requirement of touch and concern, unless it infringes upon "a constitutionally protected right, contravenes a statute or governmental regulation, or violates public policy". (section 3.1) Violation of public policy consists, e.g., of unreasonable restraint of alienation (3.4.) or unreasonable restraint of trade or competition (3.6). The Restatement provides a non-exhaustive list to indicate the content of "public policy." Under Section 3.1, a servitude will be held invalid when it's content: (1) is arbitrary, spiteful, or capricious; (2) imposes a unreasonable burden on a passes on

When servitude is considered by law not to “touch and concern” the burdened or dominant land, it will not run with land to bind successors - that is, a mere transfer of ownership of the burdened land then defeats the original agreement.²⁵ The exact definition of touch and concern is somewhat elusive. A survey of case law of the past hundred years reveals a wide range of definitions.²⁶ Many pages in the literature have been devoted to the question on

railroads and constitutional right; (3) imposes an unreasonable restraint on alienation under 3.4 and 3.5; (4) unreasonably restrains trade or competition (3.6); (5) is unconscionable under 3.7. Note that the requirement against the direct restraint on alienation of the burdened estate imposes a Kaldor-Hicks test: The reasonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint (section 3.4). On the other hand, indirect restraints of otherwise valid servitude remain valid even if it indirectly restrains alienation by limiting the use that can be made of property, by reducing the amount realizable by the owner on sale or other transfer of property, or by otherwise reducing the value of the property (section 3.4). Examples of the latter include servitudes of view, historical preservation, conservation of habitat.

²⁵ *Spencer's case* laid down the requirement that for a burden of a covenant to run with the land and bind assignees it must touch and concern the property, and not merely be “collateral.” Landlord Spencer had leased real property to a tenant, who covenanted that he, his executors or assigns would build a brick wall on the leased land. The land interest was assigned by tenant to J, who assigned to another party who refused to build the wall. The court required of covenants that 1) that the parties intended them to run, 2) that there be privity of estate, and 3) that the covenant touches and concerns the land. In the end, the covenant was held not to bind the defendant on the grounds that intent was lacking – the word ‘assigns’ were missing in tenants agreement. Many questions were left open, among them the precise meaning of touch and concern. *See* 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583). American courts extended Spencer's landlord-tenant relationship to cases concerning conveyances in fee and to the running of benefits. The requirement of touch and concern was also imposed on equitable servitudes, *see* E.H. BURN, CHESHIRE'S MODERN LAW OF REAL PROPERTY 583-ff (1972).

²⁶ A number of judicial decisions on touch and concern regard the test as a matter of economic effect. Hereby a promise is considered to touch and concern the land when the covenant has *economic impact on the value of the land or the title of ownership*. Such a definition has rightly been criticized in the literature for its circularity, since the courts determination regarding touch and concern focuses on whether the covenant affects the legal interests of the parties as landowners. (*See, Berger* , 1970, 210-211). Moreover, personal promises can be regarded as to affect the title of the land and will pass the touch and concern test without regard to the concern of wasteful fragmentation. From this test it has been held that building heights and setback lines (*See for example, Fong v.*

the meaning and function of this doctrine²⁷ and it accounts for much of the criticism on the complexity of the law of servitudes.²⁸

Hashimoto, 1998 WL 71951 (Hawai'i App.)), restrictions of use for aesthetic purpose (*Bluffs Div. II Park Protection Ass'n v. Radich*, Wash.App. Div. 2, Jun 26, 1998.) and monthly maintenance fees run with the land (*Palm Beach County v. Cove Club Investors Ltd.*, 734 So.2d 379, 24 Fla. L. Weekly S162 (Fla., Apr 08, 1999)). Another broad test, implied from the vague description in the Second Restatement of Property (CHECK), is to assess whether the covenant *influences the use and enjoyment of the land*. Like the previous test, such a criterion does not provide any guarantee with regard to the inhibition of personal promises or idiosyncratic promises. Under this definition, limitations on use of the land have logically been held to run with the land (see, *Mains Farm Homeowners Ass'n v. Worthington*, 121 Wash.2d 810, 854 P.2d 1072 (Wash., Jul 15, 1993). Even limitations to use for single benefit residential purposes were held to run (see *Meisse v. Family Recreation Club, Inc.*, Ohio App. 2 Dist., Feb 20, 1998), whereas attorneys' fees were not (see, *Paloma Inv. Ltd. Partnership v. Jenkins*, 978 P.2d 110-116). Another recurring test holds that the *intention* of the parties is decisive on whether a promise is personal or running. On this ground, assessment fees for maintenance have been determined to run (see, *Bishop v. Twin Lakes Golf and Country Club*, 89 Wash.App. 1024, 1998 WL 62822), even limitations to use for single benefit residential purposes were held to run. In a minority of cases courts hold that a promise must affect *the legal rights of the covenanting parties as landowners* (see, e.g., *Hagan v. Sabal Palms, Inc.*, 186 So.2d 302, Fla.App. 2 Dist., Mar 23, 1966.) Such a description partially resembles the original definition, especially if it implies the supplementary provision that the covenant must also have no bearing on their legal rights as non-owners. In other words, if it were required that the promise is to be useless to the beneficiary after he has conveyed the estate, then the test verges on the original definition as employed by the English courts. However, the outcome in these cases - which often favors personal land promises - negates the presumption that the additional requirement is actually implied when this legal-rights affection criteria is set forth.

²⁷On the definition, test of and policy rule behind the touch and concern doctrine see JOSEPH W. SINGER, PROPERTY LAW 460 (1997); Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167-235, 207-233 (1970) [hereinafter Berger]; see also *infra* 29.

²⁸ Criticizing today's complexity: Andrew Dana & Michael Ramsey, *Conservation Easements and the Common Law*, 8 STAN. ENVTL. L.J. 2 (1989); Allison Dunham (1982), 'Statutory Reformation of Land Obligations', 55 S. CAL. L. REV. 1351-1353; Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI L. REV. 681 (1973); Robert C. Ellickson & Dan A. Tarlock, LAND-USE CONTROLS: CASES AND MATERIALS (1981); Epstein, *supra* note 17, at pages 1353-1369; French, *supra* note 16; Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 143 (1977) [Hereinafter Reichman II]. Much of the frustration is due to the (alleged) indeterminacy of the test; see Olin. L. Browder, *Running Covenants and Public Policy*, 77

Several legal scholars have attempted to explain the purpose of this doctrine and to guide its interpretation although no definite test for the touch and concern requirement has emerged.²⁹ Some have proposed that the requirement

MICH. L. REV. 13 (1978) [hereinafter Browder], arguing that unstated and poorly conceived policy concerns lie at the heart of the indeterminate manner by which courts have handled the issue of touch and concern. On judicial manipulation of touch and concern in order to achieve predetermined results, *see e.g.*, Rau, *supra* note 21, at pages 163-169; Susan F. French, Susan F., *Servitudes, Reform and the New Restatement of Property: Creation, Doctrines, and Structural Simplification*, 73 CORNELL L. REV. 928, 940 (1988) [hereinafter French II].

²⁹ On ethical and other possible socio-economic purposes of the touch and concern rule, *see* Reichman II, *supra* note 28 . In Tarlock's view, touch and concern assures subsequent purchasers that there is a reasonable relationship between the financial obligations and the benefits to their property. *See* Tarlock, *supra* note 5, at p. 813. As such, the modern function of touch and concern is to prevent frustration of purpose on behalf of the non expectant or uninformed purchaser of burdened land. Similarly, according to Clark, the real policy behind touch and concern is to give effect to the intent that most people would have given to the agreement. *See* CLARK II, *supra* note 12. Therefore, the test would be whether the usual expectation of the well-informed layman would accord with the servitude right (For more on Clark's interpretation of touch and concern, *see* Reichman II, *supra* note 28). This proposal, advocated also by Berger reveals touch and concern as a device for intent effectuation, through which the law conforms itself to the normal, usual or probable understandings of the community (Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINNESOTA LAW REVIEW 167; *see also* Browder, *supra* note 28, at pages 13-46; on the combination of the intent and the touch and concern requirement by courts, *see* Rau, *supra* note 21, at page 155). Such an approach leaves many questions unresolved. For instance, what is the normal expectation of the layman? When will we impose the 'normal' expectation above a idiosyncratic but perfectly legitimate understanding between the original parties? Furthermore, how does this relate to the intent requirement itself? In an attempt to validate touch and concern on economic grounds, Jeffrey Stake's efficiency proposition is that courts use touch and concern to allow those promises to run with the land that are more efficiently allocated to the successors than to the original party to the covenant - typically evaluated when the estate is transferred; when then the question of touch and concern is most demanding. The hypothesis is that when there is no existing service available as an alternative to the covenant, the burden should touch and concern. If, however, the service is commercially available, the burden should not touch and concern. For instance, in the case where the promisor promises large water supply from the source on his land, which is the most adequate water source near the place of performance, the court should anticipate the consequences of transfer of the estate. Is it efficient to hold the original promisor/seller liable to the performance? In this case, he

be abandoned altogether.³⁰ However, despite these efforts by scholars and the drafters of the Third Restatement, touch and concern remains is very much alive in the case law today.³¹ Hence, there are still many unanswered questions. What is the purpose of the doctrine of touch and concern and what would be an adequate definition, given functional use? What does it mean for a promise to

