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## Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements

Gerald Korngold  
*New York Law School*

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# Privately Held Conservation Servitudes: A Policy Analysis in the Context of in Gross Real Covenants and Easements

Gerald Korngold\*

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\* Professor of Law and Associate Dean for Academic Affairs, New York Law School. B.A. 1974, J.D. 1977, University of Pennsylvania. The author is grateful to Arthur Best and George W. Dent, Jr., for their helpful comments on earlier drafts of this Article.

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I. Introduction

Privately held conservation servitudes in gross<sup>1</sup> challenge the wisdom and creativity of courts and legislatures because they present a difficult choice among conflicting social values. Although authorization of private conservation servitudes in gross reinforces freedom of contract, promotes the benefits of private initiative, and assists conservation of the natural environment, other important social policies suffer. Over the past decade numerous legislatures, apparently failing to recognize this tension, have approved privately held conservation servitudes in gross. This Article describes the conflict and suggests paths to its resolution.

A. *Description of Private Conservation Servitudes in Gross*

Although conservation servitudes vary significantly in their terms depending on the specific conservation purposes intended, some generalizations are possible. Essentially, a conservation servitude is a negative restriction on land prohibiting the landowner from acting in a way that would alter the existing natural, open, scenic, or ecological condition of the land.<sup>2</sup> Typical provisions included in conservation servitudes range

1. Throughout this Article “private” and “privately held” refer to ownership by a nongovernmental, nonprofit association, corporation, or trust. Servitudes other than conservation servitudes are referred to herein as “general servitudes.”

2. See SENATE COMM. ON ENERGY AND NATURAL RESOURCES, 97TH CONG., 1ST SESS., WORKSHOP ON PUBLIC LAND ACQUISITION AND ALTERNATIVES 450 (Comm. Print 1981) (statement of Michael Priesnitz) [hereinafter cited as WORKSHOP]; S. REP. NO. 1007, 96th Cong., 2d Sess. 10-11, reprinted in 1980 U.S. CODE CONG. & AD. NEWS 6736, 6745-48 (defining “conservation purpose”); U.S. COMPTROLLER GENERAL, THE FEDERAL DRIVE TO ACQUIRE PRIVATE LANDS SHOULD BE REASSESSED 12-17 (CED 80-14, 1979) [hereinafter cited as PRIVATE LANDS]; National Park Service of the U.S. Dept. of the Interior, Revised Land Acquisition Policy, 44 Fed. Reg. 24,790, 24,797 (1979) [hereinafter cited as Acquisition Policy]; R. BRENNEMAN, PRIVATE APPROACHES TO THE PRESERVATION OF OPEN LAND vii-ix (1967); PROTECTING NATURE’S ESTATE: TECHNIQUES FOR SAVING LAND 54 (E. Stover ed. 1975); W. WHYTE, SECURING OPEN SPACE FOR URBAN AMERICA: CONSERVATION EASEMENTS 7 (Urban Land Institute, Technical Bulletin No. 36, 1959); Cunningham, *Scenic Easements in the Highway Beautification Program*, 45 DEN. L.J. 168, 170-74 (1968); Higgins, *Easements for Wild and Scenic Rivers*, 70 J. FORESTRY 744 (1972); Maryland Environmental Trust, *Conservation Easements* 5 (1979) (copy on file with the *Texas Law Re-*

from a prohibition against destruction of trees, shrubs, or other greenery to a restriction to residential or existing uses.<sup>3</sup> Conservation servitudes typically do not permit the holder to have physical use of or general access to the burdened parcel,<sup>4</sup> but allow inspection of the land to determine compliance with the restrictions.<sup>5</sup> In short, a conservation servitude seeks to preserve the environmental status quo of the burdened land by shifting some ownership rights from the owner of the servient tract to the servitude holder.

There is confusion over the appropriate label for these conservation interests and over the nature of the property rights conferred. Common names include: conservation easements, restrictions, rights, and futures; open-space easements and less-than-fee interests; scenic easements and interests; and development rights.<sup>6</sup>

More important than appropriate labels is the question of which body of law should govern. Traditionally, the law of real covenants (enforced either as covenants-at-law or as equitable servitudes) has been seen as distinct from that of easements.<sup>7</sup> Courts have viewed easements as valuable and protected property rights, while treating real covenants with suspicion and subjecting them to greater barriers against enforcement.<sup>8</sup> Consequently, choosing the "easement" label for a conservation interest and following the classical rules could lead an uncritical decisionmaker to a quick and rigid result without the necessary policy analysis.

Such shortcuts should be resisted for two principal reasons. First, assuming there is validity to the traditional dichotomy between real cove-

view); The Nature Conservancy, *Conservation Easements 2* (1976) (copy on file with *Texas Law Review*).

