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For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents

Gerald Korngold*

While property scholars have argued persuasively for a unified law of servitudes and for a unified law of defeasible fees, Professor Korngold argues that further unification is necessary: the law should integrate servitudes and defeasible fees involving land use controls. Because these interests are functional equivalents, judicial results should not depend on the historical label attached to the interest. Courts should address the tension between freedom of contract and free alienability values that inhere in both interests. Professor Korngold focuses on significant issues that arise in both defeasible fees and servitudes contexts, including the forfeiture remedy, ownership in gross, permissible subject matter, and termination and modification doctrines. A unified law can resolve these important issues satisfactorily and accommodate the intentions of parties who create land use controls. Either the courts or legislatures can accomplish this unification, which would further the goals of a modern, integrated property law.

I. Introduction

Real property law has developed many distinct interests designed to allocate to their holders a nonpossessory right in land—covenants, equitable servitudes, easements, rights of entry, possibilities of reverter, and executory interests.¹ Although these interests are functional equivalents evoking similar policy concerns, classical legal theory gives each a separate label and a distinct set of doctrinal rules. In this fragmented legal universe, the label is often the key to results. Arcane rules divert decision makers' attention from underlying policy issues and the larger fabric of private land use rights. History, doctrinal mystique, and separate jurisprudential origins help to perpetuate the disunity.

Commentators in recent years have articulated convincing arguments for the abolition of classical distinctions between the fee simple

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1. This list is not exhaustive. Licenses are also nonpossessory rights in land; they are not discussed in this Article, but might be analogized to easements for some purposes. Covenants, equitable servitudes, and easements are present rights. Rights of entry, possibilities of reverter, and executory interests are future interests associated respectively with fees simple on condition subsequent, fees simple determinable, and fees simple on executory limitation. Upon termination of the fee by the occurrence of the stated event (and for a fee simple on condition subsequent, action by the future interest holder), the future interest holder will have a possessory estate. Until that time, the restriction on the fee owner related to the stated event gives the future interest holder the equivalent of a current nonpossessory right. See RESTATEMENT OF PROPERTY §§ 23-25, 44-46 (1936).

subject to a condition subsequent and the fee simple determinable.² Consistent with those views, this Article treats the two estates as a single interest—a *fee on condition*. Commentators also have criticized the false distinctions between fees on condition and fees simple subject to executory limitation.³ In this Article, *defeasible fee* refers collectively to fees on condition and fees on executory limitation⁴ and *condition* refers to the limiting conditions in both interests.⁵ In addition, a number of commentators recently have urged the integration of covenants at law, equitable servitudes, and easements into a single interest known as a *servitude*.⁶

2. See, e.g., Chaffin, *Reverters, Rights of Entry, and Executory Interests: Semantic Confusion and the Tying Up of Land*, 31 *FORDHAM L. REV.* 303, 320-22 (1962) (arguing that distinctions between possibilities of reverter, rights of entry, and executory interests result in uneven regulation of future interests under the Rule Against Perpetuities); Dunham, *Possibility of Reverter and Powers of Termination—Fraternal or Identical Twins?*, 20 *U. CHI. L. REV.* 215, 234 (1953) (arguing that courts should “frankly put the decision whether to grant relief from forfeiture or not on the ground of need and intention”); Goldstein, *Rights of Entry and Possibilities of Reverter as Devices To Restrict the Use of Land*, 54 *HARV. L. REV.* 248, 274-75 (1940) (concluding that distinctions among grantors’ interests are only verbal); McDougal, *Future Interests Restated: Tradition Versus Clarification and Reform*, 55 *HARV. L. REV.* 1077, 1090-93 (1942) (criticizing the *Restatement of Property* for perpetuating unjustified distinctions through a “maze of ambiguous and easily reversible rules” that lack a “persuasive and consistent theme”); Waggoner, *Reformulating the Structure of Estates: A Proposal for Legislative Action*, 85 *HARV. L. REV.* 729, 752-53 (1972) (arguing for “a reformulation . . . which assures that [all] property interests which in substance operate the same way are grouped in the same categories even though they may be stated differently in form”); see also Jost, *The Defeasible Fee and the Birth of the Modern Residential Subdivision*, 49 *MO. L. REV.* 695, 708-10 (1984) (observing that distinctions among fees on condition mean little to courts and drafters of deed restrictions); Powell, *Determinable Fees*, 23 *COLUM. L. REV.* 207, 231 (1923) (noting that Illinois courts have been careless in using the term “defeasible fee”); Simes, *Restricting Land Use in California by Rights of Entry and Possibilities of Reverter*, 13 *HASTINGS L.J.* 293, 298-99 (1962) (noting that California courts construe the scope of a condition or limitation narrowly to prevent forfeiture); White, *Bringing Tennessee into the Twentieth Century Re Possibilities of Reverter, Powers of Termination and Executory Interests When Used as Land Control Devices*, 16 *MEM. ST. U.L. REV.* 555, 562-74 (1985) (pointing out the Tennessee courts’ history of inconsistent interpretations); Williams, *Restrictions on the Use of Land: Conditions Subsequent and Determinable Fees*, 27 *TEXAS L. REV.* 158, 164 (1948) (noting confusion over future interest distinctions in Texas appellate courts).

3. See, e.g., *Pritchett v. Turner*, 437 So. 2d 104, 109 (Ala. 1983); *Oak’s Oil Serv. v. Massachusetts Bay Transp. Auth.*, 15 Mass. App. Ct. 593, 598 n.10, 447 N.E.2d 27, 30 n.10 (1983); Chaffin, *supra* note 2, at 320-21; White, *supra* note 2, at 562-73.

4. The term “defeasible fee” is borrowed from the RESTATEMENT OF PROPERTY § 16 (1936).

5. As a technical matter, the term “condition” only refers to the restriction in a fee simple subject to a condition subsequent. See *id.* § 24. A fee simple determinable is limited by a “special limitation,” see *id.* § 23, while a fee simple subject to an executory limitation is restricted by an “executory limitation,” see *id.* § 25. All three limitations are triggered by the occurrence of an event stated by the conveyor.

6. See, e.g., C. Berger, *Some Reflections on a Unified Law of Servitudes*, 55 *S. CAL. L. REV.* 1323, 1337 (1982) [hereinafter Berger, *Reflections*]; Browder, *Running Covenants and Public Policy*, 77 *MICH. L. REV.* 12, 12-13 (1978); Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 *S. CAL. L. REV.* 1353, 1358-68 (1982); French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 *S. CAL. L. REV.* 1261, 1304-19 (1982); McDougal, *Land-Use Planning by Private Volition: A Framework for Policy-Oriented Inquiry*, 16 *ARIZ. L. REV.* 1, 4-7 (1974); Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes: Two Concepts, or One?*, 21 *HASTINGS L.J.* 1319, 1344-45 (1970); Reichman, *Toward a Unified Concept of Servitudes*, 55 *S. CAL. L. REV.* 1177, 1227-60 (1982); Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 *S. CAL. L. REV.* 1403, 1409-16 (1982); Sturley,

This Article argues for a further unification of private land use allocation devices. Specifically, the law should integrate defeasible fees involving land use controls and servitudes.⁷ These interests serve the same purpose: they create rights and corresponding restrictions related to the use of land.⁸ The tensions between freedom of contract rights and the policy disfavoring restrictions on land inhere in both interests. The confusion in cases involving recently created defeasible fees,⁹ the forthcoming *Restatement (Third) of Property (Servitudes)*,¹⁰ and current scholarship examining the relationship between economic efficiency and rules governing consensual agreements¹¹ underscore the need for integration. Logic, fairness, and the need to further land use policy goals compel an integration.

The "Land Obligation": An English Proposal for Reform, 55 S. CAL. L. REV. 1417, 1445-47 (1982). But see L. Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 368 (1986) [hereinafter Berger, *Integration*] (describing "impediments in the way of a meaningful integration," including different rules of creation and applicability of vertical privity concept); Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 660-61 (1985) (discussing the need for servitudes reform and arguing that the elimination of current restrictions in favor of freedom of contract is not a sensible solution). See generally Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEXAS L. REV. 433, 436-37, 450 (1984) (discussing conservation servitudes in the context of the unification of general servitudes). The American Law Institute currently is exploring an integration of these interests. See RESTATEMENT (THIRD) OF PROPERTY (SERVIDUTES) (Prelim. Draft No. 3, 1987).

7. Contrary to conventional wisdom, the law of defeasible fees offers the more valuable model for unification on certain key issues. See *infra* Part IV. Most of the cases discussed in this Article deal with fees on condition involving land use controls. Few reported cases discuss fees on executory limitation that create land use controls, and those that do involve gratuitous transfers. See *Oak's Oil Serv. v. Massachusetts Bay Transp. Auth.*, 15 Mass. App. Ct. 593, 598 n.9, 447 N.E.2d 27, 30 n.9 (1983); Jost, *supra* note 2, at 710. The theoretical and policy framework set out herein, nevertheless, is applicable to all types of defeasible fees allocating land use rights.

8. This Article focuses on conditions related to land use, as opposed to conditions controlling personal conduct such as marriage, childbearing, or matriculation.

9. See *Falls City v. Missouri Pac. R.R.*, 453 F.2d 771, 772 (8th Cir. 1971) (1971 condition requiring completion of improvements); *Union County v. Union County Fair Ass'n*, 276 Ark. 132, 134, 633 S.W.2d 17, 19 (1982) (1961 condition requiring holding of a fair); *Lincoln v. Narom Dev. Co.*, 10 Cal. App. 3d 619, 623, 89 Cal. Rptr. 128, 131 (1970) (1959 condition requiring erection of a building); *Girard v. Miller*, 214 Cal. App. 2d 266, 271, 29 Cal. Rptr. 359, 362 (1963) (1958 condition limiting tree removal and types of building); *Nielsen v. Woods*, 687 P.2d 486, 489 (Colo. Ct. App. 1984) (1978 condition requiring buyer to refinance the property conveyed); *City of Idaho Springs v. Golden Sav. & Loan Ass'n*, 29 Colo. App. 119, 123, 480 P.2d 847, 849 (1970) (1955 condition limiting use of conveyed property to operation of a swimming pool); *Genet v. Florida E. Coast Ry.*, 150 So. 2d 272, 273 (Fla. Dist. Ct. App.) (1957 condition requiring building of a warehouse), *cert. denied*, 155 So. 2d 551 (Fla. 1963); *Kaczynski v. Lindahl*, 5 Mich. App. 377, 379, 146 N.W.2d 675, 676 (1966) (deed between 1951-1960 with condition barring sale of alcohol); *Rourk v. Brunswick County*, 46 N.C. App. 795, 798, 266 S.E.2d 401, 403 (1980) (1957 condition requiring building of a health center); *County of Abbeville v. Knox*, 267 S.C. 38, 39, 225 S.E.2d 863, 864 (1976) (1965 condition requiring erection of a building); *Forsgren v. Sollie*, 659 P.2d 1068, 1068 (Utah 1983) (1960 condition restricting use of conveyed property to church or residential purposes).

10. RESTATEMENT (THIRD) OF PROPERTY (SERVIDUTES) (Prelim. Draft No. 3, 1987).

11. See, e.g., Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 711-19 (1973).

Part II of this Article reviews the foundation supporting integration and focuses on servitudes and conditions as functional equivalents. Shared attributes of the interests are examined—the contract and antirestrictions policy dichotomy, remedies, “in gross” interests, permissible subject matter, and termination and modification. Part III evaluates the advantages and disadvantages of unification, concludes that unification is desirable, and proposes legislative and judicial approaches to achieve integration. These observations are important to courts and legislatures both for the interpretation of interests under the current fractionalized system and for the implementation of an integrated law. This Article’s inquiry into the desirability of unification also reveals the critical issues raised by a merged law of defeasible fees and servitudes and in Part IV suggests how to resolve them.

II. The Foundation for Unification

A. *Servitudes and Conditions as Functional Equivalents*

A condition imposed in a defeasible estate and a servitude limiting a fee are methods for transferring from the fee owner to another person a nonpossessory ownership interest in the land burdened by the servitude or condition.¹² This ownership interest can be a negative restriction controlling activities on the burdened parcel, or an affirmative right requiring the servient owner to perform an act or tolerate an intrusion on her fee. Numerous nonpossessory ownership rights have substantively equivalent prohibitions or entitlements, and they differ only in the form chosen to memorialize the transaction. Landowners employ both conditions and servitudes to create negative restrictions on permissible uses of property,¹³ type and quality of construction,¹⁴ manufacture or sale of

12. See Reichman, *supra* note 6, at 1231.

13. See, e.g., *Downs v. Kroeger*, 200 Cal. 743, 744, 254 P. 1101, 1101 (1927) (real covenant; residential purposes); *Springmeyer v. City of S. Lake Tahoe*, 132 Cal. App. 3d 375, 378, 183 Cal. Rptr. 43, 44 (1982) (fee on condition; governmental purposes); *Jones v. Burns*, 221 Miss. 833, 844, 74 So. 2d 866, 869 (1954) (executory limitation; school uses; void under Rule Against Perpetuities); *Shipton v. Sheridan*, 531 S.W.2d 291, 293 (Mo. Ct. App. 1975) (same); *Rick v. West*, 34 Misc. 2d 1002, 1003, 228 N.Y.S.2d 195, 196 (Sup. Ct. 1962) (real covenant; residential purposes); *Murray v. Trustees of the Lane Seminary*, 1 Ohio Op. 2d 236, 237, 140 N.E.2d 577, 579 (C.P. 1956) (fee on condition; residential purposes); *City of Klamath Falls v. Bell*, 7 Or. App. 330, 334, 490 P.2d 515, 517 (1971) (executory limitation; library purposes; void under Rule Against Perpetuities).

14. See, e.g., *Firth v. Marovich*, 160 Cal. 257, 258, 116 P. 729, 730 (1911) (fee on condition; private residence and minimum value); *Shields v. Bank of Am. Nat'l Trnst & Sav. Ass'n*, 225 Cal. App. 2d 330, 332, 37 Cal. Rptr. 360, 362 (1964) (fee on condition; single-family dwelling); *Snow v. Van Dam*, 291 Mass. 477, 479-80, 197 N.E. 224, 225 (1935) (real covenant; single-family dwelling and minimum value).

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alcohol,¹⁵ and competing business activities,¹⁶ as well as to improve affirmative obligations such as a requirement to seek approval from an architectural committee before building¹⁷ or to maintain or build certain structures on the land.¹⁸ The remedies available for breach of condition and servitude differ theoretically,¹⁹ but the two vehicles are simply alternative ways to accomplish the same allocation of rights in land. That a third party holds the enforcement right with a fee simple subject to an executory limitation does not distinguish the interest from other land rights allocation devices; rather, it is similar to a servitude enforced, under third-party beneficiary theory, by a party other than the covenantee.²⁰ The condition and the servitude are essentially functional equivalents.

Traditionally, classification as a defeasible fee or a servitude depends on the language chosen by the parties.²¹ Defeasible estates arise when words of conveyance limit the fee and provide for automatic expiration in favor of the grantor on the occurrence of a stated condition,²² for a power of termination or right of entry in the grantor upon breach of a

15. See, e.g., *El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066, 1067 (Del. 1984) (real covenant); *Kaczynski v. Lindahl*, 5 Mich. App. 377, 379, 146 N.W.2d 675, 676 (1966) (fee on condition); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 438, 58 A.2d 89, 92 (Ch.) (real covenant), *aff'd*, 1 N.J. 508, 64 A.2d. 347 (1948); *Betts v. Snyder*, 341 Pa. 465, 467, 19 A.2d 82, 83 (1941) (executory limitation); *Benner v. Tacony Athletic Ass'n*, 328 Pa. 577, 579, 196 A. 390, 391 (1938) (real covenant); see also RESTATEMENT OF PROPERTY § 46 illus. 23 (1936) (fee on condition).

16. See, e.g., *Calumet Council Bldg. Corp. v. Standard Oil Co.*, 167 F.2d 539, 540 (7th Cir. 1948) (fee on condition prohibiting sale of fuels and lubricants); *Dick v. Sears-Roebuck & Co.*, 115 Conn. 122, 124, 160 A. 432, 432 (1932) (real covenant promising not to rent to retail or wholesale furniture businesses); *Shell Oil Co. v. Henry Ouellette & Sons Co.*, 352 Mass. 725, 726 n.2, 227 N.E.2d 509, 510 n.2 (1967) (real covenant promising not to use adjacent property for any purpose that would compete with any use of the conveyed property); *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 37, 42 N.W. 532, 532 (1889) (fee on condition prohibiting sale of liquor so as to create a monopoly).

17. See, e.g., *Girard v. Miller*, 214 Cal. App. 2d 266, 270, 29 Cal. Rptr. 359, 361 (1963) (fee on condition); cf. *McNamee v. Bishop Trust Co.*, 62 Haw. 397, 400, 616 P.2d 205, 208 (1980) (real covenant; approval required from managing committee); *Jones v. Northwest Real Estate Co.*, 149 Md. 271, 275, 131 A. 446, 448 (1925) (real covenant; approval required from grantor).

18. See, e.g., *Anderson v. Bradley*, 23 Conn. Supp. 87, 87, 177 A.2d 227, 228 (Super. Ct. 1961) (real covenant; maintain a dam and pond); *Genet v. Florida E. Coast Ry.*, 150 So. 2d 272, 273 (Fla. Dist. Ct. App.) (fee on condition; build a warehouse), *cert. denied*, 155 So. 2d 551 (Fla. 1963); *McNaughton v. Schaffer*, 314 S.W.2d 245, 246 (Mo. Ct. App. 1958) (real covenant; maintain a fence); *Betts v. Snyder*, 341 Pa. 465, 466, 19 A.2d 82, 83 (1941) (executory limitation; maintain farm buildings); *County of Abbeville v. Knox*, 267 S.C. 38, 39, 225 S.E.2d 863, 864 (1976) (fee on condition; build an industrial building).