would either need to supply water from a distant place to the beneficiary tract or negotiate with his successor for performance of the covenant. Stake's focus is primarily on the cost comparison between the promisor and his successor on the one hand, and between the promisee and his successor on the other hand, not on the costs that may arise out of a need to negotiate between promisor's successor and promisee (or his successor). The hypothesis is that when there is no existing service available as an alternative to the covenant, the burden should touch and concern. If, however, the service is commercially available the burden should not touch and concern. For example, according to Stake's efficiency test, promises not to do something on the promisor's land have to run. It will always be the successor of the interest in the estate who will be better equipped to prevent certain acts on the land (e.g. not to build). If the original party were personally obliged to perform the act, it would involve serious transaction costs (according to Stake). But what if the covenant not to build dates from an area in time where the parcel lied in a rural, picturesque site, but now is situated in a industrial area? The successor, let's assume a project developer, will have to negotiate all the servitudes not to build which are attached to the land parcel. Although the successor is the cheapest cost provider if the promise in terms of own private cost, the total costs to society of having the promise run with the land might well be negative. See Jeffrey E. Stake, *Towards and Economic Understanding of Touch and Concern*, 1998 DUKE LAW JOURNAL 925, 959 (1998) [hereinafter Stake]. Stake assumes that the burden should run with the land, unless the promisee can hire existing business as an alternative performer. Nevertheless, it is unclear why the seller will not have an incentive to contractually bind the buyer to supply the water. Moreover, even if such contractual solution does not take place, the monopolistic pricing will merely occasion a redistribution of wealth (from old owner to new owner) and not a deadweight loss, given the perfect inelasticity of demand (i.e., the full quantity of water originally contracted for by the benefit of the land will still be delivered, with no contraction of resources).

³⁰ See Epstein, *supra* note 17 (public records of land obfuscate the need for a touch and concern requirement). See also French II, *supra* note 28; RESTATEMENT (THIRD) OF PROPERTY, SERVITUDES.

³¹ The authors conducted a case law survey on the Lexis Nexis ("Legal > Cases - U.S. > Federal & State Cases; text ("touch and concern)"). Our survey reveals that, measured over an 18-year span, touch and concern remains a permanent fixture in the case law on land use arrangements. Measured over 4-year intervals from between 1982 and 2002, touch and concern arises respectively 55, 52, 50 and 57 times. Over 1-year intervals between 199 and 2002 is arises respectively 18, 6, 9 and 10 times. More details are on file with authors.

benefit “land” and not its owner and why there is not a category of promises that both touch and concern and are personal?³²

B. Civil Law Restrictions

Under feudalism, the system of servitudes was greatly extended beyond its origin in Roman law.³³ This can be seen as part of a general trend under feudal law whereby the notion of absolute ownership underwent a substantial change. The primary type of property during the feudal era was *domaine éminent* or *direct* of the lord where ownership vested on a series of interests in the same property.³⁴ Later on, the *domaine éminent* was reduced to a series of charges or servitudes that were imposed not only on the land but also on the tenant - in most cases involving labor obligations.³⁵ In the post-revolutionary days, servitudes, perceived as a manifestation of the feudal hierarchy of fiefdom and subinfeudation, were severely curtailed. This hostility towards the free use of property was carried over into the influential post-revolutionary Civil Code of 1804.³⁶ As a result, “freedom of contract is quite seriously restricted in the matter of servitudes” under civil law.³⁷ This hostility is reflected principally in two

³² Berger, *supra* note 29, at page 210.

³³ See Generally, F.L. GANSHOF, FEUDALISM 160 (1952); E. GLASSON, L’HISTOIRE DU DROIT FRANÇAIS 188-208 (1904).

³⁴ GANSHOF, *supra* note 33.

³⁵ See AUBENAS, COURS D’HISTOIRE DU DROIT PRIVÉ 92 (1955).

³⁶ The Civil Code of 1804 still applies today in Belgium and France. Although the civil codes of Belgium and France have diverged over the years, the provisions relating to servitudes have remained identical. For an excellent overview, see Paul McCarthy, *The Enforcement of Restrictive Covenants in France and Belgium: Judicial Discretion and Urban Planning*, 93 COLUMB. L. Rev. 1, 2 (1973) [hereinafter McCarthy], citing J. CARBONNIER, 1 DROIT CIVIL 57-58 (7d. ed. 1967).

³⁷ MARCEL PLANIOL & GEORGE RIPERT, TREATISE ON CIVIL LAW, Vol. 1, Part 2, 2928 (1880) [hereinafter PLANIOL AND RIPERT]. See also J.B. VANIER, LES SERVITUDES (1886) (includes a detailed account on the history and framework of the French civil code provisions on servitudes).

concepts of Continental property law: the concept of nominate property rights and the principle of prediality.

1. Nominated and Innominated Property Rights

Most modern European codes limit land use arrangements to a number of specific, socially desirable property rights.³⁸ This favoring of certain property arrangements is known as the *numerus clausus* principle and is an important expression of the fundamental principle of unity that underlies modern property law. The *numerus clausus* doctrine contains the notion that no real property rights may be created other than those provided by the law.³⁹ The purpose of this principle is to forestall private individuals from creating property rights that differ from those that are expressly recognized by the legal system.⁴⁰

In many ways the intellectual product of the French revolution, the influence of the *numerus clausus* principle is felt today in most modern European codes. The Napoleonic Code of 1804,⁴¹ the German BGB of 1900,⁴²

³⁸ European scholars also refer to this principle by invoking the concept of *nominate* property rights. Merrill and Smith have recognized that, although the *numerus clausus* principle is mostly a Roman law doctrine followed and enforced in most civil law countries, the principle also exists as part of the unarticulated tradition of the common law. Thomas Merrill and Henry Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 69 (2000). Merrill and Smith illustrate the many ways in which common law judges are accustomed to thinking in terms comparable to the civilian doctrine.

³⁹ Cass. 16th of September 1996, *J.T.* 1967, 59 and *R.C.J.B.* 1968, 166 - note Hansenne.

⁴⁰ For a modern challenge to the *numerus clausus* principle, see Bernard Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem*, in OXFORD ESSAYS ON JURISPRUDENCE 239 (J. Eekelaar & J. Bell eds. 3d ed. 1987) (critical analysis of the legal, philosophical, and economic justifications for limiting the types of legally cognized property interests to a handful of standardized forms).

⁴¹ Several articles of the French Civil Code embrace the concept of “typicality” of real rights and articulate principles of unitary and absolute property. See, e.g. Article 516 on the differentiation of property; Article 526, enlisting the recognized forms of limited real rights (usufruct, servitudes and mortgages); Articles 544 - 546 on the definition and necessary content of absolute ownership, etc.

and several other codifications⁴³ contain provisions that restrict the creation (or at least withhold the enforcement) of atypical property rights. As Rudden aptly put it, “in very general terms, all systems limit, or at least greatly restrict, the creation of real rights: ‘fancies’ are for contract, not property.”⁴⁴ These limits on the creation of atypical property rights eventually emerged as a general principle of modern property law.⁴⁵ Even jurisdictions that have not formally codified the doctrine adhere to its structures.⁴⁶

2. Predial and Personal Servitudes

With regard to servitudes, the hostility to the creation of land use arrangements is formulated most clearly in the requirement of ‘prediality’.⁴⁷

⁴² BGB Paragraph 90, by providing that “Only corporeal objects are things in the legal sense” can be seen as a substantial departure from the feudal conception of property, where most atypical rights a non-tangible nature.

⁴³ Practically all important modern codifications – not all of which were directly influenced by the French and German models – embrace a similar principle of unity in property. Rudden, *supra* note 33, provides a comparative survey of the *numerus clausus* principle in the modern legal systems of the world, reporting that many Asian legal systems have adopted a basic rule according to which ‘no real rights can be created other than those provided for in this Code or other a legislation’ e.g., Korean CC 185, Thai CC 1298, and Japanese CC 175. Similar provisions exist in other systems of direct European derivation such as in the La. CC 476-8, Argentinian CC 2536, Ethiopian CC 1204 (2), and Israeli Land Law 1969 sections 2-5.

⁴⁴ Rudden, *supra* note 40, at 243.

⁴⁵ European scholars also refer to this principle by invoking the concept of *nominate* property rights. Merrill and Smith (2000, p. 69) have recognized that, although the *numerus clausus* principle is mostly a Roman law doctrine followed and enforced in most civil law countries, the principle also exists as part of the unarticulated tradition of the common law. The authors illustrate the many ways in which common law judges are accustomed to thinking in terms comparable to the civilian doctrine.

⁴⁶ See, for instance, the *Blieck* case in Belgium, *see* Cass. 16th of September 1996, *J.T.* 1967, 59 and *R.C.J.B.* 1968, 166 - note Hansenne. Here _____.