3. For examples of conservation servitudes, see W. WHYTE, *supra* note 2, at 44, 60 (creating a scenic easement); Cunningham, *supra* note 2, at 201 (prohibiting excavation and building structures or roads, outdoor advertising, removal or destruction of trees and restricting land to residential or existing uses); The Nature Conservancy, *supra* note 2, at 11 (prohibiting excavation and building structures or roads, removal or destruction of trees, interference with water areas, motor vehicles, accumulation of trash and unsightly materials, acts detrimental to water or soil conservation or fish and wildlife preservation, and limiting varieties of new plantings); New Jersey Conservation Foundation, *Tax and Estate Planning: Land Preservation 24* (1981) (prohibiting excavation and building structures or roads, removal or destruction of trees, accumulation of trash and unsightly materials, and acts detrimental to water and soil conservation or fish and wildlife preservation) (copy on file with *Texas Law Review*).

4. See, e.g., R. BRENNEMAN, *supra* note 2, at 100 (expressly denying right of public access).

5. See, e.g., Maryland Environmental Trust, *supra* note 2, at 20-21; The Nature Conservancy, *supra* note 2, at 11.

6. See Netherton, *Environmental Conservation and Historic Preservation Through Recorded Land-Use Agreements*, 14 REAL PROP. PROB. & TR. J. 540, 567-80 (1979) (listing names for conservation interests).

7. The *Restatement of Property* distinguishes easements from real covenants. RESTATEMENT OF PROPERTY §§ 450-511, 530-568 (1944).

8. See *infra* note 235.

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nants and easements, conservation servitudes more closely resemble real covenants than easements and hence should not be labeled and treated as easements.<sup>9</sup> Although conservation servitudes are negative restrictions, they do not resemble any of the four traditional types of negative easements.<sup>10</sup> Like real covenants, conservation servitudes are “promises respecting the use of land.”<sup>11</sup>

Second, shortcut decisions that rely on mere labeling fail to address inherent policy conflicts. This failure is underscored by recent scholarship pointing out similarities between real covenants and easements, criticizing their divergent rules of law, and calling for their unification into a single law of servitudes.<sup>12</sup> This Article, therefore, will examine not only traditional real covenant and easement law, but also policy concerns. For clarity, conservation interests are referred to as conservation “servitudes,” a neutral term that avoids the traditional categories.

Private conservation servitudes in gross can be validated by statute or by judicial decision. At least thirty-seven jurisdictions have enacted statutes expressly<sup>13</sup> or impliedly<sup>14</sup> recognizing the validity of conserva-

9. See Krasnowiecki & Paul, *The Preservation of Open Space in Metropolitan Areas*, 110 U. PA. L. REV. 179, 194 (1961) (“[T]he type of interest needed to accomplish open-space preservation is so unlike any easement and so like most restrictive covenants that one can expect the courts to treat them as covenants.”).

10. See RESTATEMENT OF PROPERTY § 452 comment a (1944); 3 R. POWELL, REAL PROPERTY ¶ 405 (1984); Costonis, *The Chicago Plan: Incentive Zoning and the Preservation of Urban Landmarks*, 85 HARV. L. REV. 574, 613 & n.144 (1972).

11. See RESTATEMENT OF PROPERTY §§ 522-568 (1944).

12. See *infra* note 73 and accompanying text.

13. ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1983) (recognizing private and governmental power to create conservation easements); CAL. GOV'T CODE §§ 6950-6954 (West 1980) (government may obtain fee or any lesser interest in open space); *id.* §§ 7000-7002 (government may acquire highway scenic easements); *id.* §§ 51070-51097 (West 1983) (government may obtain open space easements); *id.* §§ 51230-51239 (government may establish agricultural preserves); COLO. REV. STAT. §§ 38-30.5-101 to -110 (1982) (governmental and private right to create conservation easements); CONN. GEN. STAT. §§ 7-131b to -131d (1972 & Supp. 1984) (government may acquire open space easements); *id.* §§ 47-42a to -42c (1978) (governmental and private power to acquire and enforce conservation restrictions); DEL. CODE ANN. tit. 7, §§ 6811-6815 (1983 & Supp. 1984) (governmental and private conservation easements); FLA. STAT. ANN. § 704.06 (West Supp. 1983) (recognizing private and governmental conservation easements); GA. CODE ANN. §§ 44-10-1 to -5 (1982) (establishing right to create governmental and private conservation easements); Conservation Rights in Real Property Act §§ 1-6, ILL. ANN. STAT. ch. 30, §§ 401-406 (Smith-Hurd Supp. 1983) (recognizing governmental and private conservation rights); IND. CODE ANN. §§ 14-4-5.5-1 to -5.4 (Burns 1973) (recognizing governmental conservation easements); IOWA CODE §§ 111D.1-.5 (1984) (governmental power to acquire conservation easements); LA. REV. STAT. ANN. tit. 9, § 1252 (West Supp. 1985) (creation of governmental or private real property rights); ME. REV. STAT. ANN. tit. 33, §§ 667-668 (1978) (defining conservation restrictions and granting governments the right of acquisition); *id.* tit. 38, § 955 (Supp. 1982) (government may acquire and administer conservation restrictions); MD. REAL PROP. CODE ANN. § 2-118 (1981) (creation of governmental or private conservation easements); MASS. GEN. LAWS ANN. ch. 184, §§ 31-33 (West 1977 & Supp. 1984) (creation of governmental and private conservation restrictions); MICH. COMP. LAWS ANN. §§ 399.251-.257 (West Supp. 1984-1985) (MICH. STAT. ANN. §§ 15.1816(51)-.1816(57) (Callaghan 1984)) (permitting creation of governmental and private conservation easements); MINN. STAT.