19. See *infra* section II(C)(1); *infra* subpart IV(A).

20. See *Roehrs v. Lees*, 178 N. J. Super. 399, 405, 429 A.2d 388, 391, (App. Div. 1981); *Fey v. Swick*, 308 Pa. Super. 311, 316, 454 A.2d 551, 554 (1982); RESTATEMENT OF PROPERTY § 541 (1944).

21. Circumstances are important when the language is unclear. See *Second Church of Christ Scientist v. LePrevost*, 67 Ohio App. 101, 105-06, 35 N.E.2d 1015, 1017-18 (1941); RESTATEMENT OF PROPERTY § 44 comment m, § 45 comment p (1936).

22. RESTATEMENT OF PROPERTY § 44 (1936) (fee simple determinable).

condition,²³ or for an executory limitation in a third party upon occurrence of a stated event.²⁴ Real covenants, in contrast, are created by language of promise and usually appear in bilateral agreements rather than grants.²⁵

Recognizing different rules and results for servitudes and defeasible fees, however, is illogical when the only true distinction between them is language—the imperfect signs chosen to express the parties' intent—and the parties' underlying understandings are essentially the same.²⁶ Even if such a distinction were viable theoretically, it would be difficult to apply. One court demonstrated the confusion by stating that “this covenant grants a conditional estate, in the nature of a negative easement.”²⁷ Technical differences in language should not prevent a merger of easements and real covenants,²⁸ treatment of all fees on condition as functional equivalents,²⁹ or a rationalization of classical distinctions between fees on condition and fees on executory limitation;³⁰ similarly, these dif-

23. *Id.* § 45 (fee simple subject to a condition subsequent).

24. *Id.* § 46 (fee simple subject to executory limitation).

25. *See id.* § 44 comment m, § 45 comments n, p.

26. In *Letteau v. Ellis*, the court criticized rigid adherence to language distinctions:

We find it needless to follow appellants' arguments on the technical rules and distinctions made between conditions, covenants, and mere restrictions. In many, if not all, of the cases dealing with changed conditions, the terms have been used with apparent disregard of the niceties of differentiation, and the reasons advanced would have application to a resulting situation, regardless of the means of its creation.

122 Cal. App. 584, 588, 10 P.2d 496, 497 (1932); *see also* *Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 257, 139 A.2d 291, 297 (1958) (“The ancient land law imputed a thaumaturgic quality to language . . .”).

27. *Duester v. Alvin*, 74 Or. 544, 552, 145 P. 660, 663 (1915); *see also* *Strong v. Shatto*, 45 Cal. App. 29, 36, 187 P. 159, 162 (1919) (“[T]he conditions in the deeds are reservations in the nature of easements or servitudes . . .”).

28. *See* RESTATEMENT OF PROPERTY § 483 comment h (1944); C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND”: INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS 5 (2d ed. 1947); 3 R. POWELL & P. ROHAN, POWELL ON REAL PROPERTY ¶ 407, at 34-37 to -38 (rev. ed. 1987).

29. Courts not only confuse servitudes and defeasible fees, but also confuse the two traditional categories of fees on condition: the fee simple subject to a condition subsequent and the fee simple determinable. *See, e.g.*, *Calumet Council Bldg. Corp. v. Standard Oil Co.*, 167 F.2d 539, 543 (7th Cir. 1948) (referring to grantor's retained interest as both a possibility of reverter and a right of entry); *Shields v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 225 Cal. App. 2d 330, 334, 37 Cal. Rptr. 360, 363 (1964) (same); *Cole v. Colorado Springs Co.*, 152 Colo. 162, 167, 381 P.2d 13, 16 (1962) (finding that a “possibility of reverter” followed a fee simple subject to a condition subsequent); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 433, 58 A.2d 89, 95 (Ch. 1948) (same). This confusion has caused criticism of continued differentiation and a call for unification of the two interests. *See, e.g.*, *McDougal*, *supra* note 2, at 1090-92 (demonstrating the weakness of the purported distinction between the two different types of fees on condition); *Waggoner*, *supra* note 2, at 752-53 (calling for abolition of separate interests).

30. Some courts have difficulty distinguishing between fees on condition and fees simple subject to executory limitation. *See, e.g.*, *In re Pruner's Estate*, 400 Pa. 629, 637-38, 162 A.2d 626, 631 (1960) (observing that the interest at issue has been variously called a base or qualified fee, a fee simple subject to an executory devise, a fee simple defeasible, and a fee simple determinable); *see also* RESTATEMENT OF PROPERTY § 25 comment c (1936) (noting that executory interests differ from

ferences should not bar an integration of the law of servitudes and defeasible estates. With technical arguments eliminated, the policies that underlie both servitudes and conditions may be analyzed to determine whether their similarity justifies such an integration. Identifying and exploring the common policy concerns in conditions and servitudes also will indicate the issues that a unified law must accommodate.

B. The Contract and Antirestrictions Dichotomy

Servitudes and defeasible fees are treated as distinct areas of the law, even though the interests share the same policy conflict. Two major, conflicting themes—freedom of contract and a policy disfavoring restrictions on land—underlie both the law of servitudes³¹ and the law of defeasible fees and make case resolution difficult.

1. *Freedom of Contract.*—One major strain running through real covenant cases is the idea that freedom of contract validates these interests. Real covenants are enforced like other consensual arrangements between private parties.³² Treating real covenants as contracts supports values of moral obligation, efficiency, and freedom of choice. Similar freedom of contract values are inherent in defeasible fees, although they are obscured by various factors. A major obstacle to recognition of contract values is that defeasible fees are created by deed, a unilateral instrument, rather than by contract, a document of bilateral promises.

conditions subsequent because they cannot operate in favor of the conveyor). Courts especially have problems determining whether a conveyance providing for a reversion to the land retained creates a fee simple subject to executory limitation or a fee on condition. *See, e.g., Fayette County v. Morton*, 282 Ky. 481, 484-85, 138 S.W.2d 953, 955 (1940) (fee on condition); *Jones v. Burns*, 221 Miss. 833, 841, 74 So. 2d 866, 868 (1954) (executory limitation); *Shipton v. Sheridan*, 531 S.W.2d 291, 292 (Mo. Ct. App. 1975) (executory limitation); *County School Bd. v. Dowell*, 190 Va. 676, 686-88, 58 S.E.2d 38, 43 (1950) (fee on condition). Courts also have problems deciding which interest is created by a reversion mentioning a grantor's heirs. *See, e.g., Standard Knitting Mills, Inc. v. Allen*, 221 Tenn. 90, 96, 424 S.W.2d 796, 799 (1967) (executory limitation); *Williamson v. Grizzard*, 215 Tenn. 544, 548-49, 387 S.W.2d 807, 809 (1965) (fee on condition).

31. The tension between these values is most apparent in the real covenants part of servitudes, but these issues also require attention in connection with easements.

32. *See, e.g., Gruble v. MacLaughlin*, 286 F. Supp. 24, 31 (D.V.I. 1968) (enforcing restrictive covenant under freedom of contract doctrine); *Benton v. Bush*, 644 S.W.2d 690, 691 (Tenn. Ct. App. 1982) (“[R]estrictions, like other contracts, will be enforced according to the clearly expressed intentions of the parties.”). Commentators agree that the free will and intent of the parties is an important factor in determining outcomes. *See, e.g., Berger, Reflections, supra* note 6, at 1329 (acknowledging that the “intent of the parties should be given a dominant position in the interpretation of agreements”); *Epstein, supra* note 6, at 1358 (“[W]ith notice secured by recordation, freedom of contract should control.”); *French, supra* note 6, at 1305 (“[L]ike other agreements . . . the law should give effect to the parties’ intentions, enforcing the agreement until it becomes obsolete or unreasonably burdensome.”); *see also Ellickson, supra* note 11, at 713-14 (explaining why covenants generated by market forces tend to optimize resource allocation and promote efficiency); *Reichman, supra* note 6, at 1184 (recognizing that “[t]he practice of allowing free market transactions to allocate user’s rights contributes to the overall efficient utilization of land”).

Classical theory shows that an owner of a defeasible fee is not bound by a promise made respecting the land; rather, the law limits her ownership rights because she was granted less than a fee simple absolute. A restricting agreement is unnecessary because the "bundle of sticks" that the grantee received did not include the right in question.³³ For the purpose of analyzing freedom of contract values, however, this Article will treat defeasible fees as two-party contracts. Indeed, underlying any such unilateral grant is a bilateral agreement between the grantor and grantee in which the grantee accepts (and presumably pays for) a lesser estate. Viewed in this manner, a defeasible fee is functionally indistinguishable from a grant of a fee simple absolute with a corresponding promise by the grantee to the grantor in the form of a real covenant.³⁴ Some courts are not distracted by the classic distinction and recognize that a fee on condition involves a bilateral exchange and a contracting process.³⁵ Easements, like defeasible fees, are memorialized in unilateral deeds, but it is clear that courts interpret easements as bilateral agreements governed by the intent of the parties.³⁶

(a) *Moral obligation.*—Courts imply that conditions and servitudes should be enforced against successors to the original grantee or covenantor because of a moral obligation rooted in the notion of contract.³⁷ Some courts are concerned about the injustice of allowing a suc-

33. One court explained the right as follows:

By the deed . . . the entire and absolute interest in the estate did not pass to the grantee.

The restriction on the use of the premises contained in the deed operated as a qualification of the fee, and was in the nature of a reservation or exception out of the estate granted.

Parker v. Nightingale, 88 Mass. (6 Allen) 341, 346 (1863).

In real covenants, the promise is made by the original covenantor, and the running of burdens analysis links it to future owners.

34. For example, if a fee owner wanted to place restrictions on certain land she was selling, she could employ either an indefeasible fee with a real covenant or a defeasible fee to achieve the same end.

35. See, e.g., *Genet v. Florida E. Coast Ry.*, 150 So. 2d 272, 274 (Fla. Dist. Ct. App.) (noting that the grantee freely agreed to the imposition of the condition subsequent), *cert. denied*, 155 So. 2d 551 (Fla. 1963); *Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 257, 139 A.2d 291, 297 (1958) ("The universal touchstone today is the intention of the parties to the instrument creating the interest in land."); *Murray v. Trustees of the Lane Seminary*, 1 Ohio Op. 2d 236, 242, 140 N.E.2d 577, 585 (C.P. 1956) (observing that grantor and grantee "in good faith entered into a contractual obligation").

36. See RESTATEMENT OF PROPERTY pt. III introductory note at 3149 (1944); C. CLARK, *supra* note 28, at 65-91; 3 R. POWELL & P. ROHAN, *supra* note 28, ¶¶ 407-408; cf. *Warner v. Graham*, 181 Cal. 174, 184, 183 P. 945, 949 (1919) (indicating that both grantor's and grantee's intent are relevant in the construction of all instruments between the parties, including a deed).

37. See *Van Sant v. Rose*, 260 Ill. 401, 413, 103 N.E. 194, 198 (1913) (questioning whether anything could be "much more inequitable or contrary to good conscience" than permitting a party to profit from selling more rights in land than he purchased); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 951, 344 N.Y.S.2d 30, 31-32 (agreeing with lower court that evasion of bargained-for obligations "seems immoral"); cf. RESTATEMENT OF PROPERTY § 539 comment f (1944) (positing that parties "should be required to live up to their promises" and

cessor purchaser with notice of a condition to ignore the condition and contest its enforcement.³⁸ Decisions also reflect disapproval of a grantee's attempts to "enlarge his estate" and recover greater consideration by reselling the land free of a condition.³⁹ Although these decisions use the traditional terminology of unilateral conveyance and limited estates, one court, perhaps unconsciously, underscored the common link between conditions and servitudes by quoting *Tulk v. Moxhay*,⁴⁰ the leading equitable servitude case, on the issue of moral blameworthiness.⁴¹

(b) *Efficiency*.—Private agreements allocating nonpossessory land use rights help to achieve an efficient use of limited land resources. A party seeking a negative or affirmative right over a parcel of land need not acquire full title, but can purchase the limited entitlement from the fee owner. The purchaser does not have to devote the additional resources necessary to acquire a greater interest than she desires. Additionally, the fee owner can convert a portion of his ownership rights without having to sell more of the property than he wishes. Both the parties and society benefit by avoiding a wasteful allocation of resources. Such efficiency-maximizing transactions are only possible when the law validates and enforces them without exacting inordinate transaction costs.⁴²

Servitudes are justified because they encourage the efficient allocation of land resources.⁴³ Conditions often achieve the same goal. Courts hesitate to disturb the economic arrangement of a fee on condition be-

that this principle is one consideration in deciding whether to enforce a covenant). For a discussion of this notion in the servitudes context, see Korngold, *supra* note 6, at 450-51.

38. See, e.g., *Duester v. Alvin*, 74 Or. 544, 551, 145 P. 660, 663 (1915) (fee on condition); cf. *Hall v. Hall*, 604 S.W.2d 851, 853 (Tenn. 1980) (executory limitation; stating that purchasers will be charged with knowledge of any condition in the deed).

39. See, e.g., *Firth v. Marovich*, 160 Cal. 257, 260-61, 116 P. 729, 731 (1911) (fee on condition); see also *Murray v. Trustees of the Lane Seminary*, 1 Ohio Op. 2d 236, 242-43, 140 N.E.2d 577, 585-86 (C.P. 1956) (fee on condition; noting that nothing could be more inequitable than releasing the land from the conditions just because it is now adapted to a more valuable use).

40. 41 Eng. Rep. 1143 (Ch. 1848).

41. *Murray*, 1 Ohio Op. 2d at 243, 140 N.E.2d at 586 (quoting *Heidorn v. Wright*, 4 Ohio N.P. 235, 238 (Super. Ct. 1897), and its quoting of *Tulk*, 41 Eng. Rep. at 1144). The court stated, "Nothing would be more inequitable than the original purchaser should be able to sell the property for a greater price in consideration of the assignee being allowed to escape from the liability which he had himself undertaken." *Id.*

42. See *Ellickson*, *supra* note 11, at 713-14 (discussing covenants); *Lundberg, Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONT. L. REV. 199, 216-17 (1973) (discussing zoning variances); *Reichman*, *supra* note 6, at 1184, 1231, 1234 (discussing servitudes); cf. *French*, *supra* note 6, at 1263 (noting that public regulation often uses private servitudes as tools of regulation).

43. See *Kmiec, Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 39 (1981) (noting that efficiency is often considered the most desirable objective of a land use allocation system).

cause of the potential windfall to the fee owner if the condition holder's interest is not enforced.⁴⁴ Courts, unfortunately, do not express similar concern with the possible inefficiencies of the forfeiture remedy, which is granted for violations of conditions.⁴⁵

(c) *Freedom of choice.*—Land use allocation agreements allow parties to achieve their individual choices and to exert control over a small part of a large world. Freedom of contract encourages personal preferences, which become part of the arrangement whether cast as a condition or servitude. Courts find that the intention of the parties controls,⁴⁶ even though “one may disagree with their point of view.”⁴⁷ Other courts express this deference as the right of property owners to annex conditions onto property they are conveying.⁴⁸ While this phrasing obscures the bilateral nature of defeasible fee conveyances, it makes clear the regard for individual choice.

2. *The Antirestrictions Policy.*—Real covenants doctrine, while lauding freedom of contract values, expresses the concern running throughout real property law over burdensome restrictions on land.⁴⁹ Some defeasible fee cases also declare the importance of a “public policy

44. See, e.g., *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 442-43, 58 A.2d 89, 95 (Ch. 1948); *Murray*, 1 Ohio Op. 2d at 242-43, 140 N.E.2d at 585-86.

45. See *infra* section II(C)(1); *infra* subpart IV(A).

46. See, e.g., *Firth v. Marovich*, 160 Cal. 257, 260-61, 116 P. 729, 731 (1911) (fee on condition); *Genet v. Florida E. Coast Ry.*, 150 So. 2d 272, 274 (Fla. Dist. Ct. App.) (same), *cert. denied*, 155 So. 2d 551 (Fla. 1963); *Murray*, 1 Ohio Op. at 242, 140 N.E.2d at 585 (same); *State ex rel. Dep't. of Transp. v. Tolke*, 36 Or. App. 751, 757-58, 586 P.2d 791, 795 (1978) (same); *Hall v. Hall*, 604 S.W.2d 851 (Tenn. 1980) (executory limitation); *County School Bd. v. Dowell*, 190 Va. 676, 686-89, 58 S.E.2d 38, 42-44 (1950) (same). The Rule Against Perpetuities, however, may frustrate the intent behind an executory limitation. See 2A R. POWELL & P. ROHAN, *THE LAW OF REAL PROPERTY* ¶ 270(6) (rev. ed. 1986).

47. *Riverton Country Club*, 141 N.J. Eq. at 442, 58 A.2d at 94.

48. See, e.g., *Jeffries v. State*, 212 Ark. 213, 217, 205 S.W.2d 194, 195 (1947) (fee on condition); *Cornbleth v. Allen*, 80 Cal. App. 459, 463, 251 P. 87, 88 (1926) (fee on condition); *Parker v. Nightingale*, 88 Mass. (6 Allen) 341, 344 (1863) (restrictive covenant); *Kaczynski v. Lindahl*, 5 Mich. App. 377, 380, 146 N.W.2d 675, 676 (1966) (fee on condition); *Duester v. Alvin*, 74 Or. 544, 551, 145 P. 660, 663 (1915) (restrictive covenant).

49. See, e.g., *Spey v. Hayes*, 406 So. 2d 1176, 1178 (Fla. Dist. Ct. App. 1981) (“Covenants restricting the free use of private property must be strictly construed . . .”); *Caullett v. Stanley Stilwell & Sons, Inc.*, 67 N.J. Super. 111, 114-15, 170 A.2d 52, 54 (App. Div. 1961) (“While restrictive covenants are to be construed realistically . . . counter considerations, favoring the free transferability of land, have produced the rule that incursions on the use of property will not be enforced unless their meaning is clear and free from doubt . . .”); *Craven County v. First-Citizens Bank & Trust Co.*, 237 N.C. 502, 513-14, 75 S.E.2d 620, 629 (1953) (noting that restrictive covenants are to be strictly construed because they are in “derogation of the free and unfettered use of land”); *Voyager Village Property Owners Ass'n v. Johnson*, 97 Wis. 2d 747, 749, 295 N.W.2d 14, 15 (Ct. App. 1980) (“[R]estrictive covenants are not favored in the law and must be strictly construed in favor of the free use of land.”).

favoring free alienability of land”⁵⁰ or a “free and untrammelled use of property.”⁵¹ Yet courts give little explanation to the meaning of these concepts and fail to indicate their relevance to conditions. This lack of guidance is worsened by the inconsistency that results from applying the Rule Against Perpetuities⁵² to executory limitations but not to fees on condition. Courts must recognize that an antirestrictions policy essentially concerns marketability of land and limitation of the dead hand.