⁴⁷ *See e.g.* Article 637 French Civil Code C.C. [hereinafter cited as C.C.]; Article 1119 Greek Civil Code; §1018 & 1019 German Civil Code (Bürgerlichesgesetzbuch) [hereinafter cited as

Prediality, which finds its doctrinal origin in the Roman law concept of “*servitudes praediorum*”⁴⁸, holds that both burden and benefit bear on to land (an “immovable”) rather than a person: “A servitude is a charge imposed upon one *parcel* for the use and enjoyment of a *parcel* belonging to another owner.”⁴⁹ The requirement of prediality, largely equivalent to the touch and concern restrictions in common law, prevents the running of personal promises in many civil law systems. The requirement of prediality holds that only those land promises which are of ‘real’ nature, tied to estates rather than persons, may run with the land. Promises of personal nature are personal obligations, not real rights, and as such they do not pertain the characteristics of a real right, the most important of which is the capacity to run with the land.⁵⁰

B.G.B.); Art. 730 Swiss Civil Code; Art. 1027 Italian Civil Code. The term refers to *predia* from Latin, as it pertains exclusively to immovable goods. The requirement that a servitude is “praedial” is coined as the requirement of prediality in the Louisiana civil code (Article 646) [hereinafter cited as La. C.C.]. Servitudes (a requirement of ‘prediality’, as opposed to ‘personal’) are termed predial to refer to the establishment of land as the principal beneficiary (*predium*) of the promise. Under Louisiana law a predial servitude is defined as a “charge on a servient estate for the benefit of a dominant estate”. For more on the requirement of prediality in Louisiana, see A.N. YIANNOPOULOS, PREDIAL SERVITUDES 9-ff (1997); see also B. Kozolchyk, *Book Review: On Predial Servitudes, Civil Law Institutions and Common Law Attitudes- Apropos of Yiannopoulos’ Predial Servitudes*, 59 TUL. L. REV. 571 (1984); William H. McClendon, *Book Review: Predial Servitudes by A.N. Yiannopoulos*, 44 LA. L. REV. 87 (1984).

⁴⁸ The Roman jurists required that “there be a natural relationship between the object of the servitude and the use of dominant land”. See PLANIOL & RIPERT, *supra* note 33, at p. 2932; M. PARDESSUS, *TRAITÉ DES SERVITUDES* 23-34 (1810).

⁴⁹ “The service should be established, not in favor of a person but for land” (686 C.C.). The burdened land is referred to as “servient,” the land that stands to benefit is called “dominant.” Furthermore, affirmative obligations are not recognized as servitudes, see for example article 669 of the La.C.C. (MARCEL PLANIOL & GEORGE RIPERT, *TRAITÉ DE DROIT CIVIL FRANÇAIS* 919 (2d ed. 1952)).

⁵⁰ Furthermore, French courts imposed restrictions on the use of servitudes in land arrangements. The covenant must have been intended to bind subsequent holders of the property in question (*Guyomarc’h v. Coste*, [1964] A.J.P.I. 947, [1964] Gaz. Pal. I. 229 (Cass. Civ. 1re 1963), [1965] J.C.P. II. 14215 (Cass. Civ. 1re 1965)). Also, the covenant has to conform to all the limitations imposed by the Civil Code on *all* servitudes, the most important of which was that it must benefit the owner in the use and enjoyment of his estate rather than his personal capacity (McCarthy, *supra* note 36).

The requirement of prediality essentially means that there must be a “benefit to the dominant estate”. In this regard, “a principle of *utility* [...] sets the outer limits of party autonomy in the field of predial servitudes.⁵¹ By this token, servitudes that serve no useful purpose or expected social benefit will not be awarded status of predial servitude. In its weak form, prediality requires that a servitude right is formulated by the parties as to derive utility from the servient estate rather than ascribed to a designated owner.⁵² In strong form, the requirement of prediality entails that servitude obligation must be of such a nature that the land itself derives utility, regardless of the personal capacity of future or present owner of the affected land.⁵³

C. Conclusion

The legal concept of *numerus clausus*, prediality, and touch and concern contrast sharply with the doctrine of freedom of contract, namely that two parties to a private contract may agree on virtually any arrangement without government limitations.⁵⁴ The dichotomy between these contract and property paradigms results in a general tension between the principle of freedom to

⁵¹ A.N. YIANNPOULOS, *supra* note 47, at pages 9, 32, including references to the origins in Roman law of this principle, at footnote 16.

⁵² *Id.*, p. 33: “a servitude in favor of a named owner of an estate for the enjoyment of a swimming pool or of a tennis court in another estate is a limited personal servitude; but the same stipulation in favor of an estate, or any owner of an estate, gives rise to a predial servitude,” with reference to *Plaisance v. Gros*, 378 So.2d 178 (La.App. 1st Cir. 1979).

⁵³ Contrary to other civilian systems, Louisiana Civil Law explicitly provides that, in the absence of indications that the right is granted for the benefit of an estate or a particular person, a presumption of prediality will apply when the right granted is “of a nature to confer an advantage on an estate” (Article 733); the converse assumption applies when the right granted “is merely for the convenience of a person” (Article 734).

⁵⁴ Merrill and Smith note the peculiar dichotomy between property and contracts, observing that while contract rights are freely customizable, property rights are restricted to a closed list of standardized forms. See Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1 (2000).

contract and the societal need for standardization in property law. All Western Continental legal systems, including the modern European codifications, reflect this tension. Freedom of contract is promoted by recognizing and fully enforcing both nominate and innominate, and both predial and personal, forms of contract. Yet, at the same time, they limit private autonomy in property transactions and only enforce transactions pertaining to standardized (or nominate) forms of property.⁵⁵ This fundamental distinction between property and contract, although almost universal, remains poorly understood.⁵⁶ Why does freedom of contracting remain curtailed with regard to valuable assets in a time where freedom of contract is generally lauded?⁵⁷ Why are personal contracts on land outside of property law? What does it mean when “land” rather than “owners” need to benefit from a servitude? The next section provides some clarification.

⁵⁵ This implies that property rights are only enforced with real remedies if they conform to one of the “named” standardized categories. Conversely, the presumption is the opposite in the field of contracts: the legal system enforces all types of contracts unless they violate a mandatory rule of law concerning their object and scope.

⁵⁶ Merrill and Smith suggest that the goal of rules such as *numerus clausus* is the minimization of information costs. Because of the long-term (or perpetual) nature of most property arrangements, it is necessary to package property transactions in such a way that subsequent purchasers can easily recognize and respect their nature and content. *See* Merrill & Smith, *supra* note 54. *Compare* Henry Hansmann, and Reinier Kraakman, *Property, Contract, and Verifiability: Understanding the law's Restrictions on Divided Rights*, 2 THE BERKELEY LAW & ECONOMICS WORKING PAPERS 9 (2001). This argument fails to consider that information cost arguments cannot easily explain a large number of doctrines. Vertical and horizontal forms of fragmentation, for example, pose similar informational problems. Yet, legal systems are less liberal in permitting one form of fragmentation than the other. *See* Francesco Parisi, *Entropy in Property*, AMERICAN JOURNAL OF COMPARATIVE LAW 701-738 (2002). By the same token, most real covenants are as easily recordable and tractable as other real servitudes, yet legal systems treat such rights quite differently in terms of recognition and remedial protection. Most generally, information cost explanations lose most of their cogency as new information technologies increase the possibility of real-time and inexpensive access to public records. Nevertheless, the strong presumption against judicial recognition of new forms of property retains its power across legal systems.

⁵⁷ *See* F.H. BUCKLEY, FALL AND RISE OF FREEDOM OF CONTRACT (1999).

II. A FUNCTIONAL EXPLANATION OF SERVITUDE LAW: THE ECONOMICS OF FRAGMENTATION AND THE LAW OF ENTROPY

The restrictions on the free creation of servitudes become more intelligible when one appreciates that servitudes do not merely bring exchange benefits but also present lurking dangers for societal benefits.

The legal framework of land use law gains clarity when one regards servitudes as a *partitioning* of property rights.⁵⁸ Servitudes fulfill the function of dividing user rights between separately held possessory estates. This way they allow the acquisition of ‘owner’s entitlements’ instead of the more expensive possession itself.⁵⁹ In establishing a servitude, the use rights over a certain estate are divided among the owner and non-possessory servitude beneficiary. In economic terms, servitudes thus present a *division of property rights* where several parties obtain exclusionary right as to one particular estate.⁶⁰ Also, in the legal sense, it is sometimes recognized that the act of establishment of a servitude

⁵⁸ The “partitioning of property rights” we refer to is best defined by Alchian, and can be described as the situation when several people each possess some portion of the rights to use the land. See Armen A. Alchian, *Some Economics of Property Rights*, 30 (4) IL POLITICO 816 (1965). Alchian also provides examples of private land use arrangements such as servitudes (e.g. the right to grow wheat on it, to dump ashes over it,...).

⁵⁹ See Reichman I, *supra* note 6, 1184 (“These benefits would not be easily accomplished but for the largely positive attitude demonstrated by the Courts”).

⁶⁰ Readers, in particular those with a background in law, should note that legal conceptions and economic conceptions of the term ‘property right’ do not fully coincide. A ‘property right’, in the legal sense, typically refers to a relationship between a person and a good which is regarded “own, proper, propre, eigen” to the person. When we refer to ‘property rights’ in this article, we do not refer to any strictly outlined legal concept, but rather to the *economic conception* of property rights. To the economist, a property right refers simply to a class of rights that offers ‘*institutionally protected possibilities of individuals or groups to exert control on the actual or future use, and/or consumption, and/or allocation of a scarce resource.*’ It shall be clear that the range of this definition is very broad, covering various legal rights, beyond those assumed under a strict legal notion of property. For instance, to the lawyer, a right of use is merely a derivative right (servitude, dienstbarkeit, erfdienstbarkeit) from property itself. However, a right of use over land falls within the economic definition of ‘property rights’ since it bestows actual control over use and consumption of the resource to the owner of the servitude (e.g., the same applies to other derivative rights such as usufructus, trespass, etc).

is an alienation of a part of the property, whereby the laws governing alienation of property apply.⁶¹

Economic theory describes the potential societal costs of excessive property fragmentation.⁶² In the presence of complementarities, the use of resources independently controlled by different individuals leads to underuse and overpricing.⁶³

⁶¹ See YIANNPOULOS, *supra* note 47, at 329, with reference to 708 La. Civil Code.