tion servitudes. There is little uniformity in either substance or style among these statutes,<sup>15</sup> but one can generalize about their effect to some extent. Twenty-five of the jurisdictions that validate conservation servitudes expressly provide for ownership of conservation servitudes by private nonprofit or charitable corporations, trusts, or associations.<sup>16</sup> Of

§§ 84.64-.65 (1982) (defining governmental and private conservation restrictions and providing for enforcement); MONT. CODE ANN. §§ 76-6-201 to -211 (1983) (governmental and private conservation easements); N.H. REV. STAT. ANN. §§ 477:45-.47 (1983) (governmental and private conservation restrictions are real property interests); N.J. STAT. ANN. §§ 13:8B-1 to -9 (West Supp. 1983) (creation of governmental and private conservation restrictions); N.Y. ENVTL. CONSERV. LAW §§ 49-0301 to -0311 (McKinney 1984 & Supp. 1984-1985) (authorizing governmental and private conservation easements); N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1984-1985) (providing for governmental open space easements); N.C. GEN. STAT. § 113A-90 (1978) (government may acquire scenic easements within right-of-way boundary); OHIO REV. CODE ANN. §§ 5301.67-.70 (Page 1981) (grants of governmental and private conservation easements); OR. REV. STAT. §§ 271.710-.750 (1983) (creation of governmental and private conservation and scenic easements); PA. STAT. ANN. tit. 32, §§ 5001-5013 (Purdon Supp. 1983) (acquisition and preservation of governmental easements for open space); R.I. GEN. LAWS §§ 34-39-1 to -5 (Supp. 1983) (granting legal status to governmental and private conservation restrictions); S.C. CODE ANN. §§ 27-9-10 to -30 (Law. Co-op. 1976 & Supp. 1983) (authorizing transfers of governmental and private conservation restrictions and easements); *id.* § 51-17-80 (creating governmental and private open space easements); TENN. CODE ANN. §§ 11-13-101 to -111 (1982) (acquisition of governmental scenic river easements); *id.* §§ 11-15-102 to -108 (acquisition of governmental scenic and open space easements); *id.* §§ 66-9-301 to -309 (acquisition of private and governmental conservation easements); TEX. NAT. RES. CODE ANN. §§ 183.001-.005 (Vernon Supp. 1983) (authorization of governmental conservation easements); VA. CODE §§ 10-151 to -158 (1978 & Supp. 1984) (acquisition of governmental open space interests); WASH. REV. CODE § 64.04.130 (Supp. 1985) (authority to acquire governmental and private open space interests); *id.* §§ 84.34.200-.250 (authority to use public money to acquire conservation easements); WIS. STAT. ANN. § 61.34(3m) (West Supp. 1984-1985) (acquisition of governmental conservation easements); *id.* § 700.40 (authority to create governmental and private conservation easements); *see also infra* note 15 (discussing the Uniform Conservation Easement Act).

14. ARIZ. REV. STAT. ANN. §§ 9-464 to -464.01, 11-935.01 (1977) (authorizing expenditure of public funds for governmental acquisition of interests or rights in real property in open space lands or open areas); KY. REV. STAT. §§ 65.410-.480 (1980) (authorizing local legislative bodies to obtain scenic easements); MISS. CODE ANN. §§ 49-5-140 to -157 (Supp. 1983) (creating wildlife heritage committee to acquire interests in natural areas); MO. REV. STAT. §§ 67.870-.910 (1978) (allowing governmental and private conservation easements); VT. STAT. ANN. tit. 10, § 6303 (1973) (governmental right to acquire easements); W. VA. CODE § 20-1-7(11) (Supp. 1984) (governmental right to acquire interests in land). Historical restrictions are similar in some respects to conservation easements, but lie outside the scope of this Article. *See, e.g.*, S.D. CODIFIED LAWS ANN. § 1-19B-16 (1979).

15. *But see* UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 51 (Supp. 1984). The Uniform Act was approved by the National Conference of Commissioners on Uniform State Laws in 1981. Two jurisdictions have adopted the Uniform Act, subject to modifications. ARK. STAT. ANN. §§ 50-1201 to -1206 (Supp. 1983); WIS. STAT. ANN. § 700.40 (West Supp. 1983). The Uniform Act expresses a deliberate choice to "maximize[] the freedom of the creators of the transaction to impose restrictions on the use of land," UNIF. CONSERVATION EASEMENT ACT Commissioners' prefatory note, 12 U.L.A. 51, 51 (Supp. 1984), to uphold a conservation servitude as a "consensual arrangement freed from common law impediments," *id.*, and to advance the values implicit in the "norm" that allows conveyance of fee or nonpossessory interests by private associations unless there is a conflict with constitutional or statutory requirements, *id.* at 52. As will be argued here, such a preference is at the cost of other societal values.