(a) *Marketability*.—Courts and commentators have criticized defeasible fees and real covenants for hindering the marketability of realty.⁵³ The presence of a condition should not have this effect. Theoretically, the market in lesser estates should function as smoothly as the market in fees simple absolute. A buyer, relying on the title system, could ascertain the ownership interests and discount her offer accordingly. She furthermore might choose to purchase not only the defeasible fee, but also the right created by the condition; she would thus obtain a fee simple absolute. Defeasible fees, however, have certain characteristics that create either excessive transaction costs (at the minimum) or an imperfect market (at the extreme).

Because defeasible fees typically are held in gross,⁵⁴ significant problems may develop in tracing the many successors in interest who own fragments of the possibility of reverter, right of entry, or executory interest.⁵⁵ Even if one is willing to buy out these condition holders, locating them may be inordinately expensive or even impossible.⁵⁶ The excessive transaction costs that result from this search do not exist with

50. *Peters v. East Penn Township School Dist.*, 182 Pa. Super 116, 118, 126 A.2d 802, 803 (Super. Ct. 1956) (fee on condition); *accord Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 148 (1855) (executory limitation).

51. *In re Conference of Congregational and Christian Churches*, 352 Pa. 470, 474, 43 A.2d 1, 3 (1945) (fee on condition). The parties sometimes recognize the problems with restricting land in perpetuity. *See, e.g., Lawyers Trust Co. v. City of Houston*, 359 S.W.2d 887, 888 (Tex. 1962) (deed stated that condition would terminate in 25 years).

52. The Rule is discussed *infra* notes 62-64.

53. *See, e.g., Grant*, 69 Mass. (3 Gray) at 148-49, 152 (executory limitation); C. CLARK, *supra* note 28, at 72-73 (real covenants); Goldstein, *supra* note 2, at 250-52 (fee on condition); *see also* W. BURBY, *HANDBOOK OF THE LAW OF REAL PROPERTY* §§ 337-338 (2d ed. 1954) (discussing restraints on alienation and noting that they are generally disfavored by courts as an unreasonable hindrance on marketability).

54. *See, e.g., Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 443, 58 A.2d 89, 95 (Ch. 1948); *Shields v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 225 Cal. App. 2d 330, 335, 37 Cal. Rptr. 360, 363 (1964); *Cornbleth v. Allen*, 80 Cal. App. 459, 463, 251 P. 87, 88 (1926). In gross ownership is discussed *infra* section II(C)(2).

55. *See Mountain Brow Lodge No. 82 v. Toscano*, 257 Cal. App. 2d 22, 28-29, 64 Cal. Rptr. 816, 820 (1967) (Stone, J., dissenting).

56. *See* R. WRIGHT & M. GITELMAN, *LAND USE* 208 n.1 (3d ed. 1982). Actions to quiet title and curative statutes may provide some help, but neither is a cost free and complete solution.

appurtenant servitudes because the interest holder must own land contiguous to the burdened property.

Because many buyers refuse to purchase a defeasible fee,⁵⁷ a defeasible fee owner is left to sell in a limited market or to acquire the holder's right in order to obtain the fee simple absolute for eventual sale. The second alternative may create a distorted market with the opportunity for a future interest holder to extract exorbitant payments.⁵⁸ A seller of a fee subject to a servitude, in contrast, has access to an active market. Financing difficulties also may hinder transferability. The grantee may have difficulty in obtaining financing because lenders might avoid transactions in which potential borrowers offer defeasible estates as security.⁵⁹

Defeasible fees also create marketability problems because of the uncertainty that results from the need to rely on unrecorded facts to determine whether a breach of the condition has occurred.⁶⁰ This difficulty arises with real covenants as well, but the gravity of the forfeiture remedy heightens the problem for conditions. Even after a breach has been determined, deciding when the statute of limitations begins to run creates further difficulties.⁶¹ This issue requires a clear resolution by the legislatures and courts.

(b) *The dead hand.*—The antirestrictions policy focuses on dead hand control of land. Servitudes and fees on condition allow perpetual burdens on land, which have potential negative effects on the burdened landowner and society. In contrast, the Rule Against Perpetuities,⁶² which does not apply to rights of entry, possibilities of

57. Goldstein, *supra* note 2, at 251.

58. See, e.g., *Lincoln v. Narom Dev. Co.*, 10 Cal. App. 3d 619, 623, 89 Cal. Rptr. 128, 131 (1970) (requiring completion of the condition or payment of "an acceptable sum"); *Alexander v. Title Ins. & Trust Co.*, 48 Cal. App. 2d 488, 492-93, 119 P.2d 992, 993 (1941) (charging a "substantial consideration," \$13,000, from five lot owners to release conditions); *Cole v. Colorado Springs Co.*, 152 Colo. 162, 165, 381 P.2d 13, 15 (1963) (requesting plaintiff to make various payments for releases over the years).

59. Lenders hesitate to enter such transactions primarily because of the risk of forfeiture. See ILL. ANN. STAT. ch. 73, para. 737.15a(d) (Smith-Hurd Supp. 1987) (statutory limitation on loans by life insurance companies secured by mortgages on defeasible fees); RESTATEMENT OF PROPERTY § 52 comment a (1936); Goldstein, *supra* note 2, at 252. Lenders, however, are willing to make loans secured by mortgages on leasehold estates, even though default by the tenant-mortgagor will terminate the estate and lender's security, when the landlord provides the lender with an opportunity to cure leasehold defaults or to foreclose for noncurable breaches. See, e.g., *Jacob Hoffmann Brewing Co. v. Wuttge*, 234 N.Y. 469, 472-73, 138 N.E. 411, 411-12 (1923). Whether similar devices with limited transaction costs could be developed for defeasible estates remains to be seen.

60. See, e.g., *Jost*, *supra* note 2, at 733; *Melli, Subdivision Control in Wisconsin*, 1953 Wis. L. REV. 389, 450-51; *Simes*, *supra* note 2, at 306.

61. See *Springmeyer v. City of S. Lake Tahoe*, 132 Cal. App. 3d 375, 380 n.3, 183 Cal. Rptr. 43, 45 n.3 (1982).

62. The common-law Rule Against Perpetuities provides that "no interest is good unless it must vest, if at all, not later than twenty-one years after some life in being at the creation of the

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reverter, or servitudes,⁶³ voids executory interests that might vest remotely and thus prevents an executory limitation from creating an endless tie.⁶⁴

Land restrictions imposed by a prior owner limit the autonomy of the current landholder. Even though the Rule Against Perpetuities does not apply to fees on condition and servitudes, its underlying purpose of preventing perpetual burdens on land, which frustrate the aspirations of current owners, cannot be ignored.⁶⁵ Some courts recognize the perpetuity danger with fees on condition.⁶⁶ One court stated that a “whimsical obsession [and] an expression of testator’s vanity” do not control the grantee.⁶⁷ Another court, in an action to quiet title by a successor to an original grantee, refused to void a condition limiting subdivision development to residential purposes. Although the court speculated

interest.” J. GRAY, *RULE AGAINST PERPETUITIES* § 201 (4th ed. 1942). The Rule has been codified in various forms, *see, e.g.*, KY. REV. STAT. ANN. § 381.215 (Michie/Bobbs-Merrill 1972); MICH. COMP. LAWS § 554.51 (1967); OHIO REV. CODE ANN. § 2131.08(a) (Anderson 1976), and recently restated, *see* RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.1 (1981). The Rule has been justified as increasing the alienability of property. *See id.* pt. I introductory note; Powell, *supra* note 2, at 232-33. *But see* Haskins, *Extending the Grasp of the Dead Hand: Reflections on the Origins of the Rule Against Perpetuities*, 126 U. PA. L. REV. 19 (1977) (arguing that the Rule increases rather than decreases dead hand control). Regardless of any policy justifications, the Rule is ingrained in property law. For a further discussion of the Rule, *see* 3 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* §§ 1115-1117 (2d ed. 1956).

63. The Rule Against Perpetuities has no application to interests retained by the grantor because reversions, possibilities of reverter, and rights of entry are inherently vested in nature. *E.g.*, *Mountain Brow Lodge No. 82 v. Toscano*, 257 Cal. App. 2d 22, 25 n.3, 64 Cal. Rptr. 816, 818 n.3 (1967); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 1.4(b) (1981). The Rule has never been applied to restrictive covenants and perpetual easements on the grounds that the social utility of such interests with respect to the use of land usually outweighs the social policy against the inalienability of property. *See* 5 R. POWELL & P. ROHAN, *supra* note 28, ¶ 670(2), at 60-69. Courts, however, often apply the Rule Against Perpetuities to void a gift over to the current owner of the original or neighboring tracts after a fee simple determinable. Because the Rule does not apply to possibilities of reverter, the opportunity for dead hand control ironically remains in the heirs of the grantor. *See, e.g.*, *Fayette County Bd. of Educ. v. Bryan*, 263 Ky. 61, 91 S.W.2d 990 (1936); *Donehue v. Nilges*, 364 Mo. 705, 266 S.W.2d 553 (1954).

64. Because a land use control might last indefinitely, an executory limitation that creates a land use control must be expressly limited to a maximum duration of 21 years, in addition to any specified life in being, to survive the Rule. *Cf. Blake v. Peters*, 46 Eng. Rep. 139, 141 (H.L. 1863) (finding a restraint upon cutting timber valid as to the first devisee, and implying such limitation would be invalid as to contingent fee holders in whom the property vests).

65. *See* 3 L. SIMES & A. SMITH, *supra* note 62, § 1117, at 13-14; *see also* Dukeminier, *A Modern Guide to Perpetuities*, 74 CALIF. L. REV. 1867, 1907-08 (1986) (advocating the application of the Rule to all defeasible fees, but in a modified form allowing for a wait-and-see period of 21 years).

66. *See, e.g.*, *Texas & Pac. Ry. v. Marshall*, 136 U.S. 393, 403 (1890) (stating that permanent restrictions are “a hindrance in the way of what might be necessary for the advantage of the railroad itself and of the community”); *Cast v. National Bank of Commerce Trust & Sav. Ass’n*, 186 Neb. 385, 391, 183 N.W.2d 485, 489 (1971) (holding that condition must be reasonable and must not affect estate’s marketability).

67. *Cast*, 186 Neb. at 391, 183 N.W.2d at 489 (refusing to enforce a condition subsequent requiring grantee legally to adopt testator’s last name because the condition is an indirect restraint on alienation).

on whether such conditions violated public policy, it felt constrained by *stare decisis*:

There may be strong grounds in public policy against arbitrarily limiting and restricting the manner of use of real property for indefinite periods, which may extend far beyond the existing conditions which make such limitations reasonable and justifiable when created; but our courts have held that such limitations are not void, as against public policy⁶⁸

Dead hand control also negatively affects society because land subject to historical ties cannot readily meet society's current needs.⁶⁹ Moreover, unbending enforcement of restrictions on land leads to frustration of other important policies, such as encouraging private subdivision arrangements,⁷⁰ democratic self-determination,⁷¹ and flexibility in private land use controls.⁷²

3. *Striking a Balance.*—Express references to the antirestrictions policy appear less frequently in cases involving fees on condition than in those involving real covenants. The reason for this difference is unclear. Perhaps the more intractable historical roots of fees on condition make them less subject to challenge.⁷³ Yet the courts' decisions do acknowledge the importance of the antirestrictions policy for fees on condition.⁷⁴

68. *Strong v. Shatto*, 45 Cal. App. 29, 36, 187 P. 159, 162 (1919). For additional facts relating to this case, see *Strong v. Hancock*, 201 Cal. App. 530, 531, 258 P. 60, 61 (1927).

69. See *Texas & Pac. Ry. v. Marshall*, 136 U.S. 393, 403 (1890).

70. See, e.g., *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 325, 317 N.W.2d 611, 612 (1982) (stating that subdivision building and use restrictions are favored by public policy); *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981) (noting that restrictive covenants enhance the value of subdivision property by protecting homeowners from adjacent construction that would impair land values). One court frustrated this policy when it held that a fee simple subject to a condition subsequent was enforceable only by the grantor and not by a homeowners association. *Girard v. Miller*, 214 Cal. App. 2d 266, 271, 29 Cal. Rptr. 359, 361-62 (1963). Frustration also occurs when a court finds a breach and allows reversion of title to the grantor, because the condition no longer can be enforced against the grantor by neighbors in the subdivision. *Jost*, *supra* note 2, at 732; *Melli*, *supra* note 60, at 450-51.

71. See *Korugold*, *supra* note 6, at 459, 468-69.

72. See *id.* at 461-63.

73. Determinable fees date from at least the thirteenth century, see 1 AMERICAN LAW OF PROPERTY § 1.10 (A. Casner ed. 1952) [hereinafter AMERICAN LAW], while courts have recognized equitable servitudes only since *Tulk v. Moxhay*, 41 Eng. Rep. 1143 (Ch. 1848).

74. Courts exhibit ambivalence about the antirestrictions policy in cases involving interpretation of a condition's duration. When no time limit is specified, some courts have held that negative restrictions must be fulfilled for only a reasonable time. See, e.g., *Independent Congregational Soc'y v. Davenport*, 381 A.2d 1137, 1139 (Me. 1978); *Forsgren v. Sollie*, 659 P.2d 1068, 1069 (Utah 1983). Other courts have stated that affirmative conditions requiring permanent maintenance of a building do not require that the building remain in perpetuity. See, e.g., *Texas & Pac. Ry. v. Marshall*, 136 U.S. 393, 403 (1890); *Mead v. Ballard*, 74 U.S. (7 Wall.) 290, 294-95 (1868); *Southwestern Presbyterian Univ. v. Clarksville*, 149 Tenn. 256, 266-67, 259 S.W. 550, 553 (1923). Still other courts have reached contrary conclusions, apparently favoring freedom of contract values over the value of free transferability. See, e.g., *Indianapolis, P. & C. Ry. v. Hood*, 66 Ind. 580, 584 (1879) (finding breach of condition that required permanent location when depot was abandoned after 17 years); *Riverton*

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Although judicial concern over forfeiture and emphasis on strict construction focuses on remedies,⁷⁵ it may also demonstrate an unease with the desirability of the restriction itself.

Regardless of most courts' failure to focus on the issues, the antirestrictions policy is relevant and important for both conditions and servitudes. Free alienability considerations must be balanced against freedom of contract values when crafting rules of law. Public policy must at times prevail over consensual agreements.⁷⁶

The Rule Against Perpetuities, employed by courts to void executory limitations, fails to provide an adequate response to the freedom of contract and antirestrictions dichotomy. The Rule does provide a rough accommodation by limiting the duration of executory limitations.⁷⁷ This helps to minimize the number of potential transferees of such rights, which reduces the transaction costs of tracing them. Moreover, the Rule limits dead hand control to a fixed time period. As discussed in Part IV, however, the Rule is ultimately an unsatisfactory solution because on the one hand, it does not adequately address some important antirestrictions issues, and on the other hand, it undermines freedom of contract values by unnecessarily frustrating the parties' intent.

Accommodating both values and striking a balance between the conflicting policies are most difficult when enforcement of the land use restriction is sought against a successor to the original grantee (as in the case of conditions) or covenantor (as in the case of real covenants). Unlike the original burdened party, successors have made no express promise nor accepted the condition.⁷⁸ Moreover, the passage of time often

Country Club v. Thomas, 141 N.J. Eq. 435, 442, 58 A.2d 89, 94 (Ch. 1948) (finding that the grantor "intended its prohibition to extend indefinitely into the future").

In the unusual case of Forsgren v. Sollie, 659 P.2d 1068 (Utah 1983), property was conveyed subject to the condition that the grantee would build a fence along the boundary before beginning any other construction. The court found that the grantee was required to build a fence within a reasonable time; failing that, the grantor had a right to terminate the estate. *Id.* at 1071. The decision is odd because it converts a negative restriction (not to build any buildings unless a fence is built first) into an affirmative duty (build a fence regardless of other buildings) and forces a forfeiture in the name of the antirestrictions policy.

75. See *infra* subsection II(C)(1)(a).

76. See, e.g., Letteau v. Ellis, 122 Cal. App. 584, 587-88, 10 P.2d 496, 497-98 (1932) (finding that the public policy against restrictions based on race overrode the parties' agreement); Riste v. Eastern Wash. Bible Camp, Inc., 25 Wash. App. 299, 301, 605 P.2d 1294, 1295 (1980) (relying on the rule against direct restraints on alienation to invalidate a restriction on public policy grounds).

77. See *supra* note 64. Similarly, the common-law rules against transfer of reversionary interests, see L. SIMES, HANDBOOK OF THE LAW OF FUTURE INTERESTS § 31, at 67-68 (2d ed. 1966), which have been abrogated by many courts, might be justified today as a blunt check on the proliferation of restrictions on land. For decisions repudiating the common-law rules against transfer, see Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 444-45, 58 A.2d 89, 95-96 (Ch. 1948); State ex rel. Dep't of Transp. v. Tolke, 36 Or. App. 751, 761-66, 586 P.2d 791, 797-800 (1978); Copenhaver v. Pendleton, 155 Va. 463, 489, 155 S.E. 802, 812 (1930).