⁶² Originally coined by Frank I. Michelman, *Property, Utility and Fairness: Comments on the Ethical Foundations of “Just Compensation” Law*, 80 HARVARD LAW REVIEW 1165-1258 (1968), Michael Heller revitalized the concept of anticommons property. In an article on the transition to market institutions in contemporary Russia, Heller discusses the intriguing prevalence of empty storefronts. Stores in Moscow are subject to underuse because there are too many owners (local, regional and federal government agencies, mafia, etc.) holding rights of exclusion. The definition of the anticommons as employed by Heller, *a property regime in which multiple owners hold effective rights of exclusion in a scarce resource*, provides a powerful tool for property theory. See Michael A. Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARVARD LAW REVIEW 621 (1998). For a recent treatment of the danger of over-fragmentation see e.g. Michael A. Heller, *The Boundaries of Private Property*, 108 YALE LAW REVIEW 1163-1223 (1999) (recognizing a “boundary principle” in property law that purports to prevent excessive fragmentation; and criticising the Supreme Court’s violation of the above principle by way of protecting increasingly minimal property fragments in a recent number of cases). See also Michael M. Heller and Rebecca Eisenberg, *Can Patents Deter Innovation? The Anticommons in Biomedical Research*, 280 SCIENCE (1998), excerpted as *Upstream Patents = Downstream Bottlenecks* in 41.3 LAW QUADRANGLE NOTES 93-97 (Fall/Winter 1998) (cautioning against the stationary effects of upstream patents on downstream patent markets); Douglas Lichtman, *Property Rights in Emerging Platform Technologies*, 29 (2) J. OF LEGAL STUD. 615 (2001) (identifying externalities in emerging markets of platform technology and peripheral sellers); Ben Depoorter & Francesco Parisi, *Fair Use and Copyright Protection: A Price Theory Explanation*, 21(4) INTERNATIONAL REVIEW OF LAW AND ECONOMICS 453-473 (2002) (upholding the usefulness – from a strategic costs perspective – of fair use in copyright law in the digital era); Thomas J. Miceli & C.F. Sirmans, *Partition of Real Estate; or, Breaking Up Is (Not) Hard to Do*, 29 (2) J. OF LEGAL STUD. 783 (2000) (examining the modern statutory remedy that allows courts to order forced sale of an undivided land under joint ownership).

⁶³ James Buchanan & Yong J. Yoon, *Symmetric Tragedies: Commons and Anticommons Property*, 43 J. LAW & ECON. 1 (2000) (demonstrating that the price charged by complementary monopolists is higher than that of a single agent monopolist); Norbert Schulz, Francesco Parisi & Ben Depoorter, *Fragmentation in Property: Towards a General*

The problem of fragmentation derives from a positive externality due to complementary features of exclusive use rights. The right to exclude is embedded in the control that each property owner exercises over the use of the common resource by other agents. Property excluders do not capture the external effects of their individual decisions. This leads to an excessive level of exclusion, with underutilization of the joint property as a result.

When ex-post opportunities arise which require exclusive use of various individual property right on a land parcel, these various fragments become complementary inputs into a more productive unit. Deadweight losses of underutilization or underinvestment occur when transaction costs create an impediment for an effective rebundling of complementary inputs. The specific characteristics of servitudes, whereby burdens on land may run with the land in *perpetuity*, requiring positive action to reaggregate the fragmented rights, amplify the danger of excessive fragmentation.⁶⁴

Consider a setting where *A*, owner of property Blackacre, has granted servitudes on Blackacre to *B* (to let *B*'s children play in the backyard) and to neighbour *C* (not to barbecue on the left side of the house). *D*, who has purchased Blackacre from *A*, and who wants to construct a department warehouse on Blackacre will be confronted with the existing easements granted by *A*. *D* needs to gather the fragmented property bundles from each monopoly holder in order to optimize the scale benefits from the new need.

Model, 158 (4) J. OF INST. & THEOR. ECON. 594-613 (2002) (proposing that the anticommons deadweight losses are an increasing function in the following three factors: (a) number of property fragments; (b) degree of complementarity of such fragments in subsequent uses; and (c) independence of the pricing of such inputs by the fragmented property owners).

⁶⁴ Posner intuitively recognized the costs of excessive fragmentation in the law of servitudes. The common law distinction between promises that attach to the land and restrictive covenants that are merely personal is explained in this light. In his words: "One problem is that having too many sticks in the bundle of rights that is property increases the costs of transferring property" POSNER, *ECONOMIC ANALYSIS OF LAW* 61 (3d ed. 1986).

Of course, according to Coase's theorem, such initial partitioning of property rights does not matter for the allocation of resources when all rights are freely transferable and transaction costs are zero.⁶⁵ Reaggregation into clusters through voluntary transactions between the individual owners will maximize total value of the resources. Once the ideal conditions of the positive Coase theorem are relaxed, over-fragmentation poses an engaging incident of "asymmetric transaction costs."⁶⁶ The presence of such asymmetry is due to the fact that the reunification of fragmented rights usually involves transaction and strategic costs of a greater magnitude than those incurred for the original fragmentation of the right. The intuition for such asymmetry is quite straightforward. A single owner faces no strategic costs when deciding how to partition his property. Conversely, multiple non-conforming co-owners are faced with a strategic problem, given the interdependence of their decisions. These strategic costs increase the transaction costs of any attempted reunification of the fragments into a unified bundle.

In the example above, the new owner *D* faces transaction costs and costs of strategic behavior and cognitive error that may surmount those incurred in the original division of Blackacre. The vice of the anticommons lies in the fact that the above mentioned costs not only manifest themselves as quasi-rents in the period of direct negotiation, but also influence behavior when they are an opportunity cost for the entrepreneur, not yet committed to the venture. Otherwise profitable projects will be foregone if the costs from externalities, free riders, and holdouts are too great. When transaction costs, strategic behavior and cognitive error by multiple owners with rights of exclusion prevent the successful bundling of complementary inputs into value enhancing opportunities, potential value may be wasted.⁶⁷ In this manner arrangements such as covenants

⁶⁵ Ronald H. Coase, *The Problem of Social Cost*, 3 J. OF LAW & ECON. 1 (1960).

⁶⁶ Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, 01-13 GEORGE MASON LAW & ECONOMICS RESEARCH PAPER 1. (2002).

⁶⁷ Interestingly, legal systems often encourage open access to common property (e.g., roads, navigation, communications, ideas after the expiration of intellectual property rights, etc.). See Carol M. Rose, *The Comedy of the Commons: Custom, Commerce, and Inherently Public Property*, 53 U. CHI. L. REV. 711 (1986). Rose describes the origins of, and justifications for, common law doctrines and statutory strategies that vest collective property rights in the "unorganized" public as a means of optimal resource management.

and easements that run with the land may impede land development. Interestingly, the problem is exasperated when multiple parties are involved.⁶⁸ Since today's predominant instance of land use arrangements running with the land has shifted from two-party uses to the governance of common interest communities,⁶⁹ the relevance of the economic model of fragmentation is amplified.⁷⁰

Most recently, Smith introduced the notion of semi-commons. See Henry E. Smith, *Semicommon Property Rights and Scattering in the Open Fields*, 29 J. LEGAL STUD. 131 (2000). These property arrangements consist of a mix of both common and private rights, with significant interactions between the two. Smith observes that this property structure allows the optimizing of the scale of different uses of the property (e.g. larger-scale grazing, smaller-scale grain growing, etc.) and in other cases the legal system creates and facilitates fragmentation. For instance, the social planner uses entropy to his benefit by using conservation easements and the fragmentation (e.g. multiplication) of administrative agencies overseeing of land development to slow the pace of suburban development. The idea of the anticommons in environmental regulation is explored further in Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739 (2002). In yet other instances, the owners themselves structure the non-conforming property arrangements. Most recently, Dagan and Heller present the case of the liberal commons as a compelling illustration of efficient commons. Hanoch Dagan, and Michael Heller, *The Liberal Commons*, 110 YALE L.J. 549 (2001). Less obviously, we could imagine cases of purposely chosen anticommons. Examples of purposeful dysfunctional property fragmentation can be found in situations where unified property owners want to generate anticommons problems as a way to control the use of their property beyond the time of their ownership. An interesting real-life example is offered by the case of nature associations and mountain-hiking clubs that utilize anticommons-type fragmentation as a way to ensure long-term or perpetual conservation of the land in its current undeveloped state.). Although problematic as a rule, non-conforming partitioning of property rights may be somewhat sensible in achieving specific policy goals or other objectives that property owners desire. These idiosyncratic arrangements are both a reflection of the individual's right to freedom of contract and a legitimate policy instrument for the urban planner. In sum, respecting individual autonomy while minimizing the undesirable deadweight losses that could result from these arrangements is the critical goal. See Francesco Parisi, *Freedom of Contract and the Laws of Entropy*, 10 SUPREME COURT ECON. REV. 65-90 (2002).