16. ARK. STAT. ANN. § 50-1201(2)(ii) (Supp. 1983); CAL. GOV'T CODE § 51075(d), (f) (West 1983); COLO. REV. STAT. § 38-30.5-104(2) (1982); CONN. GEN. STAT. § 47-42b (1978); DEL. CODE ANN. tit. 7, §§ 6811-6815 (1983 & Supp. 1984); FLA. STAT. ANN. § 704.06(3) (West Supp. 1983); GA. CODE ANN. § 44-10-4 (1982); Conservation Rights in Real Property Act § 2, ILL. ANN. STAT.

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these, twenty-three expressly permit these interests to be held in gross.<sup>17</sup> The Uniform Conservation Easement Act<sup>18</sup> represents a movement to pass such statutory authorization in other jurisdictions.

Although no case to date has authorized a private conservation servitude in gross,<sup>19</sup> various commentators have urged common-law recognition.<sup>20</sup> Judicial validation presumably would recognize the conflicting

ch. 30, § 402 (Smith-Hurd Supp. 1983); LA. REV. STAT. ANN. tit. 9, § 1252(A) (West Supp. 1985); MD. REAL PROP. CODE ANN. § 2-118 (1981); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984); MICH. COMP. LAWS ANN. § 399.253 (West Supp. 1984-1985) (MICH. STAT. ANN. § 15.1816(53) (Callaghan 1984)); MINN. STAT. § 84.64 (1982); MO. REV. STAT. § 67.890 (1978); MONT. CODE ANN. § 76-6-204 (1983); N.H. REV. STAT. ANN. § 477:46 (1983); N.J. STAT. ANN. § 13-8B-3 (West Supp. 1983); N.Y. ENVTL. CONSERV. LAW § 49-0305(3) (McKinney Supp. 1984-1985); OHIO REV. CODE ANN. § 5301.69 (Page 1981); OR. REV. STAT. § 271.715(2) (1983); R.I. GEN. LAWS § 34-39-3 (Supp. 1983); S.C. CODE ANN. § 27-9-20 (Law. Co-op. 1981); TENN. CODE ANN. § 66-9-305 (1982); VA. CODE § 10-158 (Supp. 1983); WASH. REV. CODE ANN. §§ 64.04.130, 64.34.220 (Supp. 1983); WIS. STAT. ANN. § 700.40(1)(b)(2) (West Supp. 1983); *see also* KY. REV. STAT. § 65.470 (1980) (right to enforce governmental servitude is vested in any resident if government fails to enforce); UNIF. CONSERVATION EASEMENT ACT § 1(2), 12 U.L.A. 51, 53 (Supp. 1984). The remainder of the statutes listed *supra* notes 13 & 14 authorize governmental servitudes only.

17. *See, e.g.*, ARK. STAT. ANN. § 50-1204(1) (Supp. 1983); COLO. REV. STAT. § 38-30.5-104 (1982); CONN. GEN. STAT. § 47-42b (1978); DEL. CODE ANN. tit. 7, § 6812 (1983 & Supp. 1984); FLA. STAT. ANN. § 704.06(4) (West Supp. 1983); GA. CODE ANN. § 44-10-4 (1982); Conservation Rights in Real Property Act § 1(b), ILL. ANN. STAT. ch. 30, § 401(b) (Smith-Hurd Supp. 1983); LA. REV. STAT. ANN. tit. 9, § 1252(B) (West Supp. 1983); MD. REAL PROP. CODE ANN. § 2-118(c) (1981); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1983); MICH. COMP. LAWS ANN. § 399.254 (West Supp. 1984-1985) (MICH. STAT. ANN. § 15.1816(54) (Callaghan 1984)); MINN. STAT. § 84.65 (1982); MONT. CODE ANN. § 76-6-210 (1983); N.H. REV. STAT. ANN. § 477:46 (1983); N.J. STAT. ANN. § 13-8B-4 (West Supp. 1983); N.Y. ENVTL. CONSERV. LAW § 49-0305(5)(a) (McKinney Supp. 1984-1985); OHIO REV. CODE ANN. § 5301.70 (Page 1981); R.I. GEN. LAWS § 34-39-3 (Supp. 1983); S.C. CODE ANN. § 27-9-20 (Law. Co-op. 1976); TENN. CODE ANN. § 66-9-306 (1982); VA. CODE § 10-158 (Supp. 1983); WASH. REV. CODE ANN. § 64.04.130 (Supp. 1983); WIS. STAT. ANN. § 700.40(4)(a) (West Supp. 1983); *see also* UNIF. CONSERVATION EASEMENT ACT § 4(a), 12 U.L.A. 51, 56 (Supp. 1984).

An in gross real covenant or easement does not benefit a dominant parcel, but is held by the servitude owner without reference to land owned by him. *See* AMERICAN LAW OF PROPERTY § 9.32 (A. Casner ed. 1952).

18. 12 U.L.A. 51 (Supp. 1984); *see supra* note 15.