78. Generally, freedom of contract considerations justify enforcing the rights agreed to by the

exacerbates the difficulties with ties on land.⁷⁹ Much of the law of real covenants developed to leap the theoretical hurdle of enforcing an agreement against a person who never made a promise.⁸⁰ Similarly, courts dealing with defeasible fees justify binding a successor owner on the basis that she has notice and accepts the condition when she acquires the lesser estate.⁸¹

C. Common Issues

Servitudes and defeasible fees, in addition to sharing the freedom of contract and antirestrictions conflict, raise similar issues as to the permissible extent of private land use agreements. These issues include remedies, "in gross" interests, the subject matter of land restrictions and rights, and termination and modification doctrines. The wooden categories separating the law of servitudes and conditions, however, often translate into different resolutions for the same problem. Moreover, courts rarely address these issues when dealing with executory limitations. Perhaps this is due to the comparatively few executory limitation cases involving land use controls;⁸² more likely, it is because of an unarticulated and incorrect belief that the Rule Against Perpetuities adequately resolves these problems.

This subpart examines the treatment of these common issues under current law and demonstrates how the contracts and antirestrictions policy dichotomy underlies them. Part IV shows how a unified law would resolve these issues.

1. Remedies: The Forfeiture Problem.—The key difference between defeasible fees and servitudes is the remedy available for breach of the land use right. Violation of a defeasible fee's condition results in forfeiture of the estate to either the grantor or a third party, while courts can enforce servitudes only by injunctions or damages.⁸³ This contrast

original parties to the servitude or defeasible fee. See *Whitney v. Union Ry.*, 77 Mass. (11 Gray) 359, 363 (1858).

79. Over time, the restriction may become less meaningful and more frustrating in light of changing conditions in surrounding land and new societal demands.

80. See *Newman & Losey*, *supra* note 6, at 1323 (stating that the privity of estate requirement was an attempt by the law to justify binding nonconsenting parties). The *Restatement of Property* also recognized the difficulty and provided separate chapters for enforcement between original parties and enforcement between successors. RESTATEMENT OF PROPERTY chs. 44, 45 (1944); *id.* pt. III scope note.

81. See, e.g., *Cornbleth v. Allen*, 80 Cal. App. 459, 464, 251 P. 87, 88 (1926); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 445, 58 A.2d 89, 96 (Ch. 1948).

82. E.g., *Oak's Oil Serv. v. Massachusetts Bay Transp. Auth.*, 15 Mass. App. Ct. 593, 598 n.9, 447 N.E.2d 27, 30 n.9 (1983); *Jost*, *supra* note 2, at 710.

83. Forfeiture in favor of the grantor occurs with fees on condition. The forfeiture occurs automatically with a fee simple determinable, whereas forfeiture must be enforced affirmatively by

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raises questions about the desirability and enforceability of consensual arrangements regarding remedies.

(a) *The attitude of the courts.*—The forfeiture remedy troubles the courts in fee on condition cases. To avoid forfeiture,⁸⁴ courts declare that whenever possible they will construe an interest as a real covenant rather than a fee on condition.⁸⁵ Additionally, the courts use various interpretive devices to prevent forfeiture with fees on condition. They construe such conditions strictly against the party trying to enforce them,⁸⁶ require language showing a clear intention to allow forfeiture,⁸⁷ narrowly construe the language and the facts to determine if the event triggering the condition has occurred,⁸⁸ recognize situations that constitute a waiver of the condition,⁸⁹ and insist on an intentional, not accidental, violation of the condition before allowing forfeiture.⁹⁰

the grantor or his successors with a fee simple subject to condition subsequent. *See* Donehue v. Nilges, 364 Mo. 705, 709, 266 S.W.2d 553, 554-55 (1954); Emrick v. Bethlehem Township, 506 Pa. 372, 379, 485 A.2d 736, 739 (1984). Forfeiture in favor of a third party occurs with executory limitations.

84. Courts prefer to construe a grant as a fee simple subject to a condition subsequent rather than a fee simple determinable because the latter's automatic forfeiture remedy theoretically prevents the use of equitable powers to avert the loss of property. *See, e.g.,* Mountain Brow Lodge No. 82 v. Toscano, 257 Cal. App. 2d 22, 25 n.2, 64 Cal. Rptr. 816, 818 n.2 (1967); Nielsen v. Woods, 687 P.2d 486, 489 (Colo. Ct. App. 1984); Hagan v. Board of Educ., 117 N.J. Super. 446, 453-54, 285 A.2d 63, 67 (1971); Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 890 (Tex. 1972); RESTATEMENT OF PROPERTY § 45 comment m (1936).

85. *E.g.,* Humphrey v. C.G. Jung Educ. Center, 714 F.2d 477, 483 (5th Cir. 1983); Oak's Oil Serv. v. Massachusetts Bay Transp. Auth., 15 Mass. App. Ct. 593, 601, 447 N.E.2d 27, 32 (1983); DeBlois v. Crosley Bldg. Corp., 117 N.H. 626, 629, 376 A.2d 143, 145 (1977); *Hagan*, 117 N.J. Super. at 453-54, 285 A.2d at 67; Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 440, 58 A.2d 89, 93 (Ch. 1948).

86. *See, e.g.,* Riverton Country Club, 141 N.J. Eq. at 440, 58 A.2d at 93; Forsgren v. Sollie, 659 P.2d 1068, 1071 (Utah 1983) (Howe, J., dissenting).

87. *See, e.g.,* Springmeyer v. City of S. Lake Tahoe, 132 Cal. App. 3d 375, 380, 183 Cal. Rptr. 43, 46 (1982); *State ex rel. Dep't of Highways v. LoBue*, 83 Nev. 221, 223, 427 P.2d 639, 640 (1967), *cert. denied*, 451 U.S. 971 (1981).

88. *See, e.g.,* Springmeyer, 132 Cal. App. 3d at 381, 183 Cal. Rptr. at 46; Kelley v. City of Lakewood, 644 P.2d 103, 105 (Colo. Ct. App. 1982); Regular Predestinarian Baptist Church v. Parker, 373 Ill. 607, 612-14, 27 N.E.2d 522, 523 (1940); Clark v. City of Grand Rapids, 334 Mich. 646, 656-57, 55 N.W.2d 137, 142 (1952). *But see* Genet v. Florida E. Coast Ry., 150 So. 2d 272, 274 (Fla. Dist. Ct. App.) (construing an interest as a condition rather than an option, and upholding forfeiture even though an equally plausible interpretation would not have worked a forfeiture), *cert. denied*, 155 So. 2d 551 (Fla. 1963).

89. *See, e.g.,* Letteau v. Ellis, 122 Cal. App. 554, 588, 10 P.2d 496, 497 (1932) (recognizing implied waiver of a racial restriction because surrounding lots were owned by blacks); Cole v. Colorado Springs Co., 152 Colo. 162, 167-69, 381 P.2d 13, 16-17 (1963) (finding that selling of unrestricted lots, not asserting the right of reverter upon breach, and granting releases constituted waiver of condition); Lawyers Trust Co. v. City of Houston, 359 S.W.2d 887, 891 (Tex. 1962) (allowing waiver of condition because of a seven-year hiatus between breach of condition and claim for reversion).

90. *See, e.g.,* Kinney v. State, 238 Kan. 375, 382, 710 P.2d 1290, 1296 (1985); McArdle v. School Dist., 179 Neb. 122, 125, 136 N.W.2d 422, 427 (1965).

Some courts adjudicating an action to quiet title have implied that the action does not involve a

In executory limitation cases, on the other hand, courts show little concern over the termination of the grantee's interest and rarely use limiting constructional devices to prevent forfeiture.⁹¹ Several factors may account for this indifference in particular cases: the forfeiture is not in favor of the grantor,⁹² the forfeiture is asserted against the original grantee,⁹³ the case involves a gratuitous transfer and thus the grantee loses no consideration, or the Rule Against Perpetuities voids so many executory interests that forfeiture becomes a moot issue.⁹⁴ Nevertheless, forfeiture is a concern to at least some courts dealing with fees on executory limitation,⁹⁵ and others should recognize its importance as well.

(b) *The problems with forfeiture.*—Courts do not adequately explain the problems with forfeiture and usually resort to maxims to justify their predisposition against it. A number of courts have explained that conditions are not favored because they “tend to destroy estates.”⁹⁶

forfeiture remedy. *See, e.g.,* Calumet Council Bldg. Corp. v. Standard Oil Co., 167 F.2d 539, 543 (7th Cir. 1948); Strong v. Shatto, 45 Cal. App. 29, 36-37, 187 P. 159, 162 (1919); Riverton Country Club v. Thomas, 141 N.J. Eq. 435, 446-47, 58 A.2d 89, 97 (Ch. 1948). *But see* Jeffries v. State, 212 Ark. 213, 220-21, 205 S.W.2d 194, 197 (1947) (permitting forfeiture in quiet title action); Anderson v. Jackson County Bd. of Educ., 76 N.C. App. 440, 445-46, 333 S.E.2d 533, 536-37 (1985) (same).

91. Interestingly, the *Restatement of Property* does not provide the same constructional devices to limit fees simple subject to executory limitation that it does to limit the finding and effect of fees on condition. *See* RESTATEMENT OF PROPERTY § 44 comments m, n, § 45 comments i, l-p (1936).

92. When property reverts to the original grantor, the loss may be especially bitter to the divested grantee. Although the purchase price theoretically was discounted by the condition, many people have a negative intuitive reaction to the original grantor getting the consideration and land, and the grantee retaining nothing. Courts may feel more comfortable using their enforcement power when a third party receives the land, and the grantor does not end up with what many perceive as a double recovery.

93. *Cf. Whitney v. Union Ry.*, 77 Mass. (11 Gray) 359, 364 (1858) (stating that rights to which original parties agree deserve enforcement).

94. When courts void an executory interest under the Rule Against Perpetuities, the forfeiture right held by the third party disappears. *See* 5A R. POWELL & P. ROHAN, *supra* note 28, ¶ 790. If the court holds that the present interest was a fee simple on a condition subsequent, the voiding of the future interest will convert the present interest into a fee simple absolute. *See Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 156 (1855). If, in the presence of clear language, the present interest is deemed to be a fee simple determinable, the forfeiture right is preserved for the grantor. *See Institution for Saving v. Roxbury Home for Aged Women & Others*, 244 Mass. 583, 587, 139 N.E. 301, 303 (1923).

95. *See, e.g., Pritchett v. Turner*, 437 So. 2d 104, 110 (Ala. 1983) (noting that a vague condition should not result in forfeiture).

96. *See, e.g., Springmeyer v. City of S. Lake Tahoe*, 132 Cal. App. 3d 375, 380, 183 Cal. Rptr. 43, 46 (1982); *Cole v. Colorado Springs Co.*, 152 Colo. 162, 167, 381 P.2d 13, 16 (1963); *Barrie v. Smith*, 47 Mich. 130, 130, 10 N.W. 168, 168 (1881); *Gange v. Hayes*, 193 Or. 51, 61, 237 P. 2d 196, 200 (1951); *Martin v. Norfolk Redevelopment & Hous. Auth.*, 205 Va. 942, 947, 140 S.E.2d 673, 677 (1965); *see also* 4 J. KENT, COMMENTARIES ON AMERICAN LAW *129 (offering an early articulation of this view). *But see Calumet Council Bldg. Corp. v. Standard Oil Co.*, 167 F.2d 539, 542 (7th Cir. 1948) (“However, ‘if the intention . . . is clear and the restrictions are not opposed to a settled rule of law or public policy, courts will give effect to them.’” (quoting *Dunne v. Minsor*, 312 Ill. 333, 340, 140 N.E. 842, 844 (1924))).

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Others have declared that “the law does not favor forfeiture.”⁹⁷ These statements do little to illuminate the forfeiture issue. This concern over forfeiture in fees on condition contrasts sharply with real covenants, which are routinely enforced even though the fee’s value is reduced to a very small percentage of its unencumbered value.⁹⁸ Is this concern over forfeiture another example of the traditional Anglo-American view that ownership of land is highly regarded for its mystical, rather than economic, value? What justifies the supervention of the remedy to which the parties agreed?

To understand the place of the forfeiture remedy in a unified law of conditions and servitudes, one must first examine the real difficulties with forfeiture. By nature, forfeiture is drastic because it allows a remedy that is in most cases grossly disproportionate to the breach. While it is true that the parties agreed to it, the courts appropriately should hesitate to enforce forfeiture if fundamental fairness is at stake.⁹⁹

Another major negative effect of the forfeiture remedy is underutilization of land. Defeasible fee owners may not fully use the land for fear of losing the land, the value of their improvements, and any market

97. See, e.g., *Board of Comm’rs v. Russell*, 174 F.2d 778, 781 (10th Cir.), cert. denied, 338 U.S. 820 (1949); *Springmeyer*, 132 Cal. App. 3d at 380, 183 Cal. Rptr. at 46; *Atkins v. Anderson*, 139 Cal. App. 918, 920, 294 P.2d 727, 729 (1956); *Forsgren v. Sollie*, 659 P.2d 1068, 1069 (Utah 1983).

98. See, e.g., *Sax, Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 725-26 (describing loss of fee value due to imposition of real covenant). The relative hardship doctrine alleviates some of the disproportionate hardship resulting from enforcement of real covenants. See *infra* note 137.

99. Chancellor Kent recognized that “in many cases [forfeiture is] hardly reconcilable with conscience.” 4 J. KENT, *supra* note 96, at *129; see also *Springmeyer*, 132 Cal. App. 3d at 380, 183 Cal. Rptr. at 45 (“[Reversion’s] all or nothing character has an inherent potential for working inequity since it provides no occasion for comparison of the severity of the remedy with the gravity of the breach.”); *Richter v. Distelhurst*, 116 A.D. 269, 273, 101 N.Y.S. 634, 637 (1906) (holding a condition restricting grantee from erecting any buildings of a certain class invalid because forfeiture is not justified when the condition is inserted by the executors or trustees to protect their own property rather than the property of the grantor).

Theoretically, the grantor receives no windfall when forfeiture leaves him with both the land and the consideration originally paid by the grantee. According to contract paradigm, this results because the parties knew or should have known the economic ramifications of their choice of condition and adjusted their bargain accordingly. Courts might still object to this economic result out of a belief that, despite contract theory, not all parties fully appreciate the effect of forfeiture. Cf. *Mead v. Ballard*, 74 U.S. (7 Wall.) 290, 295 (1868) (construing the intent of a condition subsequent providing for a “permanent” building on the property satisfied if the condition was fulfilled within a year from conveyance); *Board of Comm’rs v. Russell*, 174 F.2d 778, 781 (10th Cir.) (stating that forfeiture provisions will be strictly construed and will be denied unless the language of the parties is clear), cert. denied, 338 U.S. 820 (1949); *Nielsen v. Woods*, 687 P.2d 486, 489 (Colo. Ct. App. 1984) (declining to enforce a forfeiture when the party seeking it can otherwise be made whole); *Genet v. Florida E. Coast Ry.*, 150 So. 2d 272, 274 (Fla. Dist. Ct. App.) (enforcing condition subsequent provision on a grantee who freely agreed to the condition but failed to meet it), cert. denied, 155 So. 2d 551 (Fla. 1963); *County of Abbeville v. Knox*, 267 S.C. 38, 225 S.E.2d 863 (1976) (holding that a complete and absolute estate created in a granting clause cannot be diminished by subsequent provisions in the deed).

appreciation through forfeiture,¹⁰⁰ which may result from an inadvertent violation, unrelated to the legitimate use of the property. Landowners who are uncertain whether a specific act constitutes a violation of the condition will be especially reluctant to go forward with the act. Even when the condition is only slightly ambiguous, the landowner might underutilize the land given the enormity of the loss if she subsequently is proved wrong. Landowners will not act efficiently or freely when the specter of forfeiture haunts them;¹⁰¹ this results in personal and societal detriment. Real covenants do not create this potential for underutilization because upon breach the owner faces either an injunction ordering cessation of the prohibited activities or monetary damages, neither of which is as cataclysmic as forfeiture of the land. The antirestrictions policy focuses on inefficient and unfair land ties and mandates mitigation of the forfeiture remedy.

2. *Ties Among Neighbors: The "In Gross" Issue.*—Parties may wish to create a servitude or condition "in gross," in which the interest holder does not own any land benefited by the restriction and holds the right without respect to any other land owned by her.¹⁰² This interest contrasts with an "appurtenant" right or restriction that benefits nearby land held by the interest holder.¹⁰³ Enforcement of in gross land use rights permits a person removed from an area to control, by exercising a veto power or requiring affirmative acts, a potentially unlimited amount of land and landowners. This potential raises antirestrictions problems not present with appurtenant interests. Both the law of servitudes and fees on condition have struggled with the in gross ownership issue. Cases involving executory limitations have yet to focus on the in gross issue; moreover, the application of the Rule Against Perpetuities sometimes exacerbates the in gross problem by voiding executory interests held by neighbors to the benefit of reversionary interests owned by successors to the grantor.¹⁰⁴

100. See Melli, *supra* note 60, at 451; *cf.* *Barrie v. Smith*, 47 Mich. 130, 133, 10 N.W. 168, 169 (1881) (leaving open the question whether a grantee is statutorily entitled to compensation for improvements made on the strength of grantor's seeming acquiescence).

101. Testing the condition in an action to quiet title may be of little help because some courts will not void conditions in that context, *e.g.*, *Strong v. Shatto*, 45 Cal. App. 29, 37, 187 P. 159, 162-63 (1919), and others show that they treat quiet title actions differently from enforcement cases, *see, e.g.*, *Calumet Council Bldg. Corp. v. Standard Oil Co.*, 167 F.2d 539, 543 (7th Cir. 1948); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 447, 58 A.2d 89, 97 (Ch. 1948).

102. See RESTATEMENT OF PROPERTY §§ 453-454 (1944); 2 AMERICAN LAW, *supra* note 73, § 9.32.

103. See 5 R. POWELL & P. ROHAN, *supra* note 28, ¶ 620(2).

104. See *Fayette County Bd. of Educ. v. Bryan*, 263 Ky. 61, 66, 91 S.W.2d 990, 993 (1936); *Donehue v. Nilges*, 364 Mo. 705, 711, 266 S.W.2d 553, 556 (1954).