⁶⁸ Schulz, Parisi & Depoorter, *supra* note 63. See also Depoorter & Parisi, *supra* note 62.

⁶⁹ See e.g. Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75 (1998); Wayne S. Hyatt, *Symposium: Common Interest Communities: Evolution and Reinvention*, 31 J. MARSHALL L. REV. 303 (1998); Patrick A. Randolph, Jr., *Symposium: Common Interest Development Communities: Part II: Changing the Rules: Should Courts Limit the Power of Common Interest Communities to Alter Unit Owners' Privileges in the*

An intuitive understanding of the dangers of overfragmentation may thus provide insight into the reluctance of legal systems to grant property right protection to atypical property rights. As we demonstrate below, these insight shed light on the complicated matter of servitude law. The unbounded creation of all types of servitudes may be costly from a societal perspective. Yet, the question remains why we recognize certain land use contracts as property rights and refer others to the realm of personal contract. In the following Section, we turn to this selective property right treatment of land use arrangements.

III. MINIMIZING FRAGMENTATION LOSSES: FROM EX-ANTE TO EX-POST

A. *Common Law: From Touch and Concern to the New Restatement*

1. The *Ex Ante* Approach of Touch and Concern

Property right divisions create asymmetric transaction costs. Unlike ordinary transfers of rights from one individual to another, bundling fragmented property rights usually involves transaction and strategic costs higher than those incurred in the original act of division.⁷¹ These costs increase with the extent of fragmentation. In real property arrangements, this asymmetry generates a one-directional stickiness in the transfer of legal entitlements. Even reversing a simple property transaction can result in monopoly pricing by the buyer-turned-seller; reunifying property that has been split among multiple parties engenders even

Face of Vested Expectations?, 38 SANTA CLARA L. REV. 1081 (1998); Mark Fenster, *Community by Covenant, Process, and Design: Cohousing and the Contemporary Common Interest Community*, 15 J. LAND USE & ENVTL. LAW 3 (1999); David C. Drewes, *Note: Putting the "Community" Back in Common Interest Communities: a Proposal for Participation-Enhancing Procedural Review*, 101 COLUM. L. REV. 314 (2001).

⁷⁰ In this regard with respectfully disagree with Professor Gordley.

⁷¹ Schulz, Parisi & Depoorter, *supra* note 63.

higher costs given the increased difficulty of coordination among the parties and the increased opportunity for strategic pricing by the multiple sellers.⁷² An understanding the dangers of property fragmentation reveals a rationale for the age-old concept of touch and concern. As we shall see below, fragmentation theory also provides guidance the propensity and definition of touch and concern.

In *Mayor of Congleton v. Pattison*, we find the original definition of touch and concern, advanced as a matter of objective determination. A covenant touches and concerns the land if it “affect[s] the nature, quality or value of the thing demised, independently of collateral circumstances; or if it affected the mode of enjoying it,”⁷³ and not – as in *Vyoyan v. Arthur*⁷⁴ – “if it is not beneficial without regard to his continuing ownership of the estate” in which case it is “a mere collateral covenant upon which the assignee cannot sue.”⁷⁵ In a more recent applications of the formal, *intrinsic* test, several courts held that a servitude touches and concern the land if it *affects the parties’ interests as landowners’ such that the benefits and burdens could not exist independent of their ownership in the real property.*⁷⁶

⁷² Once fragmentation takes place, reunification requires the involvement of multiple parties, with transaction and strategic costs increasing with the number of parties. This creates a one-directional stickiness in the process of reallocating property among different levels of fragmentation.

⁷³ *Mayor of Congleton v. Pattison*, 103 Eng. Rep. 725, 727 (K.B. 1808).

⁷⁴ 5 Co.16 2 (1583).

⁷⁵ See also, *Hutchinson v. Thomas*, 190 Pa. 242, 42 A. 681; C.H.S. PRESTON & G.H. NEWSOM, RESTRICTIVE COVENANTS AFFECTING FREEHOLD LAND 15 (1939): “the protected land itself must be affected by the observance or non-observance of the covenants. On the one hand it is not enough that some personal advantage can be derived therefrom by successive owners.” The earliest leading cases on touch and concern consist of, e.g., *Kelly v. Barrett* [1924] 2 Ch. 379; *Rogers v. Hose Good*, [1900] 2 Ch. 388; *Zetland v. Driver*, [1937] Ch. 651; *Re Ballard*, [1937] Ch. 473.

⁷⁶ JOSEPH W. SINGER, PROPERTY LAW (1997), citing *Runyon v. Paley*, 416 S.E.2d 177, 182-183 (N.C.1992), POWELL, *supra* note 12, at 60-41 and RESTATEMENT OF PROPERTY, §537 (1944). See, e.g., *Columbia Club, Inc. v. American Fletcher Realty Corp.*, 720 N.E.2d 411 (Ind. App., Dec 03, 1999), where the obligation to maintain a drain tile was held to run because it was buried on the land.

In the original definition of touch and concern, real promises are assumed to benefit the land itself and not the individual land holder. Of course, land use promises never truly benefit “land,” they affect the “owners” of the land. How are we then to appreciate the supposedly objective, land-related nature of land use arrangement, as prescribed by the original definition of touch and concern?

This Article holds that, by excluding the running of personal promises, touch and concern reduces the inefficient use of land. By preventing the creation of atypical property rights, touch and concern bars the running of many land use arrangements that are most likely to impose deadweight losses upon society - even though the running of the agreement may create surplus for the contracting parties. What is the problem with atypical, personal property rights?

Personal, idiosyncratic agreements intrinsically have a higher probability of becoming obsolete once the ownership of the beneficent tract is transferred. More specifically, the original narrow definition may be understood as an attempt to allow the running of *only* those types of promises that will stand the test of time.⁷⁷ The paramount type of arrangements that may meet that objective are those that flow from the *natural* use of the property, with no regard to the preference set of the present or future owner. Such *intrinsic* land use arrangements provide a formal barrier against the creation of atypical property rights and are to be regarded as the paramount type of land use arrangements that fits the original definition of touch and concern.⁷⁸

⁷⁷ In this vein, Alexander's reading of Posner's law-and-economics analysis of touch and concern ascribes the idea that running covenants effectuate intent “by enforcing promises that, absent transaction costs, would have survived successive rounds of bargaining among subsequent generations of owners” (see G.S. Alexander, *Freedom, Coercion and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1998), with references at note 25 to POSNER, *supra* note 64, at 588-59; and Krier, *Book Review*, 122 U. PA. L. REV. 1664, 1678-1680).

⁷⁸ On the origin of touch and concern in English law, see CLARK, *supra* note 12, at pages 12-20.

Intrinsic servitudes that have a natural relation to the use of the land stand a greater chance of standing the test of time and will not need be removed when land is transferred. For instance, a subsequent buyer is likely to have, similar to the previous owner, a preference for retaining a view over the beach shore. Such “preference continuity” is less likely when a servitude pertains to a highly personal preference of the original party.

From a policy perspective, the decision to let a servitude run involves a tradeoff between the expected transaction costs and deadweight losses from removing the servitude when it transfer with the estate versus the costs of re-negotiating the original servitude when it does not transfer with the land. If the former outweigh the latter, a servitude should be allowed to run with the land and vice versa. As a substantive requirement, touch and concern thus bars the enforcement of non-intrinsic promises that are *prima facie* expected to create deadweight losses of fragmentation.

Consider the following equation:

$$p C(ATC) = (1 - p) C(T)$$

Where p is the probability that there will be a change in use such as to create anticommons costs, $C(ATC)$. $(1 - p)$ represents the converse probability that the initial transfer remains efficient and that, by not letting it transfer with the estate, individuals are forced to face a new transaction cost of re-negotiating the original servitude $C(T)$.⁷⁹ This equation illustrates the tilt point between efficient transfer versus non-transfer of a promise attached to land.⁸⁰ If judges were perfectly informed they would be able to employ this formula as an *ad hoc* rest whenever

⁷⁹ The probability of these costs lead Epstein to believe that no external doctrinal mechanism can *ex-ante* predict and reduce future transaction costs. Rather, the parties to the original transaction are in the best position to discount future transaction cost in the current value of the land, *see infra* Section IV.

⁸⁰ The equation could be supplemented by integrals with time and discount rates. The costs of fragmentation (ATC) are faced at a later point in time, while the renegotiation costs (T) are faced immediately. With high discount rates, one would want to let relatively more arrangements transfer with the estate.

questions arose as to the running of a promise. In reality, the formidable weighing costs involved in such a test would add great uncertainty to the assessment of servitudes.

Therefore it is perhaps understandable that the requirement of touch and concern remains a matter of positive law. Promises that clearly fall within one category are barred from running and those that do not may run with the land. A land use that is related to the natural use of the land is likely to satisfy $(1 - p) C(T) > p C(ATC)$, because the expected costs of not letting the agreement run with the land (they will need to be renegotiated whenever the title to the land changes hands) outweighs the expected costs of letting the agreement run (a new owner will need to negotiate release or termination of the promise). For example, without running with the land to pass to successive owners, a promise to allow natural water flow downstream from one parcel (dominant) to another parcel (servient) will require negotiations for the *reinstallation* of the promise every time ownership of one of the parcels change. On the other hand, allowing a personal promise to run – for example, one that requires one neighbour to play daily serenades at one’s neighbour balcony – will result in negotiations over the *removal* of the promise in the case of a change of ownership.