19. Cases have been reported involving governmental conservation servitudes. *See, e.g.*, North Dakota v. United States, 103 S. Ct. 1095, 1104-07 (1983) (preemption of state statutes that interfere with federal government's ability to acquire wetland easements); United States v. Albrecht, 364 F. Supp. 1349, 1351 (D.N.D. 1973) (enforceability of federal waterfowl easement), *aff'd*, 496 F.2d 906 (8th Cir. 1974); Santa Catalina Conservancy v. City of Los Angeles, 126 Cal. App. 3d 221, 178 Cal. Rptr. 708 (1982) (tax assessment of land subject to conservation servitude); Coons v. Carstensen, 15 Mass. App. Ct. 431, 446 N.E.2d 114, 115-16 (1983) (governmental conservation servitude encumbered title); Knowles v. Codex Corp., 12 Mass. App. Ct. 493, 499, 426 N.E.2d 734, 737-38 (1981) (standing to enforce governmental conservation servitude); Sierra Club v. Palisades Interstate Park Comm'n, 114 Misc. 2d 52, 450 N.Y.S.2d 677 (Sup. Ct. 1982) (challenge to modification of governmental conservation servitude); Appeal of Pfirrmann, 63 Pa. Cmmw. 407, 437 A.2d 1336, 1337-38 (1981) (tax assessment of land subject to conservation servitude); Kamrowski v. State, 31 Wis. 2d 256, 265-66, 142 N.W.2d 793, 797-98 (1966) (state can constitutionally condemn scenic easements).

20. *E.g.*, R. BRENNEMAN, *supra* note 2, at 20-35, 50-64; A. DUNHAM, PRESERVATION OF OPEN SPACE AREAS: A STUDY OF THE NON-GOVERNMENTAL ROLE 15-27 (1966); Netherton, *supra* note 6, at 553-56, 565-66.

A court could be required to decide the common-law validity of a private conservation servitude

policies of freedom of contract and free alienability of land, a conflict that inheres in all decisions about ties on land.

Private conservation servitudes in gross, as described by proponents and authorized by legislatures, differ significantly from general servitudes in at least three ways. First, in gross ownership of real covenants traditionally has been prohibited,<sup>21</sup> yet conservation servitudes can be created in gross.<sup>22</sup> Thus, conservation servitudes in gross do not limit the veto right to ties over neighboring properties; they extend to a potentially infinite amount of land.<sup>23</sup> Second, advocates propose a perpetual life for conservation servitudes, in stark contrast to traditional fears about ties on land of unlimited duration.<sup>24</sup> Finally, traditional common-law doctrines of judicial supervision of servitudes by their own terms do not apply to private conservation servitudes in gross, nor do existing conservation statutes provide adequate means for dealing with potential problems.<sup>25</sup>

### B. *The Shape of the Problem*

As currently conceived, privately held conservation servitudes in gross allow a private party a perpetual veto over a potentially unlimited amount of land held in fee by others. This result serves the critical goal of conserving the environment and encourages private associations to act. Yet permitting such servitudes frustrates other societal values. First, the policy against dead hand ties on land, a policy that allows living land owners to shift land use according to current market choices, is hampered. Further, the difficult choices between development and preservation historically have been reserved to the community through the

in gross in several circumstances: if the jurisdiction has enacted no conservation servitude statute at all or passed a statute authorizing only governmental conservation servitudes, if the interest in question was created before the enactment of a conservation servitude statute, or if the statutory system allows the creation of common-law interests. *See, e.g.*, ARK. STAT. ANN. § 50-1205(d) (Supp. 1983) (statute does not render interests outside statute unenforceable); FLA. STAT. ANN. § 704.06(6) (West Supp. 1983) (no implication that restrictions not within statute are unenforceable); ME. REV. STAT. ANN. tit. 33, § 668 (1978) (statute does not render interests outside statute unenforceable); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1983) (same); N.H. REV. STAT. ANN. § 477:46 (1983) (same); OHIO REV. CODE ANN. § 5301.70 (1982) (same).

21. *See infra* note 184 and accompanying text.

22. *See supra* note 17.

23. Some claim that a small tract of land could be used as a dominant parcel to avoid claims that the servitude was in gross. *See* R. BRENNEMAN, *supra* note 2, at 32; A. DUNHAM, *supra* note 20, at 17-18, 22; Shaman, *Fending Off Development—Forever*, N.Y. Times, Dec. 20, 1981, § 8, at 4, col. 2 (discussing an attempt to alter a government owned conservation servitude to allow the development of a resort hotel). Such efforts should be scrutinized carefully, and "sham" appurtenant servitudes should be treated as in gross interests. *See* RESTATEMENT OF PROPERTY § 537 illustration 4 (1944).

24. *See infra* subpart IV(B).

25. *See infra* Part V.