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(a) *Judicial treatment.*—Under classical doctrine, real covenants are not enforceable when the benefit is in gross.¹⁰⁵ In contrast, fees on condition traditionally are created and enforced without an appurtenancy requirement.¹⁰⁶ Despite this, courts reveal an antipathy toward in gross fees on condition.¹⁰⁷ Some courts have specifically rejected enforcement of a possibility of reverter or a right of entry when the grantor or his successor owns no benefited land.¹⁰⁸ Some of these courts do not indicate their reasoning,¹⁰⁹ while others rely on contract-based theories and find inadequate intent to benefit the grantor,¹¹⁰ lack of consideration,¹¹¹ or absence of mutuality.¹¹² One court, however, addressed dead hand control when it denied enforcement of a condition against the successor to the original grantee, stating that a grantor may not enforce “as his fancy may dictate” when the breach “in no way tends to his prejudice.”¹¹³ Similarly, the rule of construction providing that courts should construe a restriction as a covenant rather than a condition when the grantor retains benefited land¹¹⁴ appears to favor appurtenant over in

105. A benefit in gross exists when the holder of the condition, the easement owner, or the covenantee (real covenants) owns no appurtenant land benefited by the interest so that the interest only operates to benefit its owner personally, instead of in relation to or appurtenant to any property. *See, e.g.,* *Chandler v. Smith*, 170 Cal. App. 2d 118, 120, 338 P.2d 522, 523 (1959); *Orenberg v. Johnston [Horan]*, 269 Mass. 312, 315-16, 168 N.E. 794, 795-96 (1929); *Minch v. Saymon*, 96 N.J. Super. 464, 468, 233 A.2d 385, 387 (1967); *Wilmurt v. McGrane*, 16 A.D. 412, 416, 45 N.Y.S. 32, 34 (1897).

There are exceptions to the nonenforceability rule. *See* Korngold, *supra* note 6, at 473-76. Easements generally are enforceable when the benefit is in gross. Various commentators suggest that a unified law of servitudes should follow the model of easements. *See* Browder, *supra* note 6, at 43; Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 168, 180 (1968); French, *supra* note 6, at 1307; Reichman, *supra* note 6, at 1236-37.

106. *See, e.g.,* *Shields v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 225 Cal. App. 2d 330, 335, 37 Cal. Rptr. 360, 363 (1964); *Cornbleth v. Allen*, 80 Cal. App. 459, 463, 251 P. 87, 88 (1926); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 443, 58 A.2d 89, 95 (Ch. 1948). In both *Riverton Country Club* and *Shields* at least one of the parties seeking enforcement of the condition did own benefited land or an easement. Similarly, no doctrine requires that one enforcing an executory limitation must own nearby land.

107. Some parties recognize that in gross conditions create difficulties, and expressly provide in the deed for the condition to run with the benefited tract. *See, e.g.,* *Hunt v. Coal Run Homemakers Club*, 440 S.W.2d 267, 267 (Ky. 1969). Their good intentions, however, are often frustrated by courts that apply the Rule Against Perpetuities to such provisions. *See, e.g.,* *Fayette County Bd. of Educ. v. Bryan*, 263 Ky. 61, 66, 91 S.W.2d 990, 993 (1936); *Donehue v. Nilges*, 364 Mo. 705, 711, 266 S.W.2d 553, 556 (1954).

108. *See, e.g.,* *Firth v. Marovich*, 160 Cal. 257, 260, 116 P. 729, 731 (1911) (possibility of reverter); *Young v. Cramer*, 38 Cal. App. 2d 64, 67, 100 P.2d 523, 525 (1940) (possibility of reverter); *Barrie v. Smith*, 47 Mich. 130, 134, 10 N.W. 168, 170 (1881) (possibility of reverter); *Richter v. Distelhurst*, 116 A.D. 269, 273, 101 N.Y.S. 634, 636 (1906) (right of entry).

109. *E.g.,* *Firth*, 160 Cal. at 260, 116 P. at 731.

110. *E.g.,* *Young*, 38 Cal. App. 2d at 69, 100 P.2d at 525.

111. *E.g.,* *McArdle v. Hurley*, 103 Misc. 540, 543, 172 N.Y.S. 57, 59 (Sup. Ct. 1918); *Stevens v. Galveston, H. & S.A. Ry.*, 212 S.W. 639, 645 (Tex. Comm'n App. 1919, opinion adopted).

112. *E.g.,* *Richter v. Distelhurst*, 116 A.D. 269, 273, 101 N.Y.S. 634, 636 (1906).

113. *Barrie v. Smith*, 47 Mich. 130, 133, 10 N.W. 168, 169-70 (1881).

114. *See, e.g.,* *Strong v. Shatto*, 45 Cal. App. 29, 36, 187 P. 159, 162 (1919); *Post v. Weil*, 115

gross interests.

(b) *The threat of in gross interests.*—Judicial declarations of an appurtenancy requirement for fees on condition, when no such requirement previously had existed, underscore the dead hand problem with in gross enforcement of conditions and servitudes. First, given that properties neighboring a servient tract are limited in number, the practical effect of the appurtenancy requirement is to minimize the number of parties that can hold a right over such tracts.¹¹⁵ Moreover, the appurtenancy requirement restrains an individual's ability to acquire control over land because of the difficulty and expense of acquiring nearby land to anchor the servitude. In gross arrangements, in contrast, permit an unlimited proliferation of ties on land, with the attendant dead hand problems.

The appurtenancy requirement also promotes flexibility in consensual land use arrangements, which prevents a rigid plan of the past from frustrating future generations. Neighbors have an incentive to compromise in disputes over land allocation rights because of the desire to maintain peaceful relationships and the social norms favoring cooperation between neighbors. When the land use arrangement is reciprocal between parcels, such as use or building restrictions burdening and benefiting both parcels, the landowners increase their chances for compromise because both parties stand to gain or lose. This flexibility also makes it more likely that parties will reach agreements to remove inefficient land use rights.

Additionally, in gross interests impose an outsider's vision on a community. In contrast, a subdivision arrangement with reciprocal rights and a homeowners association designated to reach compromise decisions will enhance democratic participation and flexibility and increase self-determination over critical land use decisions affecting the community. The eccentric desires of an individual must yield to the community's vision of the common good.¹¹⁶ The appurtenancy feature,

N.Y. 361, 375, 22 N.E. 145, 148 (1889); *Carruthers v. Spaulding*, 242 A.D. 412, 414, 275 N.Y.S. 37, 39 (1934).

115. See, e.g., *Stegall v. Housing Auth.*, 278 N.C. 95, 102, 178 S.E.2d 824, 829 (1971) (stating that a grantor who creates a restrictive covenant cannot enforce it once he has parted with all interest in the land benefited by the covenant). Some courts go even further and limit the amount of the surrounding land that can be restricted. See, e.g., *Rogers v. Zwolak*, 12 Del. Ch. 200, 205, 110 A. 674, 676 (1920) (presuming that a building line of 50 feet would be onerous and inequitable but finding a line of 20 feet to be enforceable); see also RESTATEMENT OF PROPERTY § 537 illus. 4 (1944) (stating that construction three blocks away cannot be stopped by grantor).

116. Court decisions support reciprocal subdivision arrangements. See, e.g., *Bob Layne Contractor, Inc. v. Buennagel*, 158 Ind. App. 43, 53, 301 N.E.2d 671, 678 (1973) (enforcing covenant that restricted commercial development in a subdivision of single-family homes); *Beverly Island*

therefore, limits the reach of the dead hand and removes inefficient land ties.

3. *Subject Matter: Touch and Concern.*—Freedom of contract allows parties great discretion to determine the subject matter of servitudes and conditions, while the antirestrictions policy suggests limitations. Will courts uphold restrictions on personal conduct against successors, such as a ban on smoking, or will they limit enforceability to agreements related to the use and nature of the land itself? The law of conditions and the law of servitudes provide different answers.

(a) *Current doctrine.*—Servitudes law traditionally prescribes the nature of rights and restrictions that landowners can create. The touch and concern requirement limits the subject matter of real covenants.¹¹⁷ Similarly, negative easements usually are restricted to those involving light, air, view, lateral support, and stream flow.¹¹⁸ The touch and concern test has proved elusive and sometimes insurmountable for generations of law students, attorneys, and judges. Roughly, it allows enforcement of covenants related to the actual use of the land that aid the promisee as landowner or hamper the promisor in a similar capacity.¹¹⁹

In contrast, no formal limitations confine permissible conditions, and courts even allow restrictions on personal conduct.¹²⁰ In certain situations, however, courts refuse to uphold a condition because it threatens policy imperatives such as free competition¹²¹ or personal autonomy.¹²²

Ass'n v. Zinger, 113 Mich. App. 322, 325, 317 N.W.2d 611, 612 (1982) (stating that building and use restrictions in residential deeds are favored by public policy); *Swaggerty v. Petersen*, 280 Or. 739, 744, 572 P.2d 1309, 1313 (1977) (finding that proposed construction was not reasonable because it was contrary to express provisions of subdivision arrangement). For a discussion of the structuring of reciprocal subdivision arrangements, see Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711 (1975).

117. See RESTATEMENT OF PROPERTY § 537 (1944); Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645 (1914).

118. See RESTATEMENT OF PROPERTY § 452 comments a, b (1944); R. CUNNINGHAM; W. STOECK & D. WHITMAN, *THE LAW OF PROPERTY* § 8.1, at 438-39 (1984); 3 R. POWELL & P. ROHAN, *supra* note 28, ¶ 405, at 34-20.

119. C. CLARK, *supra* note 28, at 99. For discussions of the rule, see 2 AMERICAN LAW, *supra* note 73, § 9.13 at 378-83; 5 R. POWELL & P. ROHAN, *supra* note 28, ¶ 673(2)(a). Courts must analyze the covenant to see if it touches and concerns both the benefit and burden sides of the covenant. A. CASNER & W. LEACH, *CASES AND TEXT ON PROPERTY* 990 (3d ed. 1984).

120. See *Stewart v. Workman*, 85 W. Va. 695, 699, 102 S.E. 474, 475 (1920); RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 5.1 (1981).

121. *E.g.*, *Chippewa Lumber Co. v. Tremper*, 75 Mich. 36, 37, 42 N.W. 532, 532 (1889) (admitting evidence to show that condition was inserted to give grantor a monopoly on the sale of liquor).

122. *E.g.*, *Cast v. National Bank of Commerce*, 186 Neb. 385, 390, 183 N.W.2d 485, 489 (1971) (refusing to enforce condition requiring change of name by devisee).

(b) *The need for limits.*—Cases revealing a judicial tolerance of personal conduct restrictions usually involve conditions that apply only to the initial grantee or conditions enforced by the original grantor against the original grantee.¹²³ In such cases, freedom of contract trumps alienability and supports strict enforcement of the condition. With actions against successors, the antirestrictions policy requires a more critical approach.

Modern commentators have found merit in the touch and concern rule. Dean Reichman approves of the touch and concern test because it promotes efficiency by preventing obligations not related to land use. Also, by requiring an objective purpose, the test eliminates the possibility of creating modern variations of feudal serfdom.¹²⁴ This view contemplates a test that imposes external criteria on land use allocation agreements and is, therefore, more than an intent effectuation device.¹²⁵

Some support the test because they believe it effectuates the parties' intent by limiting running covenants to those that the ordinary purchaser would expect to run with the land.¹²⁶ A buyer can adjust her price accordingly to reflect the validity or invalidity of the covenant. One problem with this justification is its circularity: community expectations for covenants running with the land are derived from prior judicial decisions. Touch and concern, therefore, is not an independent criterion to effectuate policy goals. Because community expectations are important in determining the intent of the covenanting parties, it is also unclear how often the touch and concern concept differs from the requirement that the parties intend the covenant to run.¹²⁷ Moreover, if the parties expressly provide for the covenant to run, superseding that intent based on a community expectation touch and concern theory seems anomalous.

123. See, e.g., *id.* at 392, 183 N.W.2d at 488-89; RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) § 8.2 (1981). But see *Hall v. Hall*, 604 S.W.2d 851, 856 (Tenn. 1980) (concluding that an executory limitation controlling grantee's remarriage was valid even when held by transferees of grantee).

124. Reichman, *supra* note 6, at 1233; Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 150 (1978). But see Epstein, *supra* note 6, at 1361 (arguing that the touch and concern test increases transaction costs). The *Restatement of Property* indicates that "there is a social interest in the utilization of land" and that "free alienability of land is socially desirable." RESTATEMENT OF PROPERTY § 537 comments a, h (1944). It does not explain, however, what these ideas mean in the context of the freedom of contract and antirestrictions policy dichotomy or how the touch and concern test helps to achieve free alienability or utilization of land.

125. But see Epstein, *supra* note 6, at 1360 (rejecting the touch and concern test as an intrusion on the personal choice of the parties); French, *supra* note 6, at 1308 (preferring modification doctrines over the touch and concern test when the burden becomes unreasonable, unfair, or unconscionable).

126. See, e.g., C. CLARK, *supra* note 28, at 97; Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 208-09, 211-12 (1970); French, *supra* note 6, at 1289-90; Krasnowiecki, *supra* note 116, at 718.

127. See 5 R. POWELL & P. ROHAN, *supra* note 28, ¶ 673(2)(b).

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Application of a touch and concern litmus test achieves adequate policy-oriented results in the majority of cases. For example, a touch and concern test works well for most appurtenant negative covenants, because in such cases freedom of contract considerations support land use allocation agreements and no antirestrictions values supervene. Unfortunately, the touch and concern test allows courts to utilize an arcane framework to avoid articulating and analyzing important policy conflicts. Courts address the running of covenants that limit competition, for example, as an issue of touch and concern. The decisions focus on whether an effect on the physical use of the land is needed,¹²⁸ when they should analyze directly the monopoly issue.¹²⁹

The law of fees on condition provides a valuable lesson on the need to confront policy issues. Although conditions suffer from the absence of generalized restrictions on subject matter, courts that do scrutinize problematic conditions tend to confront the underlying issues and avoid the touch and concern test jargon. For example, courts expressly evaluate and decide the validity of fees on condition restraining competition based on their deleterious monopolistic effects balanced against the desire of businesses to acquire a protected market position.¹³⁰

4. Termination and Modification

(a) *Existing rules.*—Obsolete land rights allocation agreements cause inefficient allocation of land resources.¹³¹ Without judicial intervention, removal of such restrictions may prove impossible or implausible without excessive transaction costs or “blackmail” payments.¹³² Real covenants law partially responds to this problem with the doctrine of changed conditions. The doctrine denies enforcement of a real covenant if the conditions affecting the property have changed so significantly that

128. See, e.g., *Dick v. Sears-Roebuck & Co.*, 115 Conn. 122, 126, 160 A. 432, 433 (1932) (stating that anticompetitive covenant restrains use and so touches and concerns the burdened lot); *Shell Oil Co. v. Henry Ouellette & Sons Co.*, 352 Mass. 725, 730, 227 N.E.2d 509, 512 (1967) (holding that anticompetitive covenant did not run because it bestowed no direct physical advantage on benefited parcel).

129. Cf. *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 90-99, 102, 390 N.E.2d 243, 246-50, 252 (1979) (discussing the touch and concern, physical use requirement separately from and without reference to a discussion of the enforceability of covenants restraining competition).

130. See, e.g., *Burdell v. Grandi*, 152 Cal. 376, 382, 92 P. 1022, 1024 (1907) (holding that a condition prohibiting the sale of intoxicating liquors is invalid if inserted for the purpose of creating a monopoly in favor of the grantor, but might be valid for the purpose of aiding the social and moral welfare of the community by preventing intemperance); *Fusha v. Dacono Townsite Co.*, 60 Colo. 315, 319, 153 P. 226, 227 (1915) (upholding condition barring sale of liquor, imposed by grantor to benefit brewery that owned neighboring, unrestricted sites).

131. See French, *supra* note 6, at 1313; Reichman, *supra* note 6, at 1233.

132. See *supra* notes 57-58 and accompanying text.

the parties cannot achieve their original intention.¹³³ Some courts addressing fees on condition borrow this doctrine to deny enforcement of obsolete conditions and avoid forfeiture.¹³⁴ Related doctrines bar a grantor's enforcement of a condition if there is impossibility of performance¹³⁵ or substantial compliance with the condition.¹³⁶

(b) *Remaining issues.*—The traditional termination and modification rules of servitudes and conditions tend to focus on a dispute between two individuals. They neglect,¹³⁷ and expressly reject at times,¹³⁸ the public interest in removing certain interests that inefficiently tie up land. Restrictions in which the public interest is great would include, for example, a restriction against building in an unused alley that in effect bars construction of a major complex which would help the town's econ-

133. See *Downs v. Kroeger*, 200 Cal. 743, 747, 254 P. 1101, 1102-03 (1927); RESTATEMENT OF PROPERTY § 564 (1944); 5 R. POWELL & P. ROHAN, *supra* note 28, ¶ 679(2).

134. See, e.g., *Letteau v. Ellis*, 122 Cal. App. 584, 588, 10 P.2d 496, 497 (1932) (striking racial restriction); *Cole v. Colorado Springs Co.*, 152 Colo. 162, 168, 381 P.2d 13, 18 (1963) (striking liquor restriction); *McArdle v. School Dist.*, 179 Neb. 122, 131, 136 N.W.2d 422, 425 (1965) (striking restriction that land be used for school purposes); cf. *Shields v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 225 Cal. App. 2d 330, 337, 37 Cal. Rptr. 360, 365 (1964) (recognizing doctrine, but finding no changed conditions on facts). Changed conditions may be irrelevant, however, to fees on executory limitation. See, e.g., *Williamson v. Grizzard*, 215 Tenn. 544, 551-52, 387 S.W.2d 807, 810 (1965) (finding that despite changed conditions surrounding the church parsonage, any voluntary attempt to assign the parsonage would vest title in grantor).