* * *

Of course, touch and concern provides merely a necessary, but not sufficient, condition for the “real” nature of the right. Although it is more likely that the costs ($p C(ATC)$) involved in having idiosyncratic promises run with the land will be higher than that of impersonal promises, which have a stronger chance of standing the test of time, it might be that certain kinds of promises, which are classified as real or predial, might not pass the test. In other words, the requirement of touch and concern provides only a *prima facie* case for the prevention of deadweight losses; *i.e.* it avoids the cost benefit analysis of the formula above when there is no connection with land.⁸¹ So, in light of the objective of minimization fragmentation losses, the test is incomplete.

⁸¹ The non-predial (personal) nature of the right obviously does not exclude that occasionally such an arrangement satisfies an anticommons integrated cost benefit analysis. Two reasons, however, might explain why the prediality test has not been construed as a mere presumptive test but as a formal requirement of the “real” nature of the

It must be noted also that the original definition of touch and concern, as it was developed in English decisions at the start of the 19th century, is highly restrictive and inflexible. It originates from a time where the burden of a covenantor, which requires the covenantor to do an affirmative act, even on his own land, did not run with his land.⁸²

Since the courts reorientated towards a more ‘substance’ based approach of touch and concern they have at the same time struggled to formulate an accurate definition of touch and concern.⁸³ The fact that today’s economy is more dynamic than in the 19th century might provide an explanation for the development of the more lenient, *ex-post*, substantive evaluations of land use arrangements documented in the following Section.

2. The *Ex Post* Approach of the New Restatement

Historically, common law courts have started to apply doctrines of ‘changed circumstances’ and ‘relative hardship’ to refuse enforcement of covenants that have lost their original purpose and value, without having to obtain the unanimous consent of the various right holders,⁸⁴ or in cases where

right: (1) The administrative cost and uncertainty that would be generated by courts getting involved in the formidable weighing of costs and benefits when determining the nature of the right; (2) Notice to third party purchasers that need to rely on the public record without much opportunity for an *ad hoc* cost benefit analysis in each situation.

⁸² See *Neponsit*, citing *Miller v. Clary*, 210 N.Y. 127, 103 N.E. 1114, L.R.A. 1918E, 222, Ann.Cas. 1915B, 872.) As the economy changed in ever new directions, it was felt as an artificial limitation to uphold these stringent criteria from previous era. And since the historic distinction between affirmative and negative covenants has gradually been abandoned by American courts, the older definition of touch and concern was relinquished in favor of an intent and substance directed approach, instead of the older, formal *locus*.

⁸³ See *supra* note 26.

⁸⁴ Note that the doctrine of changed circumstances applies only when changed conditions have adversely affected the benefited lot, the focus is not on the burdened lot. Relative hardship involves a relative cost/benefit analysis across both the burdened and benefited

enforcement will result in hardship to the owner of the burdened land, in disproportion to the benefit obtained from the enforcement, courts may decline servitude enforcement.⁸⁵ A subdivision restriction, for example, might require the use of outmoded architectural details or the use of outdated and inefficient building materials. When contractual annulments of such subdivision covenant proves difficult because of holdout problems between the various property-holder's rights courts can turn to these doctrines to annul the covenant.

Traditionally, courts have been reluctant to intervene with real covenants, even when changes in the surrounding environment (e.g., gradual transformation of a residential subdivision into a commercial or industrial area) had come to defeat the original purpose and value of the covenant for the parties. In recent years however, common law jurisdictions have increasingly held that the doctrine of changed circumstances is a defense to a claim for damages and may be used to terminate a real covenant.⁸⁶ If a sufficient number of covenant restrictions have been violated, courts tend to consider the general subdivision plan abandoned.⁸⁷

lot - both are intertwined since changed circumstances are crucial to a finding of relative hardship, *see* Rabin, *supra* note 7, 541-42, citing Korngold, Gerald. (1990), PRIVATE LAND USE ARRANGEMENTS, New York, McGraw-Hill, 400 (Sec. 11.07). These theories are a result of the contract law origin of covenants. For examples see *Eagle Enterprises, Inc. v. Gross*, 39 N.Y.2d 505, 384 N.Y.S.2d 717, 349 N.E.2d 816 (1976); *Landau v. City of Leawood*, 519 P.2d 676 (Kan.1974).

⁸⁵ This resembles a Kaldor-Hicks efficiency test. *See* N. Kaldor, *Welfare Propositions and Interpersonal Comparisons of Utility*, 49 ECONOMIC JOURNAL 542-549 (1939); J.R. Hicks (1939), *The Foundations of Welfare Economics*, 49 ECONOMIC JOURNAL 696-710. "At the heart of this criterion is the idea that if the maximum amount of winners (those who benefit from a proposed change) are willing to pay for a change is greater than the minimum amount losers (those who are adversely affected by the change) are prepared to accept in compensation, then the change should go ahead, regardless of whether compensation is paid." Cam Donaldson, Cam and Robert J. Oxoby, *Kaldor, Hicks, and Reference Dependency: Developing a New Willingness to Pay Method from Old Principles*, UNIVERSITY OF CALGARY, DEPARTMENT OF ECONOMICS, Discussion Paper 2002-01, p. 2 (2002).

⁸⁶ *Hess v. Country Club Park*, 213 Cal. 613, 2 P.2d 782 (1931); *Restatement of Property* § 564. For a more extensive discussion, see Dwyer, John P. and Peter S. Menell (1998), *Property Law and Policy: A Comparative Institutional Perspective*, Westbury, New York, Foundation Press, 1076p.; Stoebuck, William B. (1977), 'Running Covenants: An Analytical Primer', 52 *Washington Law Review* 861, 882-85. In their recommendation for a unified

Perhaps the move the increased reliance on changed circumstances presents a case for suggesting that “real” but non intrinsic (idiosyncratic) rights should instead be subjected to a rule of liberative prescription in order to bypass/avoid the fragmentation problems and losses associated with the perpetuity of those rights, even if not actively enjoyed.

In a similar vein, Rose and others have suggested that servitudes should be limited to some fixed period.⁸⁸ It is hard to think of servitudes that can be expected to last forever.⁸⁹ Arguing that servitudes should be geared to the ‘expected life of the development they serve,’ parties should therefore state a

concept of servitudes French and Reichman propose to have the touch and concern principle replaced by a ‘usefulness’ doctrine, supplemented with a ‘changed circumstances’ device. See French, *supra* note 6; Reichman I, *supra* note 6. The latter would serve the purpose to do away with servitudes that have become obsolete and more importantly to counteract ‘hold-out’ situations (in a pursuit of economic efficiency). Carol Rose objects to this proposal for several reasons. She remarks that a ‘usefulness’ concept within a relaxed doctrine of ‘changed circumstances,’ as suggested by French and Reichman, introduces another element of uncertainty into the law of servitudes. The prospect of the imposition of future present-day conceptions of obsolescence to their servitudes might discourage parties from land development. See Rose, Carol M. (1982), ‘Servitudes, Security and Assent: Some Comments on Professors French and Reichman’, 55 *S. Cal. L. Rev.* 1403-1417. See also Robinson, Glen O. (1991), ‘Explaining Contingent Rights: The Puzzle of “Obsolete Covenants”’, 91 *Columbia Law Review* 546 (a doctrine of changed circumstances undermines personal commitments and stable expectations). The application of changed circumstances to easements, as proposed by the Third Restatement met great opposition from a group of leading scholars, see *Daily Developments* 9/20/96, ‘Is the Restatement Killing Easements?’, <<<http://www.umkc.edu/dirt/1996.htm>>> (Last visited November 2002).

⁸⁷ Article 783 of the La. Civil Code holds that incertitude “as to the existence, validity, or extent of building restrictions is resolved in favor of the unrestricted use of the immovable.” When there is doubt as to the content or validity of a restriction (e.g., a question on the validity of a subdivision plan or real covenant), the doubt is resolved favoring the unrestricted use of property - a principle of *favorem libertatis*. See Parisi, *Entropy*, 615.

⁸⁸ See Rose, *supra* note 85, URBAN LAND INSTITUTE (1964); Ellickson, *supra* note 73 (1973).

⁸⁹ Rose cites servitudes that assure protection of natural and historic heritage, for instance preservation easements. See Rose, *supra* note 85.

limited length of time that they think the servitude will enhance the development, beyond that point the servitude would be open for renegotiation. Rose's approach to limitation of servitudes of a fixed duration, chosen by the parties at the outset and renegotiated periodically,⁹⁰ closely resembles that of the contractual model.⁹¹

Previously, findings of "changed circumstances" or "relative hardship" were to be masked under the touch and concern demand, requiring unqualified invalidation of the covenant. In a new addition to the Third Restatement, the American Law Institute has substantially increased the possibilities for modification and termination of servitudes. The Restatement takes the position that servitudes may be freely created and transferred because, under its new provisions, the problem of obsolescence and inalienability can be addressed more directly through termination principles.