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democratic process of public land use controls; individual veto power over community decisions through private covenants has been limited to ties among neighbors. Allowing private, nonrepresentative organizations the veto power implicit in conservation servitudes in gross threatens such values. Finally, flexibility in both public and private land use controls is critical; perpetual conservation restrictions that lack adequate means for modifications mandated by public policy run counter to this goal. Conflicts among these policies will ripen with an increase in private conservation servitudes in gross<sup>26</sup> and with the transfer of properties subject to such servitudes to new owners unsympathetic to the goal of freezing property conditions.<sup>27</sup>

Although it may be difficult today to imagine a more important land use priority than conservation, a number of cases and events indicate that other uses sometimes may be more critical than conservation. It is not entirely clear, for example, that preservation of land is and always will be preferable to its use as a hospital or church providing services to the community,<sup>28</sup> a lower income housing project, a condominium containing recreational facilities and natural settings for its residents,<sup>29</sup> a public recreation area for picnicking, swimming, and sports,<sup>30</sup> or a commercial or industrial area providing jobs for an economically depressed region.<sup>31</sup> The choice of the best current use of a parcel of land is difficult enough;

26. There is an "absence of a comprehensive data base" for conservation servitudes. See S. REP. NO. 1007, *supra* note 2, at 15, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 6751. For examples of conservation servitudes, see U.S. GENERAL ACCOUNTING OFFICE, FEDERAL LAND ACQUISITION AND MANAGEMENT PRACTICES 9-10 (CED 81-135, 1981) [hereinafter cited as FEDERAL LAND ACQUISITION]; Coughlin & Plaut, *Less-Than-Fee Acquisition for the Preservation of Open Space: Does It Work?*, 44 J. AM. INST. PLANNERS 452, 457 (1978); Comment, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383, 383-85 (1976); *Ecology Drive Stirs Fear of Tax Losses*, N.Y. Times, Nov. 13, 1983, § 8, at 10, col. 1; Shaman, *supra* note 23, at 1, col. 1.

This Article does not intend to imply that private groups currently holding conservation servitudes act in the manner criticized here; rather, this Article focuses on potential problems.

27. For indications that enforcement problems may arise with second-generation owners of the servient property, see *United States v. Albrecht*, 496 F.2d 906 (8th Cir. 1974); Appeal of Pfirmann, 63 Pa. Commw. 407, 437 A.2d 1336, 1337 (1981); National Park Service of the U.S. Department of the Interior, *Scenic Easements* 12, 16 (1974) (copy on file with the *Texas Law Review*) [hereinafter cited as *Scenic Easements*]; Cunningham, *supra* note 2, at 182.

28. See, e.g., *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 172 N.E. 455 (1930); *Rick v. West of the Ascension*, 34 Misc. 2d 1002, 228 N.Y.S.2d 195 (Sup. Ct. 1962).

29. See Shaman, *supra* note 23.

30. For illustration of the debate on how the public is best served by recreational and park land, see Carmody, *A Preservationist Group Enters Long Battle of Morningside Park*, N.Y. Times, Mar. 2, 1983, at B1, col. 1 (dispute between group seeking preservation of park as it was designed in 1887 and neighborhood organizations trying to renovate the park and increase facilities); *Panel Approves Partial Removal of a Park Grove*, N.Y. Times, Oct. 8, 1982, at B4, col. 1 (debate over removal of a grove of trees planted as a memorial).

31. See *Oregon Land-Use Plan Is Challenged*, N.Y. Times, Oct. 26, 1982, at A18, col. 1 (describing debate over relaxation of strict environmental land use planning of the 1970s to meet the economic recession of the 1980s).

more difficult still is the decision today regarding future use, because future needs are more speculative. Rigid choices today may defeat the right of future generations to make critical decisions affecting their lives.

This Article proposes a model for conservation servitudes that supports conservation but also accommodates the traditional public interest policies in real property law. Two questions are involved: Should private conservation servitudes in gross be recognized as valid and enforceable interests? If so, what controls, if any, should be put on such interests in order to accommodate important societal goals?

Part II examines the factors favoring the use of private conservation servitudes in gross, including conservation and the possible economic advantages of servitude as opposed to fee ownership and private as opposed to public ownership. Part III explores the conflict between contract and free alienability, focusing on how free alienability may be accommodated with the values favoring private servitudes in gross. Part IV analyzes servitude cases that turn upon in gross ownership and duration of interests. That analysis serves two purposes: to discover the current judicial rules and to determine how courts have handled the policy issues inherent in the contract/alienability dichotomy. Part V examines various techniques available for terminating servitudes. Finally, Part VI proposes three legislative and two judicial approaches to the problems presented by private conservation servitudes in gross.

## II. Factors Favoring Private Conservation Servitudes

### A. *Conservation of the Natural Environment*

One hardly needs to document the increased public concern over the natural environment and the growing commitment to conservation.<sup>32</sup> The nineteenth century American precept that maximum exploitation of resources is not only most beneficial to society but also inevitable has been rejected by many.<sup>33</sup> There is also a growing realization that the supply of unexploited land is limited and that once land has been developed it is difficult, if not impossible, to restore it to its natural condi-

32. See, e.g., Kruse, *Development and Environment*, 17 AM. BEHAV. SCI. 676 (1974) (describing environmentalism as a social movement); *Public Attitudes on Conservation*, NAT'L FOOD REV., Spring 1980, at 28 (reporting results of USDA survey of Americans' attitudes towards conservation); *Public Lands: A New Dimension for Wilderness*, OUR PUB. LANDS, Fall 1977, at 11 (discussing change in Americans' views towards wilderness and describing federal conservation efforts).

33. See, e.g., R. NASH, WILDERNESS AND THE AMERICAN MIND 238-71 (3d ed. 1983) (discussed *infra* note 123); Madden, *Land as a Natural Resource*, in THE GOOD EARTH OF AMERICA 6, 6-18 (C. Harris ed. 1974); THE USE OF LAND: A CITIZEN'S POLICY GUIDE TO URBAN GROWTH 33-73 (W. Reilly ed. 1973) [hereinafter cited as THE USE OF LAND].