135. See, e.g., *Murray v. Trustees of the Lane Seminary*, 1 Ohio Op. 2d 236, 242, 140 N.E.2d 577, 585 (C.P. 1956) (stating that covenant would not be enforced if it was impossible for grantee to use the property as a private dwelling).

136. See, e.g., *Mead v. Ballard*, 74 U.S. (7 Wall.) 290, 294-95 (1872) (finding compliance with condition by constructing institute within time limit, even though building later was destroyed by fire); *Gordy v. Cobb County School Dist.*, 255 Ga. 26, 27, 334 S.E.2d 688, 689 (1985) (finding that a sufficient portion of the land was used for its designated purpose); *Independent Congregational Soc'y v. Davenport*, 381 A.2d 1137, 1140 (Me. 1978) (finding substantial compliance when condition observed for almost 150 years); *Johnson v. City of Hackensack*, 200 N.J. Super. 185, 190-91, 491 A.2d 14, 17 (App. Div. 1985) (finding that a minor deviation did not breach the condition).

137. The law of relative hardship in servitudes focuses only on the owners of the burdened and benefited properties. See, e.g., *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 312 (Mo. Ct. App. 1981) (holding that a restrictive covenant which causes hardship to the servient estate will be enforced only if it still substantially benefits dominant estate); *Katzman v. Anderson*, 359 Pa. 280, 285, 59 A.2d 85, 87 (1948) (stating that equity will not enforce a restriction if changed conditions have made its continued enforcement of no value to the dominant tenement).

Similarly, courts in fee on condition cases focus on the two parties, rather than upon the greater public interest. See, e.g., *Atkins v. Anderson*, 139 Cal. App. 918, 920, 294 P.2d 727, 729 (1956) (comparing relative burdens of the parties); *Nielsen v. Woods*, 687 P.2d 486, 489 (Colo. Ct. App. 1984) (declining to enforce a right of entry when the party seeking forfeiture can be made whole otherwise and the other party's breach was not willful or grossly negligent).

138. Some courts expressly reject public concerns. See, e.g., *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 168, 172 N.E. 455, 457 (1930) (rejecting the contention that the public interest favors the church's existence). But see *Blakely v. Gorin*, 365 Mass. 590, 599, 313 N.E.2d 903, 909 (1974) (holding that public's interest in tax dollars from hotel outweighed utility of restrictive covenant); *Holmes Harbor Water Co. v. Page*, 8 Wash. App. 600, 603, 508 P.2d 628, 630-31 (1973) (looking to nuisance law for a public interest model for covenants); MASS. GEN. L. ch. 184, § 30(5) (1986) (imposing a public interest standard on the enforceability of all restrictions on title to real property).

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omy or tax base,¹³⁹ or a privately held conservation servitude that prohibits land use required by pressing public need of employment, transportation, or recreation.¹⁴⁰ Current termination doctrine is ill-equipped to resolve the contracts and antirestrictions policy conflict inherent in such disputes.

III. The Unification Choice

Because servitudes and conditions share the same policy dynamic and face similar issues of creation and enforcement, the legal rules controlling them should be unified. The benefits, disadvantages, and means of achieving an integration must be assessed. Moreover, because traditional treatment of defeasible fees and servitudes is only one example of the fragmented state of real property law,¹⁴¹ this examination can be instructive in other problem areas.

A. *Why Unify?*

1. *The Case for Merger.*—Several considerations support unification. First, fairness and reason require that situations with similar facts and policy concerns receive equal treatment by the law. To achieve this goal, one must develop a consistent conceptual framework. Similar disposition of functionally equivalent land use allocation devices cannot occur when distinct labels and legal doctrines for servitudes and conditions prevail. Such distinctions have led to a preoccupation with classifications that bear little relation to the substance of the transfer and the policy dynamics.¹⁴² While the common law over time developed these separate doctrinal boxes, ironically, some early American judges viewed fees on condition and servitudes as functional equivalents and stated that results should not depend on “subtle and artificial” distinctions.¹⁴³ They

139. See *Blakely*, 365 Mass. at 599, 313 N.E.2d at 909 (allowing a bridge walkway over an alley in contravention of a restrictive covenant).

140. See Korngold, *supra* note 6, at 465-66.

141. Examples of other interests that are functionally equivalent yet treated differently include an installment sales contract and a conveyance with a purchase money mortgage, licenses and leases, and a vested remainder subject to divestment and a contingent remainder with a condition precedent.

142. Courts engage in lengthy discussions to determine the estate. See, e.g., *Mountain Brow Lodge No. 82 v. Toscano*, 257 Cal. App. 2d 22, 25 n.2, 64 Cal. Rptr. 816, 818 n.2 (1967); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 440-41, 58 A.2d 89, 93-95 (Ch. 1948). One court noted: “[I]n traveling through the complicated maze of future-interest concepts, we disagree about the labeling of the interest.” *Williams v. Watt*, 668 P.2d 620, 623 (Wyo. 1983).

143. *Parker v. Nightingale*, 88 Mass. (6 Allen) 341, 348 (1863) (allowing grantees to enforce condition against another grantee, and stating that “it is quite immaterial to determine the precise legal nature or quality of the restriction in question”); see also 4 J. KENT, *supra* note 96, at *124-25 (noting the lack of technical words to distinguish conditions precedent and subsequent).

sought decisions grounded in "good sense and sound equity to the object and spirit of the contract in the given case."¹⁴⁴

Second, unifying and clarifying the law of defeasible fees and servitudes benefit parties engaging in land use allocation transfers. The current disparate treatment of allocation devices creates confusion for those wishing to engage in such transactions. Courts treat fees on condition with great suspicion,¹⁴⁵ sometimes straining to prevent enforcement by resorting to various interpretive devices and savings doctrines, and preferring whenever possible to construe a provision as a real covenant rather than a fee on condition,¹⁴⁶ even when the parties apparently intended a fee on condition.¹⁴⁷ Executory limitations fare no better when courts apply the Rule Against Perpetuities to trump the parties' intentions and void interests that would be upheld if interpreted as fees on condition or servitudes. Because of the unpredictable shell game of labeling interests, parties can have little confidence that a court will not attach an unintended label to an interest and trigger an unwanted set of rules and an unexpected result. An integrated law of servitudes and defeasible fees would allow parties to transact more securely. While legitimate and articulated public policy considerations might provide limitations on any agreement, eliminating the current system of judicial labeling would end the frustration of drafters' and planners' goals. Integration would maximize the efficiency of land use allocation devices and could reduce transaction costs in the process.

Moreover, when functional equivalents have distinct labels and rules, the skilled drafter may grasp an opportunity to avoid application of

144. 4 J. KENT, *supra* note 96, at "132-33.

145. *E.g.*, *MacDonald Properties, Inc. v. Bel-Air Country Club*, 72 Cal. App. 3d 693, 699, 140 Cal. Rptr. 367, 371 (1977); *Gordon v. Whittle*, 206 Ga. 339, 340, 57 S.E.2d 169, 170 (1950); *Carolina & N.W. Ry. v. Carpenter*, 165 N.C. 465, 468, 81 S.E. 682, 683 (1914).

146. *E.g.*, *Humphrey v. C.G. Jung Educ. Center*, 714 F.2d 477, 483 (5th Cir. 1983); *Oak's Oil Serv. v. Massachusetts Bay Transp. Auth.*, 15 Mass. App. Ct. 593, 601, 447 N.E.2d 27, 32 (1983); *DeBlois v. Crosley Bldg. Corp.*, 117 N.H. 626, 629, 376 A.2d 143, 145 (1977); *Hagaman v. Board of Educ.*, 117 N.J. Super. 446, 453-54, 285 A.2d 63, 67 (App. Div. 1971); *Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 440, 58 A.2d 89, 93 (Ch. 1948).

147. *E.g.*, *Second Church of Christ, Scientist v. LePrevost*, 67 Ohio App. 101, 104-05, 35 N.E.2d 1015, 1017 (1941) (refusing to find condition subsequent in church's deed even though its language seemed to create one); *W.F. White Land Co. v. Christenson*, 14 S.W.2d 369, 372 (Tex. Civ. App.—Fort Worth 1928, no writ) (finding that "what purported to be conditions subsequent in the deed are merely building restrictions denoting covenants"); *Martin v. Norfolk Redevelopment & Hous. Auth.*, 205 Va. 942, 947-48, 140 S.E.2d 673, 677 (1965) ("[C]onditions subsequent are not favored in the law because they tend to destroy estates, and when relied on to work a forfeiture they must be created by express terms or clear implication."). The courts claim they are finding the parties intent by looking to factors besides language. *See, e.g.*, *LePrevost*, 67 Ohio App. at 104-05, 35 N.E.2d at 1017. *But see Murray v. Trustees of the Lane Seminary*, 1 Ohio Op. 2d 236, 240-41, 140 N.E.2d 577, 582-83 (C.P. 1956) (finding that even though conditions subsequent are not favored, the language in the grant unequivocally created a condition subsequent).

a desirable public policy. For example, courts have denied recent attempts to enforce real covenants limiting use of a residence to related persons against group homes for the mentally ill,¹⁴⁸ because real covenants in violation of public policy traditionally are unenforceable.¹⁴⁹ Could a court enforce a fee on condition of similar substance, given that there is no clear parallel body of law in the jurisprudence of conditions? Should the validity of such a restriction cast as an executory limitation be tested only by the Rule Against Perpetuities? A court applying a functional equivalents analysis would not answer these questions affirmatively, but under current law, that is a possible outcome. To decide private land use device cases, whether servitude or defeasible fee, by express reference to the policy concerns and rules of law developed to accommodate them is superior to legal rules that allow landowners to manipulate the labels in order to avoid these policy decisions.¹⁵⁰

2. *Concerns About Integration.*—Although some arguments against a merger of servitudes and defeasible fees have merit, they ultimately prove unsatisfactory and should not prevail. Providing parties with a number of legally valid alternatives so that they may choose the structure that best achieves their goals is beneficial, but servitudes and conditions are functional equivalents and actually do not present different options for allocating land rights. Forfeiture, a critical distinguishing feature, may be desirable in special circumstances, but it does not require a separate legal interest.¹⁵¹ Moreover, if third-party beneficiary theory is available, someone other than the original grantor will not need a separate device, such as the executory limitation, to allow them to enforce a land use right.¹⁵²

148. See, e.g., *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 61 N.Y.2d 154, 160, 460 N.E.2d 1336, 1339-40, 472 N.Y.S.2d 901, 904-05 (1984); *Crowley v. Knapp*, 94 Wis. 2d 421, 438, 288 N.W.2d 815, 823-24 (1980); see also IND. CODE ANN. § 16-13-21-14 (Burns Supp. 1985) (stating that restrictions which permit residential use of property yet prohibit use of property as a residence for the developmentally disabled or mentally ill are void as against public policy).

149. See, e.g., *Wier v. Isenberg*, 95 Ill. App. 3d 839, 842-45, 420 N.E.2d 790, 793 (1981) (stating proposition, but holding that restrictive covenant did not violate public policy in that it prevented grantee from practicing psychotherapy in his home); *Bob Layne Contractor, Inc. v. Buennagel*, 158 Ind. App. 43, 53, 301 N.E.2d 671, 678 (1973) (stating proposition, but granting permanent injunction enjoining violation of restrictive covenant after deciding that vacating blocks in subdivision did not violate public policy).

150. There is an institutional reason why the law should not preserve separate labels and rules for defeasible fees and servitudes. People may lose confidence in a legal system when interests that seem identical are treated differently and when a drastically different remedy results solely from using certain arcane words.

151. For a description of the array of remedies that could apply to a single interest, see *infra* subpart IV(A).

152. See *supra* text accompanying note 20.

Additionally, the defeasible estate's origin and strong historical tradition should not prevent unification.¹⁵³ Although generations of lawyers have been schooled that there is a valid distinction between conditions and servitudes,¹⁵⁴ and players in the legal system are invested in the existing structure, these considerations, like historical tradition, do not make the present structure any more valid or conceptually sound. The inevitable uncertainty in defining the limits of merger cannot justify the current state of the law. Because no arguments opposing unification are convincing,¹⁵⁵ careful and sensitive unification of the law of conditions and servitudes, like the proposed merger of covenants, equitable servitudes, and easements into a single law of servitudes, is possible.

B. *The Means to Unification*

1. *Merger and Unification or Integration Models.*—Different methods of joining the law of servitudes and defeasible fees are available. One model is a merger, in which a single interest, perhaps with a new name such as a "land obligation,"¹⁵⁶ emerges. Another model is unification or integration, in which interests retain separate names but the doctrine is made consistent. A desire to break from the past and to prevent backsliding into old doctrines favors the merger technique, while history, familiarity, and residual learning support the unification or integration approach. Either method achieves the key objective of harmonizing the law.

2. *Legislative and Judicial Approaches.*—Either the legislature or the courts can achieve unification. The advantages of legislation are several. For one, it provides a comprehensive resolution of the issues. Indeed, a merger may be impossible without broad-based statutory reform. Additionally, a clear legislative directive aids parties in predicting the results of their agreements and thus increases their confidence.

153. Real covenants are thought to derive from *Spencer's Case*, 77 Eng. Rep. 72 (K.B. 1583). See Reichman, *supra* note 6, at 1188 n.43. Defeasible fees predate this origin. See 2A R. POWELL & P. ROHAN, *supra* note 46, ¶ 178.

154. See, e.g., *State ex rel. Dep't of Transp. v. Tolke*, 36 Or. App. 751, 757, 586 P.2d 791, 795 (1978) (characterizing the phrase "so long as" as "magic words" that create a fee simple determinable); *Klamath Falls v. Flitcraft*, 7 Or. App. 330, 334, 490 P.2d 515, 517 (1971) (holding that the phrase "so long as" is distinctive language of fee simple determinable).

155. In determining the retroactivity of unification, concerns about reliance on the status quo may be legitimate. Another important argument is that of the slippery slope, which might lead to further amalgamation of other similar, but functionally incompatible, interests such as leases and trusts. A careful unification, however, can provide sufficient guideposts for planners and decision makers so that only a recognizable law of land use allocation rights will emerge.

156. See generally *Sturley*, *supra* note 6, at 1436-38 (discussing an English proposal to unify servitudes as "land obligations").

A statutory approach, however, only provides a broad standard to which courts must give meaning. Thus, the solutions suggested in Part IV for remedies, permissible subject matter, in gross interests, and a public-interest termination standard require the evolutionary treatment of judicial lawmaking, in which courts apply existing rules to new facts.¹⁵⁷ Although judicial lawmaking is necessary, a legislative declaration of a unification goal and an outline of the substantive issues would be beneficial in setting the judicial parameters.

This Article presents a basis for judicial unification of defeasible fees and servitudes even absent legislation. Unification essentially requires the judiciary to rationalize a legal doctrine. Legislative fact-finding and balancing of competing political interests are not prerequisites to successful unification. Courts can address effectively the substantive issues of an integrated law. Effective common-law decision making always involves, and should invoke, policy analysis. Judicial consideration of these topics is aided by law reform documents, most notably the continuing work on the *Restatement (Third) of Property (Servitudes)*.¹⁵⁸

3. *Donative Transfers*.—As an initial matter, a unified law must determine whether there are valid distinctions between rules of law applicable to nongratuitous and donative defeasible fees. More precisely, should the unification of conditions and servitudes include only transfers in which real consideration is paid, leaving gratuitous grants to separate doctrines of law? On balance, the answer to this difficult question is that unification should make no such distinction.¹⁵⁹

First, regardless of the gratuitous nature of the transfer, the same

157. For examples of conditions and servitudes statutes that require judicial development, see CAL. CIV. CODE § 3275 (West 1970) (allowing courts to provide relief from forfeiture), *construed in* *Atkins v. Anderson*, 139 Cal. App. 2d 918, 920, 294 P.2d 727, 729 (1956); MICH. COMP. LAWS ANN. § 554.46 (West 1967) (allowing invalidation of conditions that provide no substantial benefit to the enforcer); MINN. STAT. § 500.20(1) (1986) (same). Statutes that attempt to resolve the issues by setting automatic termination dates for conditions are easily applied, but provide incomplete solutions.

158. RESTATEMENT (THIRD) OF PROPERTY (SERVITUDES) (Prelim. Draft No. 3, 1987).

159. This Article questions the position of the *Restatement (Second) of Property (Donative Transfers)* to the extent that it treats donative transactions separately from commercial situations, *see, e.g.*, RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) introduction at 1 (1981); *id.* § 3.4 comment a & reporter's note 1, and does not require judicial scrutiny of restraints on land use in donative transfers, *see id.* § 3.4, § 5.1 comment b.