The replacement of touch and concern by a requirement of illegality, unconstitutionality and violation of public policy has shifted the enquiry of servitude validity. Whereas under the test of touch and concern for the enforcement of the servitude it had to be established that the promise touched and concerned the land, under the new rule, those avoiding the enforcement of the servitude must establish that the arrangement is illegal, unconstitutional or in violation of public policy.

The Third Restatement emphasis on the accessibility of modification and termination of servitude arrangements is reflected first and foremost in Section 7.12 which provides special rules for the modification and termination of affirmative covenants. Section 7.12.(1) provides Courts with the option of termination or modification of covenants that require payments for services to the burdened estate, if the obligation becomes excessive in relation to the cost of

⁹⁰ See Rose, *supra* note 85. Similarly, Ellickson suggests standard termination procedures and maximum life spans for covenants. See Ellickson, *supra* note 73.

⁹¹ See *infra* Section V.

providing the services or to the value received by the burdened estate.⁹² Section 7.13, which provides for the modification and termination of servitudes where it is difficult to locate beneficiaries, makes it difficult or possible to rid the land of obsolete or inconvenient servitudes.⁹³ Similarly, Section 7.14 provides the extinguishment of servitude benefits that remain unrecorded, save for certain exceptions, by applicable recording act. These adaptations are sensible in a dynamic environment where land uses vary relatively rapidly over time.

B. *Civil Law: Liberative Numerus Clausus and Obsolete Covenants*

1. Liberative Numerus Clausus

As discussed above, modern legal systems around the world have in different ways manifested a general reluctance to recognize atypical property agreements as enforceable real rights.⁹⁴ In recent decades, however, courts and

⁹² The main concern seems to lie with perpetual covenants to pay for benefits in the past and covenants that require payment for services and facilities if payment is required without regard to use of the services or facilities, or if the service provider enjoys a monopoly position in relation to the burdened property owner. *See* RESTATEMENT, comment to 7.12. In addition, the RESTATEMENT requires that any modifications, in relation to the decrease in value to the burdened estate, should take into account any investment made by the covenantee in reasonable reliance on continued validity of the covenant obligation - unless the servient owner is only required to remunerate services actually used and if alternative sources of supply are available, see 7.12 (2)). Note that 7.12 does not apply to obligations to a community association covered under Chapter 6 or to reciprocal obligations imposed pursuant to a common plan of development.

⁹³ To prevent an eroding effect on the security of property rights, Section 7.13 of the (THIRD) RESTATEMENT also provides that land owners may notify the holder of the servient estate or by recording notice of their interests to prevent the workings of 7.13.

⁹⁴ *See, supra* Section I. Recently, common law courts have been relatively creative in figuring out ways to enforce contracts that create covenants designed to protect existing amenities in residential areas. Furthermore, legal systems occasionally will invent a new form of property. Despite these periodical innovations, this area of the law remains the most archaic. Rose, *supra* note 85, at 213-214, observes that the common law system of

legislatures in both civil and common law jurisdictions, attuned to the modern needs of land developers and property owners, have recognized new property arrangements.⁹⁵ The clearest example of this gradual expansion of standard property arrangements in civil law jurisdictions can be found in the creation of new *sui generis* real rights that run with the land.⁹⁶

In order to protect these newly recognized real rights, courts have developed an elaborate set of requirements to minimize the long-term effects of the non-conforming fragmentation of property, adopting a set of rules that differ from traditional property or contract law. Legal systems instead balance the need to mitigate fragmentation in property by creating perpetual restrictions on the use and alienability of property with the demands of landowners and property developers, wishing to exercise their contractual freedom to dispose of their property as they deem appropriate. Various legal traditions have employed different instruments to achieve this goal. For example, under modern French law, courts do not recognize atypical property covenants as sources of real rights, though they allow parties to approximate a real right by drawing on the notion of transferable obligations. Thus, French cases have construed contracts

estates in land now seem almost crude and antiquated. As the author ironically points out, references to the “fee tail” seldom fail to bring a smile. CAROL M. ROSE, WHAT GOVERNMENT CAN DO FOR PROPERTY (AND VICE VERSA), in THE FUNDAMENTAL INTERRELATIONSHIP BETWEEN GOVERNMENT AND PROPERTY 209-222 (Nicholas Mercurio et al. 1999).

⁹⁵ YIANNOPOULOS notes the inadequacy of building and zoning ordinances to satisfy the needs of local property owners (e.g., for the preservation of the subdivision style, etc.). He also mentions that land developers have, since the turn of the 20th century, imposed contractual restrictions limiting the use of property to enhance property values (e.g. restricting use to certain specified purposes, prohibiting the erection of certain types of buildings, or specifying the material or the colors that may be used in the construction). A.N. YIANNOPOULOS, CIVIL LAW PROPERTY COURSEBOOK: LOUISIANA LEGISLATION, JURISPRUDENCE, AND DOCTRINE (3rd ed. 1983). Rudden, *supra* note 40, observes, along similar lines, that although standard possessory interests involve exclusive and continuous possession, individuals may seek to acquire alternate interests such as a time-share, which is exclusive possession for repeated, short intervals. He thinks that servitude interests have seen the most innovation of late, and that security interests have seen the least innovation.

⁹⁶ This is analogous to the trend of the valediction of new (positive) easements witnessed under common law, *see* McCarthy *supra* note 36, at pages 6-8.

between property owners as sources of obligations that are effective against third persons.⁹⁷ In Germany and Greece, atypical property covenants are also not enforced as real rights, but, as Yiannopoulos⁹⁸ points out, by allowing the contractual remedies to extend beyond the original parties to the covenant produces similar effects.

Courts have also begun to circumvent the *numerus clausus* rule and recognize servitudes that benefit the holder in their personal capacity. For instance, after some hesitation the courts, both in France and Belgium, recognized that agreements prohibiting land from being used for industrial purposes or limiting its use to residences only are servitudes not to build (*servitutes non aedificandi*).⁹⁹ Also, they have given a broad interpretation to the exception for affirmative covenants accessory to an otherwise valid servitude.¹⁰⁰ For instance, an obligation to maintain a garden enclosed with a fence in front of the house was held accessory to an agreement not to construct anything else in front of the yard.¹⁰¹ As McCarthy notes, such a process may be regarded as the equivalent in the American system of enlarging the common law lists of negative easements.¹⁰²

⁹⁷ YIANNOPOULOS, *supra* note 86, observes that the French Supreme Court (*e.g.*, Civ., Dec. 12, 1899, D. 1900.1.361, with a note by Gény) recognized the effect against third parties of a property covenant by relieving the operator of a mine from liability for damage to the surface. *See also* JEAN-LOUISBERGEL, *LES SERVITUDES DE LOTISSEMENT A USAGE D'HABITATION* (1973).

⁹⁸ YIANNOPOULOS, *supra* note 86.

⁹⁹ McCarthy, *supra* note, citing *Wesemael v. De Jonge* [1933] Pas. Belge II 189 (Cour d'appel, Bruxelles) and *Dumouchel v. Catelain et Legrand* [1900] *Recueil des Arrêts des Cours d'appel de Caen et Rouen* 176 (Cour d'appel, Caen).

¹⁰⁰ *See*, PLANIOL, MARCEL. AND RIPERT, GEORGE, *TRAITE PARTIQUE DE DROIT CIVIL FRANÇAIS* 919 (2nd ed. 1952). ____

¹⁰¹ *Lebbe v. Pelseneer* [1965] J. Trib. 87 (Cour d'appel, Bruxelles 1964).

¹⁰² McCarthy, *supra* note 36, at page 6.

2. Obsolete Covenants

The civil law approach to servitudes now integrates a number of provisions as to the automatic extinction of servitudes. The French code, for instance, provides that a servitude will be extinguished when the land is in such a state that use cannot be made of them,¹⁰³ non-use by the owner during 30 years,¹⁰⁴ and when the owner of dominant estate and owner of the servient estate become one and the same.¹⁰⁵ More recently, these provisions have been amended with an additional provision that allows judges to terminate the servitude when it has lost all utility to the dominant estate.¹⁰⁶ The court may thus unravel situations of unproductive use by dissolving servitudes that encumber the servient estate when, at the same time, the servitude has lost all utility to the dominant estate.

IV. *EX ANTE* VERSUS *EX POST* APPROACHES: THE ECONOMIC RELATIVITY OF PROPERTY

The comparative analysis of the requirement of “touch and concern” and other similar restrictions in the law of servitudes reveals a gradual shift from an *ex ante* approach, exemplified by the enumerated rights approach of the early Civilian tradition, to an *ex post* approach, found in the “changed circumstances” doctrine of the new Restatement of Property or the emerging Civilian tests for non-conforming property arrangements.

Both attitudes reveal a full attention to the problems of property fragmentation, but address the same issue from different ends.

¹⁰³ Impossibility of use, see Article 703 C.C.

¹⁰⁴ Prescription of extinction of 30 years, Article 706 C.C.

¹⁰⁵ Confusion, Article 705 C.C.. *See generally*, ENCYCLOPÉDIE DALLOZ, Droit Civil IV, 829-834 (1951).

¹⁰⁶ *See, for example*, Article 710bis of the Belgian Civil Code, 5:78a. Dutch Civil Code.