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tion.<sup>34</sup> Coupled with this is a belief that access to areas of natural, undeveloped land benefits society by preventing the estrangement of people from nature.<sup>35</sup> Open space is valuable even without physical access by the public, because people can gaze at it or merely appreciate its existence.<sup>36</sup> Both urban and nonurban areas thus are improved by preserving land in its natural state.<sup>37</sup> Conservation servitudes address these concerns by allowing restrictions on alteration of natural land without transferring possessory or access rights.

### *B. Limitations on the Public Purse: Economic Benefits*

Another factor that appears to favor conservation servitudes held by private organizations is their economic impact. Private servitudes are an economically sound alternative to governmental purchase of fee interests for conservation purposes because servitudes cost less than fee titles and because private purchases do not deplete the public purse.

1. *Cost Advantages of Servitudes over Fees.*—Purchases of fee interests for conservation purposes involve three costs: escalating acquisition costs of real estate, indirect costs, and management expenses. Indirect costs include lost productivity of private lands taken for public use and lost tax revenues. Conservation servitudes appear preferable to fee interests with regard to these three costs, but because available data on the costs of conservation servitudes are limited, the economic advantages can be questioned.

(a) *Acquisition expense.*—The cost of both urban and rural real estate has risen significantly, especially in areas under development—precisely the areas with the greatest need for open space and conserva-

34. See Cooper & Vlasin, *Ecological Concepts and Applications to Planning*, in ENVIRONMENT: A NEW FOCUS FOR LAND-USE PLANNING 183, 203 (D. McAllister ed. 1977).

35. See N.Y. GEN. LAW § 247 historical note (McKinney 1974); S. REP. NO. 1007, *supra* note 2, at 9-10, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 6744-45; R. BRENNEMAN, *supra* note 2, at vii-viii.

36. See Act of Dec. 31, 1970, Pub. L. No. 91-609, § 401, 84 Stat. 1770, 1781 (formerly codified at 42 U.S.C. § 1500(d) (1982) (omitted pursuant to 42 U.S.C. § 5316 (1982) (terminating authority to make grants under the Act)) (congressional purpose to prevent "urban blight and deterioration" by increasing open-space land); CAL. GOV'T CODE § 51084(b)(1) (West 1983) (legislative declaration of value of open space to neighboring urbanized areas or to maintain rural character); N.Y. GEN. MUN. LAW § 247 (McKinney 1974 & Supp. 1984-1985); S. REP. NO. 1007, *supra* note 2, at 11, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 6746; WORKSHOP, *supra* note 2, at 4 (statement of Sen. Malcolm Wallop); W. WHYTE, *supra* note 2, at 7 ("Open space is not the absence of something harmful; it is a public benefit in its own right . . ."); *id.* at 8, 16-20.

37. See Wild and Scenic Rivers Act of 1968, 16 U.S.C. §§ 1271-1287 (1982) (nonurban); Act of Dec. 31, 1970, Pub. L. No. 91-609, § 401, 84 Stat. 1770, 1781 (formerly codified at 42 U.S.C. § 1500(d) (1982) (omitted pursuant to 42 U.S.C. § 5316 (1982) (terminating authority to make grants under the Act)) (urban); CAL. GOV'T CODE § 51084(b)(1) (West 1983) (urban and rural).

tion and hence the targets of governmental and private conservation efforts.<sup>38</sup> Although federal expenditures for land acquisitions have greatly increased over the past twenty years, the purchasing power of the federal government has not.<sup>39</sup> Moreover, the amount of private land the federal government can acquire for conservation purposes is limited.<sup>40</sup> The most optimistic estimates suggest that future funding will be inadequate for projected state and federal land acquisitions.<sup>41</sup> Conservation servitudes seem to provide government and private associations with a cost-efficient alternative to fee acquisition; available data indicate that payments for a conservation servitude generally range from fifteen percent to ninety percent of the cost of fee title. Moreover, in certain cases no compensation at all is paid.<sup>42</sup>

Two questions arise, however, about whether conservation servitudes are truly cost effective. First, some cases demonstrate that the cost savings of servitude acquisition over fee purchase are sometimes slight.<sup>43</sup> It is not clear how many servitudes sell for ninety percent of fee value and how many for fifteen percent, nor what the actual total dollar savings are. Second, in some cases it may be more efficient to buy the complete ownership rights than to pay ninety percent of the fee title price for the limited rights of a conservation servitude. This may be true especially with governmental purchases because government has other land use goals besides preservation—for example, providing recreation—which can be achieved only by fee acquisition.

(b) *Indirect costs.*—When the government purchases a fee interest in private land for public use, society bears not only the nominal

38. See PRIVATE LANDS, *supra* note 2, at 10; Coughlin & Plaut, *supra* note 26, at 452.

39. See PRIVATE LANDS, *supra* note 2, at 10.

40. See *North Dakota v. United States*, 103 S. Ct. 1095, 1097-98 (1983); WORKSHOP, *supra* note 2, at 3 (comments of Sen. Malcolm Wallop), 6 (comments of Sen. Dale Bumpers), 8 (comments of Secretary of the Interior James Watt); THE USE OF LAND, *supra* note 33, at 118-19; New Jersey Conservation Foundation, *supra* note 3, at 1 (comments of Gordon A. Millsbaugh, Jr.).