For similar reasons, this Article questions the charity-to-charity exception in CONN. GEN. STAT. § 45-97 (1975), which provides for a thirty-year limit on the effectiveness of rights of entry and possibilities of reverter; some courts' exemption of commercial transfers from the Rule Against Perpetuities, *see, e.g.*, *Camerlo v. Howard Johnson Co.*, 545 F. Supp. 395, 397 (W.D. Pa. 1982); *Producers Oil Co. v. Gore*, 610 P.2d 772, 776 (Okla. 1980); and the nonapplicability of the Rule Against Perpetuities to transfers when all interests are for charitable purposes, *see Dukeminier, supra* note 65, at 1908.

antirestrictions concerns arise when enforcement is sought against a successor. Indeed, because market forces do not constrain a donor's behavior, he is free to place eccentric ties on the land, making antirestrictions controls especially desirable. Second, unification presents no significant disincentives to making socially desirable donative transfers. The initial donor usually can strictly enforce the land use right against the initial donee on freedom of contract grounds,¹⁶⁰ and rarely will antirestrictions concerns allow a donee's successor to avoid enforcement when the restriction is socially desirable. Finally, the difficulty in determining whether consideration has been paid makes a rule based on a distinction between nongratuitous and donative transfers unworkable.¹⁶¹

IV. The Substantive Issues: The Shape of a Unified Law

The doctrinal rules of an integrated law of servitudes and conditions must rest on legitimate policy concerns. The current law of defeasible fees and servitudes revolves primarily around buzzwords and arcane requirements, burying policy considerations beneath the surface. The tension between freedom of contract and the antirestrictions policy requires a straightforward resolution. Somewhat surprisingly, the law of fees on condition provides a better solution than the law of servitudes for a number of the common issues. Even without unification, this discussion suggests a need to reshape certain current doctrines of servitudes.¹⁶²

A. Remedies

1. *The Calculus of Remedies.*—Because the forfeiture remedy presents significant difficulties for efficient land use and fairness,¹⁶³ an integrated law must circumscribe its role. Courts should not avoid en-

160. See RESTATEMENT (SECOND) OF PROPERTY (DONATIVE TRANSFERS) pt. III introductory note (1981).

161. *E.g.*, *Springmeyer v. City of S. Lake Tahoe*, 132 Cal. App. 3d 375, 377 n.1, 183 Cal. Rptr. 43, 44 n.1 (1982) (land donated to city for purpose of constructing city government buildings); *Mountain Brow Lodge No. 82 v. Toscano*, 257 Cal. App. 2d 22, 24-25, 64 Cal. Rptr. 816, 817 (1967) (land bequeathed by ex-lodge member for the lodge's use). On other facts, the presence or the extent of consideration is difficult to determine. See, *e.g.*, *State ex rel. Dep't of Highways v. LoBue*, 83 Nev. 221, 223, 427 P.2d 639, 640 (1967) (finding oral representation by grantee that it would build a street benefiting grantor's retained land to constitute consideration); *Higdon v. Davis*, 315 N.C. 208, 214, 337 S.E.2d 543, 546 (1985) (holding that the consideration included the condition requiring grantee to maintain right-of-way); *Rourk v. Brunswick County*, 46 N.C. App. 795, 797-98, 266 S.E.2d 401, 403 (1980) (holding condition that grantee would build public health center to be consideration to grantor, a physician).

162. Other issues that must be resolved in integrating servitudes and defeasible fees, such as privity and informal creation of interests, are left for other forums. See *Berger, Integration, supra* note 6, at 355.

163. See *supra* text accompanying notes 99-101.

forcement of forfeiture through resort to artifices, nor should they mechanically permit it. New doctrines must accommodate the competing policy interests and adopt the beneficial aspects of remedies for both defeasible fees and servitudes. An integrated law can then offer a superior array of remedies when compared to the remedies currently available for the separate interests.

Courts should not enforce a conveyance's forfeiture clause automatically, but should consider it as one possible remedy for breach of the condition.¹⁶⁴ They might award instead damages or an injunction when appropriate. This approach departs significantly from the current law of conditions.¹⁶⁵ Presently, a court must choose either all or nothing when enforcing a condition—either ordering forfeiture or not upholding the land use allocation right.¹⁶⁶ Damages and injunctive relief are unavailable for a condition unless the court chooses to transform it into a real covenant. By combining the remedies of conditions and servitudes, unification would allow courts to fashion rules for relief that recognize both antirestrictions and freedom of contract values.

An array of remedies would benefit parties by greatly increasing the courts' flexibility and ability to shape results in order to fulfill the parties' true needs. Moreover, it would minimize the deleterious effects of the forfeiture remedy but preserve forfeiture in favor of the grantor or a designated third party when the parties have consented to it, when damages and equitable relief are inadequate, and when society's transcendent goals are not disturbed. The limited availability of forfeiture represents an advantage over the current law of servitudes in which no such remedy exists.

2. *Illustrative Situations.*—Consider, for example, a defeasible fee that imposes a negative restriction, such as a limitation on the nature and quality of improvements.¹⁶⁷ As with real covenants, an injunction against a threatened violation achieves the grantor's goal of preventing certain improvements. The court could order cessation of the offending

164. A court's refusal to enforce forfeiture and substitution of alternate remedies is analogous to the court's rejection of a specific enforcement clause in a contract.

165. Some courts may hesitate to rewrite the remedy agreement of the parties. See *Stueber v. Arrowhead Farm Estates Ltd. Partnership*, 69 Md. App. 775, 781, 519 A.2d 816, 819 (1987).

166. For ways in which the court attempts to justify different solutions, see *supra* text accompanying notes 85-90.

167. See, e.g., *Firth v. Marovich*, 160 Cal. 257, 260-61, 116 P. 729, 731 (1911) (minimum value for residence); *Springmeyer v. City of S. Lake Tahoe*, 132 Cal. App. 3d 375, 382, 183 Cal. Rptr. 43, 47 (1982) (governmental purposes); *Shields v. Bank of Am. Nat'l Trust & Sav. Ass'n*, 225 Cal. App. 2d 330, 334, 37 Cal. Rptr. 360, 362-63 (1964) (single-family dwelling); *McArdle v. School Dist.*, 179 Neb. 122, 130-31, 136 N.W.2d 422, 427-28 (1965) (school purposes); *Murray v. Trustees of the Lane Seminary*, 1 Ohio Op. 2d 236, 237, 140 N.E.2d 577, 579 (1956) (dwelling houses).

conduct and removal of the offending structures.¹⁶⁸ If the grantor or third-party beneficiary owns a benefited parcel, damages would equal the diminution of the parcel's value caused by the violation,¹⁶⁹ as is the case with real covenants. A negative restriction in which damages or an injunction would be inadequate and forfeiture thus necessary to effectuate the land allocation agreement is hard to imagine.

Similarly, an injunction or damages usually suffice when a defeasible fee requires the grantee to do an affirmative act, such as placing a plaque on a building,¹⁷⁰ building a roadway,¹⁷¹ or refinancing the acquired property.¹⁷² A court either could order performance of the act or award damages based on the actual loss to the grantor or third-party beneficiary.¹⁷³

For some affirmative conditions, however, forfeiture is the only adequate and appropriate remedy. Consider a governmental entity seeking to spur economic development in the region. To that end, it conveys a piece of land, perhaps at a bargain price, to an entity that is to erect an industrial facility. The grantor intends the project to provide jobs and also to serve as an anchor for attracting future development to the area, and so the grantor includes a condition obligating the grantee to build the designated facility within a specified time, with forfeiture to result upon failure to do so. If the grantee fails to comply and has no valid defenses, damages would be difficult, if not impossible, to calculate; anything short of having the facility erected on the desired location probably would be inadequate and would not satisfy the objectives of the grantor. Injunctive relief may be an insufficient remedy as well. If the grantee's default results from financial or technical inability to perform the job, an injunction ordering performance would be inappropriate. Even if the grantee could perform, a court might hesitate to order injunctive relief

168. See, e.g., *Jones v. Northwest Real Estate Co.*, 149 Md. 271, 277-78, 131 A. 446, 449 (1925) (real covenant; removal of offending porch); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 89-97, 390 N.E.2d 243, 246-49 (1979) (real covenant; injunction against threatened breach). Conditions held in gross, in which the grantor has no benefited land, present added difficulty in understanding the grantor's motive for the prohibition. Under an integrated law, enforcement of such restrictions should not be permitted.

169. For real covenants cases discussing the calculation of damages, see *infra* note 208. When the grantor or third-party beneficiary owns no neighboring parcel, damages calculation is more difficult.

170. E.g., *Springmeyer v. City of S. Lake Tahoe*, 132 Cal. App. 3d 375, 378, 183 Cal. Rptr. 43, 44 (1982).

171. E.g., *Lincoln v. Narom Dev. Co.*, 10 Cal. App. 3d 619, 625, 89 Cal. Rptr. 128, 132 (1970).

172. E.g., *Nielsen v. Woods*, 687 F.2d 486, 489 (Colo. Ct. App. 1984).

173. See generally *Texas & Pac. Ry. v. Marshall*, 136 U.S. 393, 406-07 (1890) (advocating money damages rather than an injunction when railroad violated its covenant to use town as a terminus); *Carolina & N.W. Ry. v. Carpenter*, 165 N.C. 465, 468, 81 S.E. 682, 683 (1914) (allowing grantor either to compel railroad company to lay track and erect a station on property granted or to pay damages).

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because the forced performance could be of low quality and because such an order is of an oppressive nature.¹⁷⁴

For this example, forfeiture is probably the only adequate remedy.¹⁷⁵ Before allowing forfeiture, however, the court must employ its equitable powers to avoid the problems of windfall to the grantor, unfairness to the grantee, and underutilization of land. In recognizing these problems, a court could require the grantor to return the purchase price with interest and reimbursement for taxes and basic maintenance. The court also could grant an offset for the reasonable rental of the property during the grantee's occupancy and for any other damages proved by the grantor.¹⁷⁶

3. *Support for Avoiding Forfeiture.*—Some doctrine supports a court's refusal to apply forfeiture automatically. First, public policy considerations occasionally trump private agreements.¹⁷⁷ A long-standing tradition of judicial intervention to prevent forfeiture of fees on condition only recently has receded.¹⁷⁸ In addition, a few courts already have taken a flexible approach to remedies in fee on condition cases.¹⁷⁹ These

174. The decision in *County of Abbeville v. Knox*, 267 S.C. 38, 42-43, 225 S.E.2d 863, 865 (1976), similar to the text hypothetical, indicates the problem with the current law of conditions. The court voided the condition because of case precedent that had developed to prevent the usually unjust effect of forfeiture: restrictive words after a grant of a fee simple absolute are ineffective. This decision is the unfortunate result of a failure to address the true policy issues arising in fees on condition. For another example of a condition imposed by government, see *Collard v. Incorporated Village*, 52 N.Y.2d 594, 603-04, 421 N.E.2d 818, 822-23, 439 N.Y.S.2d 326, 330-31 (1981) (refusing to void landowner's covenant with city not to erect structures without permission despite city's unreasonable withholding of consent).

175. Another example in which forfeiture may be appropriate is when a grantor conveys subdivision lots with a condition designed to create communal stability and enhance property values. *But see Tristram's Group, Inc. v. Morrow*, 22 Mass. App. Ct. 980, 981, 496 N.E.2d 176, 178 (1986) (construing condition requiring grantee of subdivision lot to build within four years to be an option that has been barred by laches due to lapse of eleven years).

176. Other damages might reflect lost opportunities to sell the land during grantee's possession. The specific nature of these damages would depend on the circumstances. For example, if the price of the land dropped during the grantee's occupancy, the court might require the return of the current fair market value rather than the purchase price. Also, the improvements reimbursement would depend on whether the improvements were generically beneficial or only related to the grantee's needs. For cases in which the parties attempted to provide for the grantor's refund of consideration upon forfeiture, see *Mead v. Ballard*, 74 U.S. (7 Wall.) 290 (1868); *Board of Comm'rs v. Russell*, 174 F.2d 778 (10th Cir.), *cert. denied*, 338 U.S. 820 (1949); *Nielsen v. Woods*, 687 P.2d 486 (Colo. Ct. App. 1984); *Genet v. Florida E. Coast Ry.*, 150 So. 2d 272 (Fla. Dist. Ct. App.), *cert. denied*, 155 So. 2d 551 (Fla. 1963). *See also* E. FARNSWORTH, *CONTRACTS* § 12.5, at 825 (1982) (describing the court's flexibility in framing an equitable order).

177. *See, e.g., Letteau v. Ellis*, 122 Cal. App. 584, 587-88, 10 P.2d 496, 497-98 (1932) (finding that public policy against restrictions based on race overrode the parties' agreement); *Riste v. Eastern Wash. Bible Camp, Inc.*, 25 Wash. App. 299, 301, 605 P.2d 1294, 1295 (1980) (relying on the rule against direct restraints on alienation to invalidate a restriction on public policy grounds).

178. *See* 4 J. KENT, *supra* note 96, at *129.

179. *See, e.g., Lincoln v. Narom Dev. Co.*, 10 Cal. App. 3d 619, 625, 89 Cal. Rptr. 128, 132 (1970) (preferring completion of contemplated road as a more appropriate equitable remedy than

precedents and the arguments set out in this Article form the basis for courts to provide alternate remedies in defeasible fee cases, even if they fail to endorse the concept of integration in its entirety.

Finally, contract law provides additional support for courts to ignore the remedy specified by the parties in favor of its own. If courts were to conceptualize forfeiture as a form of liquidated damages for breaches of land use allocation agreements, forfeiture would be vulnerable to judicial attack as an *in terrorem* clause (an unreasonable stipulation of the damages) or as a shotgun clause (recovery for any type of breach regardless of its significance).¹⁸⁰ Additionally, courts are not bound by an agreement specifying equitable relief¹⁸¹ and may view forfeiture as an equitable remedy in order to avoid enforcement of a forfeiture provision.

B. *In Gross Interests*

In light of the antirestrictions policy, how should an integrated law of servitudes and defeasible fees treat in gross interests? Specifically, will the burden of an in gross interest bind a successor and can the benefit be transferred?¹⁸² The running of burdens invokes dead hand issues. Transaction costs increase when benefits are transferred because of the need to trace owners.

1. *Running of Burdens.*—The antirestrictions policy requires that the burden of negative and affirmative interests not be imposed on a successor when the benefit is in gross. Some exceptions are required, however, because of other significant public policy considerations. But even

forfeiture to original grantee); *Nielsen v. Woods*, 687 P.2d 486, 488-89 (Colo. Ct. App. 1984) (refusing to order forfeiture for grantee's failure to satisfy refinance condition when the object of the condition—obtaining financing—was already accomplished through restoration of grantor's VA mortgage eligibility); see also *Creamery Dairy Co. v. Electric Park Co.*, 138 S.W. 1106, 1107 (Tex. Civ. App.—San Antonio 1911, no writ) (preventing forfeiture of a leasehold on equitable grounds when tender required by covenant was made at time of notification of termination).

180. See generally RESTATEMENT (SECOND) OF CONTRACTS § 356(1) (1979) (stating that liquidated damages are permitted only if reasonable in light of anticipated or actual loss and difficulties of proof of loss); E. FARNSWORTH, *supra* note 176, § 12.18, at 896-902 (discussing distinctions between penalties and valid liquidated damages provisions).

181. See E. FARNSWORTH, *supra* note 176, § 12.6, at 831-32 (discussing how consensual limitation of equitable remedies is not binding on courts); Kronman, *Specific Performance*, 45 U. CHI. L. REV. 351, 369-76 (1978) (discussing the reluctance of courts to enforce privately created specific performance or injunctive remedies). But see MacNeil, *Power of Contract and Agreed Remedies*, 47 CORNELL L.Q. 495, 520-23 (1962) (stating that denial of specific performance may infringe on freedom of contract, especially when the parties have agreed to the remedy).

182. While the burden of an in gross easement is assumed to run with the land, see *Marlatt v. Peoria Water Works Co.*, 114 Ill. App. 2d 11, 14, 252 N.E.2d 403, 405 (1969), the assignability of the benefit is disputed. See 3 R. POWELL & P. ROHAN, *supra* note 28, ¶ 419 (discussing transferability of benefits in gross).

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in these exceptional cases, courts may rely on other doctrines to avoid the exception if perpetual rights threaten antirestriction values and raise efficiency concerns.¹⁸³

One exception should occur when the in gross right provides an identifiable and significant benefit to its owner's commercial interest. This exception would encompass affirmative easements in gross such as railroad corridors,¹⁸⁴ mineral rights,¹⁸⁵ and water, sewer, oil, gas, and utility lines.¹⁸⁶ Certain affirmative covenants or conditions also should be included, such as a promise to maintain on the property a warehouse that benefits the grantor's business¹⁸⁷ or an obligation to purchase the products sold on the property from the grantor, if they are of reasonable duration and do not violate anticompetitive concerns.¹⁸⁸ These obligations often are necessary to encourage commencement of desirable commercial activities.

The rights within this exception do not involve dead hand control exerted by an outside entity. Rather, enforcement of these rights is justified by their commercial importance¹⁸⁹ and because they efficiently allocate land use privileges. Although they do restrict the servient owner's acts to some extent, they usually intrude only on a limited portion of the burdened land. Moreover, people may hesitate to transfer fees if these key rights appended to the transfer are not enforceable.

A burden related to an in gross benefit also might be enforced when the party seeking enforcement can demonstrate a direct and significant benefit to a clearly defined, publicly desirable interest. For example, a court may permit the burdens of in gross conservation restrictions to run

183. For example, courts may employ termination and modification doctrines to alter a general principle that a burden should run.

184. *See, e.g., Farrell v. Hodges Stock Yards, Inc.*, 343 So. 2d 1364, 1366-68 (La. 1977) (enforcing servitude agreement granting right-of-way to railroad against easement grantors' successors).

185. *See* RESTATEMENT OF PROPERTY § 450 comment f (1944) (recognizing that easement may include right to sever minerals).

186. *See, e.g., Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837, 839 (8th Cir. 1975) (enforcing right-of-way contract for oil and gas pipelines against easement grantors' successors); *City of Pasadena v. California-Michigan Land & Water Co.*, 17 Cal. 2d 576, 578-80, 110 P.2d 983, 984-85 (1941) (construing exclusivity of grant of easement for water lines).

187. *See, e.g., Genet v. Florida E. Coast Ry.*, 150 So. 2d 272, 273 (Fla. Dist. Ct. App.) (grantor hoped that the warehouse would increase demand for its freight haulage business), *cert. denied*, 155 So. 2d 551 (Fla. 1963).

188. *See, e.g., Trosper v. Shoemaker*, 312 Ky. 344, 346-47, 227 S.W.2d 176, 178 (1949) (upholding grantee's covenant to sell one brand of petroleum products exclusively on filling station premises); *Staebler-Kempff Oil Co. v. Mac's Auto Mart, Inc.*, 329 Mich. 351, 356-57, 45 N.W.2d 316, 318-19 (1951) (same); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 950-51, 344 N.Y.S.2d 30, 31-32 (1973) (same).

189. *See* C. CLARK, *supra* note 28, at 81-89 (stating that assignability may turn on the value or importance of the interest).

because of the recognized public interest in preservation.¹⁹⁰ Other affirmative rights that are not justified by commercial importance, such as a parking privilege,¹⁹¹ may be enforceable against the successor of the burdened land because of the utility of such arrangements and their limited intrusiveness.