The early civilian approach addresses the problem more rigidly, with a preventive attitude. The *numerus clausus* doctrine, for example, prevents the creation of atypical property arrangements and the consolidation of non-conforming agreements into perpetual property rights, by denying recognition and remedial protection to such arrangements.¹⁰⁷

Departing from such traditional attitude, however, the emerging approaches – best exemplified by the gradual abandonment of the “touch and concern” requirements at Common law, in favor of the more flexible “changed circumstances” doctrine – are, instead, remedial rather than preventive in nature. This allows the creation of atypical and non-conforming rights, outside the enumerated listing of traditional property law, but creates default mechanisms to facilitate the reunification of fragmented property, for those arrangements that, due to a change of circumstances, have lost their usefulness over time. This approach is remedial in the sense that it corrects *ex post* those situations of property fragmentation that are unlikely to be voluntarily corrected by the interested parties.

In light of such paradigmatic shift in the law of servitudes, one should naturally look for a plausible explanation. What has driven the gradual abandonment of the preventive *ex ante* approach in favor of the corrective *ex post* approach? For legal scholars, the temptation is great to provide the explanation often provided by comparative legal theorists: the shift is due to the gradual corrosion of traditional legal dogmas and the gradual increase in judicial pragmatism in adopting new solutions for the problem of property fragmentation. We shall resist such temptation and offer an alternative hypothesis: the “touch and concern” and prediality requirements for servitudes, and the enumerated approach to real rights in general, was formulated for the standard needs of rural

¹⁰⁷ This more drastic approach to the prevention of property fragmentation should not be surprising. The civil law is in fact well-known for pushing the theory of absolute ownership (dominium) quite far, so far that many believe that this is the reason that the civil law never developed the law of trust. See, e.g. Vera Bolgar, *Why No Trusts in the Civil Law?*, 2 AMERICAN JOURNAL OF COMPARATIVE LAW 204 (1953); Henry Hansmann & Ugo Mattei, *The Functions of Trust Law: A Comparative Legal and Economic Analysis*, 73 N.Y.U. LAW REVIEW 434 (1998).

and urban societies, and no longer fits the profile of the modern economy and changing needs of the modern land economy.

The usefulness of the *numerus clausus* doctrine, with the enumeration of recognized property forms, is indeed highly dependent on the needs of society and the structure of the economy. Evidence of the relativity of the categories of real property can be found already in Roman law, at the very outset of the conception of typical real rights. Roman law developed a *different* listing of the recognized forms of property in rural and urban societies, given the different likely needs of real property owners in the two social settings. Property servitudes that were serving a valuable and durable purpose in an urban setting (e.g., light easements, etc.) were not likely to have a similar long-lasting value in an agricultural and rural setting, and vice versa. As a result, servitudes that could validly be constituted on an urban property would not necessarily be recognized if imposed on agricultural land, and vice versa. In such setting, the validity and admissibility of the constituted servitude depended on the social and economic context in which it was operating. While the “touch and concern” requirement has been sufficiently flexible to be adapted to changing circumstances overtime, its limitations as an absolute limit to the creation of new forms of property has proved to be increasingly binding in the new economy.

It is not surprising, then, to see that the rigid approach of the *numerus clausus* doctrine, and to the specific restrictions to the creation of various nominate real rights has become increasingly tight and unfitting the changing needs of the modern world. In the modern world economy, the diverse needs of local communities and the special needs of a fast-changing industrial and digital economy pose ever changing challenges to traditional property dogmas and to the enumerated categories of property law, such as to render the rigid *ex ante* test of conformity obsolete and hardly useful. In such a changing and volatile environment, the gradual shift to a more flexible corrective approach is thus explainable as a way to accommodate new property needs, while minimizing the risk of persisting property fragmentation.

Likewise, other legal rules may create default reunification mechanisms. Time limits, statutes of limitation, liberative prescription, rules of extinction for

non-use, etc., can all be regarded as legal devices that facilitate the otherwise costly and difficult reunification of non-conforming fragments of a property right.

These legal solutions are analogous to a gravitational force, reunifying rights that, given their strict complementarity, would naturally be held by a single owner. This tendency towards reunification works to rebundle property rights in order to regenerate the natural conformity between use and exclusion rights and more generally, between any two complementary fragments of property.

V. FREEDOM OF CONTRACT: PROBLEM OR SOLUTION?

This Article suggests that there is a reason for imposing restrictions in the creation of atypical real rights. Such reason relates to the problems of anticommons that has recently been identified in the law and economics literature. To clarify the ideological underpinnings of our analysis, we have been stressing that excessive fragmentation is not the result of irrational or short-sighted choices of private parties. To the contrary, excessive equilibrium levels of property fragmentation may obtain even with fully rational individual choices made in a world of stochastic uncertainty.

In this context, this Article examined the alternative solutions of damage-type remedies or inalienability rules (e.g., *numerus clausus* doctrines) and other restrictions in the field of property law and concluded that most such solutions can be explained not on the basis of distrust for private autonomy, but on the basis of a realization of the asymmetric forces that can possibly lead towards increasing anticommons fragmentation.

The preceding analysis should, however, be qualified by an important corollary. If parties' autonomy were extended to the choice of remedy, by allowing the parties to choose the form of remedial protection at the moment of creating, transferring, or modifying a property right, the problem would in most instances disappear. If the freedom of contract of the parties could extend not only to the content of the property agreement, but also to the ability of the parties

to specify how their newly created property interest should be protected, rational actors would logically limit the adoption of real-type remedial protection to those instances in which the expected benefits of such “hard” protection would likely justify the costs of anticommons fragmentation in the future. Alternatively, they could still pursue their short term objective by creating property arrangements with “soft” protection, thus avoiding the expected costs of perpetual fragmentation.¹⁰⁸

In this context, it should be noted that much of the reason for the recent “real covenant” movement was driven by the legal inability of parties to create property arrangements that were at the same time “soft” in the remedial protection and opposable to third party purchasers as real rights. Absent such private autonomy in the choice of remedial protection, the parties would be facing a double-edged sword. If structured as contractual obligations, the covenants would have the benefit of a “soft” type protection but would not enjoy the opposability and durability of real-type arrangements. Alternatively, if structured as real rights, the real covenants would enjoy the benefits of a full-fledged property interest (including recordability and opposability to subsequent owners), but would consequently generate the costs of a “hard” type protection (including the problems of entropy and persisting fragmentation). Rational owners will choose the lesser of the two evils, but would not be able to combine the best attributes of each alternative solution by custom-tailoring the structure and remedial protection of their property interest.¹⁰⁹

It is thus important to conclude by noting that anticommons problems could be avoided either by (a) imposing restrictions on the parties' autonomy (e.g., *numerus clausus*) and adopting conservative remedial protection, or, with a methodologically opposite approach, (b) expanding the domain of individual autonomy and letting parties freely specify the type of remedial protection at the moment of creating, transferring or modifying a property interest. Anticommons

¹⁰⁸ Francesco Parisi, *Freedom of Contract and the Laws of Entropy*, 10 SUPREME COURT ECON. REV. 65-90 (2002).

¹⁰⁹ Francesco Parisi, *The Asymmetric Coase Theorem: Dual Remedies for Unified Property*, GEORGE MASON LAW & ECONOMICS RESEARCH PAPER, No. 01-13, 15-18 (2002).

problems can thus be conceived as resulting from too much freedom of contract or, conversely, as the result of too little contractual freedom in the structuring of property rights and the design of remedies.¹¹⁰

VI. CONCLUSION

From the limitations of the old institutions of contract law, courts gradually created a new body of law which allowed land use-related promises to attach to the title to property. At the same time, almost without exception, legal systems implementing the innovation of running promissory servitudes, have created atypical regimes to govern remedial protection and regulate these new rights. These are rules that diverge substantially from the traditional principles governing property or contracts. Commentators generally attribute these divergences to mere historical accidents. Contrary to the common wisdom in the literature, this Article explains why these anomalies might not be haphazard after all.

As we have argued, benchmark doctrines such as ‘touch and concern’ and the civil law principles of ‘prediality’ and *numerus clausus* have served as instruments to limit cases of dysfunctional fragmentation. The treatment of certain land-related promises as enforceable contracts between parties rather than real rights that run with the land in perpetuity, can be explained as an attempt to minimize the transaction and strategic costs resulting from dysfunctional property arrangements. Likewise, as we discussed in Section III, legal rules create default reunification mechanisms. In property law time limits, statutes of limitation, liberative prescription, rules of extinction for non-use, etc., can all be regarded as legal devices to facilitate the, otherwise costly and difficult, reunification of non-conforming fragments of a property right.

¹¹⁰ Francesco Parisi, *Freedom of Contract and the Laws of Entropy*, 10 SUPREME COURT ECON. REV. 65-90 (2002).

Furthermore, a comparative analysis of the common law requirement of “touch and concern” and other similar restrictions in the civilian law of servitudes reveals a paradigmatic shift in the law of servitudes from an *ex ante* approach of preventing the creation of atypical property arrangements, best exemplified by the enumerated rights approach of the early Civilian tradition, to an *ex post* approach of remedial protection from such arrangements, such as is found in the recent emphasis on a ‘changed circumstances’ doctrine in common law and civilian systems and the abandonment of the requirement of touch and concern in the most recent (Third) Restatement of Property.

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