2. *Transfer of Benefits.*—The benefits of in gross land use rights should not run except when the burdens bind a successor. This rule limits the dead hand and reduces the excessive transaction costs that often result from such transfers. In addition, a recording system for assignments would minimize transaction costs by keeping ownership information current.¹⁹²

When a burden does run, the benefit should run only if the successor receives a benefit similar to the original interest holder's benefit and the original parties clearly did not intend that the right be nonassignable.¹⁹³ For example, a successor conservation foundation can assume the benefit of an in gross conservation interest. Similarly, a railroad company can transfer its lines to another railroad without forfeiting any rights. In both cases, the successor is likely to benefit much like its predecessor from the in gross interest, and the importance of the interest justifies its enforcement.

3. *Special Cases.*—Certain other exceptions to the general in gross enforcement prohibition are appropriate in light of policy considerations. Courts should enforce government-owned in gross interests, whether negative or affirmative, against successors to the burdened land. Many important land use controls are achievable only by a governmental entity's ownership of a negative restriction.¹⁹⁴ The governmental entity must be in a position to enforce affirmative undertakings in conveyances that benefit the area.¹⁹⁵ The political process assures the flexibility and

190. See Korngold, *supra* note 6, at 442-47.

191. See RESTATEMENT OF PROPERTY § 492 illus. 1 (1944).

192. See, e.g., CAL. CIV. CODE § 835.030 (West Supp. 1987) (requiring re-recording within 30 years); IOWA CODE ANN. § 614.24 (West Supp. 1987) (same); see also Sturley, *Easements in Gross*, 96 LAW Q. REV. 557, 566-67 (1980) (arguing that registration mitigates antirestrictions problems for easements in gross). A five year re-recording period would be helpful without being onerous.

193. See RESTATEMENT OF PROPERTY §§ 491-492 (1944).

194. In *City of Idaho Springs v. Golden Sav. & Loan Ass'n*, 29 Colo. App. 119, 123, 480 P.2d 847, 849 (1970), the city wanted a municipal swimming pool, but lacked the funds to construct it. The city conveyed land to a grantee under the condition that the property be used solely as a pool. A court must enforce such a land use restriction, even though held in gross, in order to permit land use allocation that meets community needs. *But see* *Selectmen of the Town of Nahant v. United States*, 293 F. Supp. 1076, 1078 (D. Mass. 1968) (stating that mere recital in the deed of the purpose to which land is to be put is insufficient to limit the estate granted).

195. Cf. *Oldfield v. Stoeco Homes, Inc.*, 26 N.J. 246, 260-62, 139 A.2d 291, 298-99 (1958) (de-

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democratic control of local land use decisions that the usual in gross restriction threatens.

Additionally, courts should permit homeowners associations to enforce land use rights on behalf of lot owners.¹⁹⁶ This situation does not involve veto power asserted by someone external to the land because the owners themselves control the association. The homeowners association exception enhances flexibility and increases efficiency by reducing the transaction costs that would result from multiple enforcement.

C. *Touch and Concern*

An integrated law of defeasible fees and servitudes should limit the subject matter of private land use arrangements and should invalidate those arrangements that create antirestrictions problems or eccentric ties. But unlike current treatment, courts should face these issues directly instead of burying them within classic touch and concern ruminations. An integrated law requires clear articulation of the contract and antirestrictions dichotomy and the rules dealing with particular categories of troublesome land use rights, such as anticompetitive covenants and affirmative obligations.¹⁹⁷ Although an integrated law can look to current touch and concern doctrine for guidance, the test must not take on a life of its own.

Cases involving restrictions on the sale and manufacture of liquor illustrate the danger of a rigid touch and concern test and the need for policy analysis. These restrictions present troubling questions about subject matter. Should they be upheld as legitimate, appurtenant ties designed to maintain quality of life in a neighborhood, or invalidated as an attempt to impose a personal or religious belief on a landowner without any direct benefit to land owned by the grantor? A number of courts interpreting such restrictions when cast as conditions have focused di-

clining to enforce condition requiring grantees to fill swamp land for city land redevelopment because city had modified time for performance but had not eliminated the requirement of performance); *Collard v. Incorporated Village*, 52 N.Y.2d 594, 599-603, 421 N.E.2d 818, 821-22, 439 N.Y.S.2d 326, 329-30 (1981) (noting that permissible spot zoning is "part of a well-considered and comprehensive plan calculated to serve the general welfare of the community").

196. See, e.g., *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 190-91, 136 N.E.2d 556, 558-59 (1956) (holding that property owners association could maintain action to enjoin restrictive covenant violation); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 262, 15 N.E.2d 793, 798 (1938) (holding that property owners association could foreclose on lien for nonpayment of assessments); cf. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 223, 95 N.E. 216, 219 (1911) (stating that development company could enforce restrictions even though it no longer owned any of the land).

197. For example, it is unclear whether a covenant requiring grantee or his successor to refinance the property's mortgage within two years, which restores grantor's VA loan eligibility, would touch and concern under traditional analysis, even though good reasons support binding a successor. For a case discussing a condition similar to this covenant, see *Nielsen v. Woods*, 687 P.2d 486 (Colo. Ct. App. 1984).

rectly on the difficult policy issues. They have discussed possible motives behind such conditions: to uphold "the social and moral welfare of the community by preventing intemperance,"¹⁹⁸ to impose personal and religious beliefs,¹⁹⁹ to create an "ideal city,"²⁰⁰ or to restrain trade.²⁰¹ These courts have decided the condition's validity based on their views of its goals. Under an integrated law, courts should tie these motives into the policy dichotomy and focus their analysis on the condition's import.

In one noteworthy case the court denied enforcement of a condition barring the sale of liquor against a successor when the grantor no longer owned land in the area.²⁰² The court indicated its sensitivity to the reach of the dead hand in explaining that a grantor may not impose conditions "as his fancy may dictate" and seek enforcement although he is not harmed by the breach.²⁰³ This approach is consistent with an integrated law's framework for judicial decision.

D. Termination and Modification Doctrines

A unified law should adopt the changed conditions doctrine and the related theories in fees on condition law²⁰⁴ to permit removal of obsolete land ties. These approaches, which focus on the functional validity of land rights allocation agreements, are preferable to legislation setting arbitrary time limits on such interests.²⁰⁵ Professor French, in a recent article on servitudes, argues against enforcement of affirmative obligations that become unduly burdensome, obsolete, wasteful, or unreasonable.²⁰⁶ Moreover, she urges courts to use modification and termination procedures when dealing with problematic servitudes.²⁰⁷ An integrated law should adopt such an approach because it furthers the antirestrictions policy and encourages flexible decision making.

198. *Burdell v. Grandi*, 152 Cal. 376, 379, 92 P. 1022, 1023 (1907).

199. *See, e.g., Kaczynski v. Lindahl*, 5 Mich. App. 377, 380, 146 N.W.2d 675, 676 (1966); *see also Riverton Country Club v. Thomas*, 141 N.J. Eq. 435, 442, 58 A.2d 89, 94 (Ch. 1948) (recognizing that restrictive covenant was intended to assure grantors that country club would not become "gathering place for individuals partial to use of intoxicants").

200. *Cole v. Colorado Springs Co.*, 152 Colo. 162, 168, 381 P.2d 13, 16 (1963).

201. *See, e.g., Burdell v. Grandi*, 152 Cal. 376, 380, 92 P. 1022, 1023 (1907); *Fusha v. Dacono Townsite Co.*, 60 Colo. 315, 318, 153 P. 226, 227 (1915).

202. *Barrie v. Smith*, 47 Mich. 130, 134, 10 N.W. 168, 170 (1881).

203. *Id.* In real covenant cases, courts generally ignore the policy considerations of liquor restrictions. *See, e.g., El Di, Inc. v. Town of Bethany Beach*, 477 A.2d 1066, 1070 (Del. 1984); *Clary v. Lamont*, 67 So. 2d 227, 227 (Fla. 1953); *Reichert v. Weeden*, 618 P.2d 1216, 1220 (Mont. 1980); *Benner v. Tacony Athletic Ass'n*, 328 Pa. 577, 579, 196 A. 390, 392 (1938).

204. *See supra* notes 135-36 and accompanying text.

205. *See, e.g., CONN. GEN. STAT. ANN. § 45-97* (West 1981) (30 years); *FLA. STAT. ANN. § 689.18(3)* (West Supp. 1987) (21 years); *ILL. ANN. STAT. ch. 30, paras. 37b-37h* (Smith-Hurd 1969) (40 years); *MASS. GEN. LAWS ANN. ch. 184A, § 3* (West 1977) (30 years).

206. French, *supra* note 6, at 1316-17.

207. *Id.* at 1313-18.

In addition, a unified law must go beyond the current law of conditions and servitudes and provide a mechanism whereby a court can refuse equitable enforcement of a land allocation agreement when that enforcement violates the public interest. Injunctive relief ignores the policy dichotomy essential to conditions and servitudes. Damage awards could, in most cases, adequately remedy the harm.²⁰⁸ This doctrinal advance would respect the values of freedom of contract and yet enable a court to effectuate the antirestrictions policy by preventing excessive dead hand control in extraordinary situations. A public interest doctrine also harmonizes an integrated law with the classic doctrine that “the interests of . . . the public are factors to be considered in determining the appropriateness of injunction against tort.”²⁰⁹ While a public interest test may add ambiguity and require greater judicial resources, it is necessary for adequate resolution of the contracts and antirestrictions policy conflict. Courts could employ such a public policy doctrine to resolve the problems that arise when private restrictions in effect bar land use that would benefit the community.

E. The Rule Against Perpetuities

A unified law should not incorporate the Rule Against Perpetuities for all conditions and servitudes. The substance of the common-law Rule and its automatic and remorseless nature do not adequately address freedom of contract and antirestrictions concerns.²¹⁰

The courts mercilessly apply the Rule even though it defeats the grantor's express intention.²¹¹ The Rule clearly does more violence than necessary to freedom of contract concerns, and threatens the moral imperative, economic efficiency, and freedom of choice inherent in private arrangements. Moreover, the Rule applies prospectively to void an exec-

208. The measure of damages could be the diminution in the value of the benefited parcel attributable to the breach. *See, e.g.,* *Bauby v. Krasow*, 107 Conn. 109, 116, 139 A. 508, 511 (1927) (refusing injunction ordering destruction of house, and awarding damages measured by diminution in value of benefited estate); *Orange & Rockland Utils., Inc. v. Philwold Estates, Inc.*, 52 N.Y.2d 253, 267, 418 N.E.2d 1310, 1316, 437 N.Y.S.2d 291, 297 (1981) (stating that owners of benefited land would be entitled to prove damages when restriction is extinguished). For in gross interests when the violation is total and permanent, damages could be the difference in the market values of the burdened land with and without the restriction. *See* Prop. Treas. Reg. § 1.170A-13(h)(3), 48 Fed. Reg. 22940, 22947 (1983). Limitation of the remedy to damages is not a taking, which could raise constitutional issues. *See* Korngold, *supra* note 6, at 465-66.

209. RESTATEMENT (SECOND) OF TORTS § 942, at 586 (1976).

210. The Rule Against Perpetuities confers only limited benefits by fixing a maximum time period during which an executory limitation must vest. This in turn holds down the number of potential transferees, thus reducing tracing costs, and confines dead hand control to a specified time.

211. *See, e.g.,* *Proprietors of the Church in Brattle Square v. Grant*, 69 Mass. (3 Gray) 142, 158 (1855); *Shipton v. Sheridan*, 531 S.W.2d 291, 293 (Mo. Ct. App. 1975); *Standard Knitting Mills, Inc. v. Allen*, 221 Tenn. 90, 101, 424 S.W.2d 796, 801 (1967).

utory interest. This approach can prevent divestment of the original grantee's estate, which runs counter to the traditional view that the agreement should be enforced between the original parties.²¹²

At the same time, the Rule does not resolve antirestrictions issues adequately. The Rule is underinclusive because it allows some interests that pose antirestrictions problems²¹³ and overinclusive because it voids rights when no true dead hand issue exists.²¹⁴ The antirestrictions benefits of the Rule, therefore, do not justify its offensiveness to contract concerns. Similarly, the Rule is applied without regard to the in gross issue. Indeed, rigid application of the doctrine has resulted in favoring in gross over appurtenant interests in some cases.²¹⁵ Additionally, the condition's subject matter is not a factor in Rule Against Perpetuities analysis. The Rule can void a condition prohibiting the consumption of alcohol on the premises without inquiry into potentially valid purposes behind the condition.²¹⁶ Also, to the extent the Rule sets arbitrary time limits on conditions, it is an unsatisfactory termination device because it is unable to provide courts with the flexibility necessary to effectuate the policy dichotomy. Finally, the Rule does not apply when charities hold both the present and future interest.²¹⁷ Although this charity-to-charity exception does recognize significant policy mandates, it leaves dead hand control unchecked for such interests. An integrated law would instill flexibility that is unavailable under the wooden approach of the Rule Against Perpetuities.

Additional disadvantages plague the Rule. Its complexity creates

212. See *supra* note 78 and *supra* text accompanying note 160. Even under various reform doctrines such as wait-and-see and *cy pres*, see Dukeminier, *supra* note 65, at 1880-87, 1898-901, the Rule could void an executory interest while the property is held by the original grantee.

213. For example, the Rule does not apply to possibilities of reverter even though they may create antirestrictions problems. See *supra* note 63. Moreover, the Rule does not void interests that vest within the requisite period even though they may be held in gross or involve questionable subject matter. See *infra* notes 215-16 and accompanying text.

214. The Rule could automatically void an executory limitation in favor of a governmental entity or a homeowners association even though no dead hand control concerns are present. See *supra* text accompanying notes 194-96. Similarly, the Rule could prevent land use allocation agreements when benefits are not held in gross. See *Fayette County v. Morton*, 282 Ky. 481, 485, 138 S.W.2d 953, 955 (1940) (neighbors could not enforce condition without creating Rule Against Perpetuities problem); *County School Bd. v. Dowell*, 190 Va. 676, 688, 58 S.E.2d 38, 43 (1950) (same).

215. For example, if the grantor creates a fee simple determinable followed by an executory limitation in favor of the owner of the original tract from which the conveyed parcel was taken, and the Rule voids the executory interest, only an heir of the grantor or successor could enforce the condition, and not the neighbor now owning the tract. See, e.g., *Jones v. Burns*, 221 Miss. 833, 842, 74 So. 2d 866, 868 (1954); *Shipton v. Sheridan*, 531 S.W.2d 291, 293 (Mo. Ct. App. 1975); *Yarbrough v. Yarbrough*, 151 Tenn. 221, 231, 269 S.W. 36, 38-39 (1925).

216. See *Betts v. Snyder*, 341 Pa. 465, 467-68, 19 A.2d 82, 83 (1941); cf. *Knowles v. South County Hosp.*, 87 R.I. 303, 308, 140 A.2d 499, 501-02 (1958) (upholding condition requiring annual growth of at least one peck of Indian maize, or Rhode Island johnnycake corn).

217. See Dukeminier, *supra* note 65, at 1908.

traps for even the wary.²¹⁸ Moreover, the technical manipulation of the Rule is so daunting that this alone becomes the focus of courts, which diverts their attention from important policy issues. Reliance on this technical doctrine as the *ratio decidendi* allows decision makers to hide the unarticulated and often determinative policy reasons for a decision.²¹⁹ While current doctrine, which applies the Rule Against Perpetuities to executory limitations but not their functional equivalents, is unsatisfactory,²²⁰ expanding the Rule's application to conditions is not the appropriate response.²²¹ The Rule should not apply to any interests that allocate land use rights. The law can strike a better balance between freedom of contract and antirestrictions policies through the unified law that this Article has suggested for remedies, in gross ownership, interest subject matter, and termination and modification doctrines.

V. Conclusion

Planners and decision makers currently are confronted by separate legal rules for defeasible fees and servitudes even though these interests are functional equivalents, share the same policy bases, and present common problems of private land use allocation devices. Classification of an interest is critical in the present system of decision by labeling and rigid adherence to history. The courts do not confront adequately the competing values of freedom of contract and the antirestrictions policy.

Defeasible fees and servitudes must be integrated into a single law of private land use allocation devices to eliminate unjustifiable inconsistencies among the interests. The substantive rules of arcane doctrine should be replaced with substantive rules derived from a unified law that addresses the real and current problems of private land use control through careful balancing of contract and antirestrictions considerations. Integration can eliminate the ambivalence over forfeiture and make it available for the special situations that merit it. A unified law can curtail in gross interests that threaten antirestrictions values, limit subject matter

218. *Id.* at 1905-06.

219. *See* County School Bd. v. Dowell, 190 Va. 676, 684-85, 58 S.E.2d 38, 41-42 (1950) (unclear whether concern over deterioration of property during grantee's occupancy led to court's upholding possibility of reverter despite Rule Against Perpetuities).

220. Under the current regime, classification of an interest determines its validity. One court observed: "[I]f the . . . deed had undertaken to confine the reversion to the ultimate owner of the adjoining property . . . unquestionably the restriction would be void as offending the statute against perpetuities. But we do not so construe it, and, therefore, . . . the provision for reverter was valid." Fayette County v. Morton, 282 Ky. 481, 485, 138 S.W.2d 953, 955 (1940)

221. For commentaries that do suggest some expansion of the Rule's application, see Dukeminier, *supra* note 65, at 1907-08; Fratcher, *Defeasance as a Restrictive Device in Michigan*, 52 MICH. L. REV. 505, 513-17 (1954); Lynn & Ranser, *Applying the Rule Against Perpetuities to Functional Equivalents: Capps Chapel and the Woburn Church Revisited*, 43 IOWA L. REV. 36, 45 (1957).

of private land use devices by directly examining troublesome restrictions, and provide for increased termination and modification of servitudes in light of the public interest.

The legislatures and courts can accomplish this unification. Moreover, the *Restatement (Third) of Property (Servitudes)* presents a unique opportunity to chart the course for a broad integration of the law of private land use control devices. Such a unification might serve as a model for reforming other areas of real property law in which separate boxes of rules have developed to address similar issues.