41. See PRIVATE LANDS, *supra* note 2, at 10.

42. See WORKSHOP, *supra* note 2, at 447, 490-91 (statement of Robert Coughlin); FEDERAL LAND ACQUISITION, *supra* note 26, at 75; PRIVATE LANDS, *supra* note 2, at 25; THE USE OF LAND, *supra* note 33, at 131-33; W. WHYTE, *supra* note 2, at 32; Coughlin & Plaut, *supra* note 26, at 456; Sax, *Buying Scenery: Land Acquisitions for the National Park Service*, 1980 DUKE L.J. 709, 725-26.

Presumably the variation in price depends on factors such as the nature of the restrictions imposed by the specific servitude, see *supra* note 3 and accompanying text, the degree to which the seller reduces the selling price due to sympathy with the conservation purposes of the servitude, see W. WHYTE, *supra* note 2, at 36; compensation to the transferor in the form of federal income tax deductions, see I.R.C. § 170(f), (h) (1982), or local real estate tax relief, see PROTECTING NATURE'S ESTATE: TECHNIQUES FOR SAVING LAND, *supra* note 2, at 55; W. WHYTE, *supra* note 2, at 36, potential alternative uses of the property, and the pressure of development in the surrounding area, see Carroll, *City Urges Preservation of Staten Island Greenbelt*, N.Y. Times, Feb. 6, 1983, § 1, at 34, col. 4.

43. See, e.g., Sax, *supra* note 42, at 726, 728.

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purchase price, but also the cost of removing this land from the private sector, which both decreases real estate tax revenue available to state and local governments<sup>44</sup> and eliminates the benefits of increased employment and resource exploitation from currently or potentially productive property.<sup>45</sup> Presumably, such indirect costs would result whether the buyer was a tax-exempt conservation association or the government.

Conservation servitudes alleviate some of the realty tax revenue loss because the owner of the land subject to the servitude continues to pay property tax on the fee interest.<sup>46</sup> Although conservation servitudes decrease public revenue by lowering the assessed value of the burdened fee estate, the loss is not total. It may still be significant, however, because strict conservation restrictions on undeveloped land in a developing area may greatly reduce its assessed value and thus greatly lower revenues.<sup>47</sup>

It is more difficult to determine whether conservation servitudes alleviate the societal cost of removing productive land from private ownership. Although a conservation servitude leaves the seller with fee title, strong limitations on the use and development of the land may greatly reduce its productive value.

(c) *Maintenance expenses.*—Maintenance and administrative expenses,<sup>48</sup> the third cost component of fee ownership, place a burden on private and governmental conservation activities. There is evidence that inadequate funding has prevented needed maintenance and restoration of some federally owned lands.<sup>49</sup> If so, the goal of conservation and preser-

44. See, e.g., WORKSHOP, *supra* note 2, at 8 (remarks of Secretary of the Interior James Watt); Coughlin & Plaut, *supra* note 26, at 455.

45. See THE USE OF LAND, *supra* note 33, at 119; WORKSHOP, *supra* note 2, at 8 (remarks of Secretary of the Interior James Watt), 20 (statement of John B. Crowell, Jr.). The psychological benefits to society resulting from governmental conservation purchases probably would counter some of these indirect costs.

46. For statutes requiring the parcel subject to a conservation servitude to be assessed at a lower rate, see COLO. REV. STAT. § 38-30.5-109 (1982); IND. CODE ANN. § 14-4-5.5-3 (Burns 1973); N.Y. GEN. MUN. LAW § 247(3) (McKinney 1974); PA. STAT. ANN. tit. 16, § 11943 (Purdon Supp. 1983).

47. This actual situation is discussed in New Jersey Conservation Foundation, *supra* note 3, at 20 (remarks of Clifford Starret) (discussing a 95% reduction in property value after encumbrance by a conservation servitude). Additional transaction costs may occur because the reappraisal process is difficult and some local authorities may balk at lowering the assessed value. See Cunningham, *supra* note 2, at 204-05. *But see* W. WHYTE, *supra* note 2, at 42-43 (suggesting that although the existence of a conservation servitude may lower the property tax revenues from the servient parcel, the presence of open space may increase the value of surrounding properties and draw additional residents, thus raising property tax revenues).

48. See Coughlin & Plaut, *supra* note 26, at 455.

49. See FEDERAL LAND ACQUISITION, *supra* note 26, at 7-9; WORKSHOP, *supra* note 2, at 14 (remarks of Secretary of the Interior James Watt).

vation obviously is hindered;<sup>50</sup> further, government may be allowing a deterioration of property that would not occur under private ownership.<sup>51</sup>

One respect in which conservation servitudes are superior to fee interests is that maintenance and operating expenses are borne by the fee owner, not the servitude holder.<sup>52</sup> On the other hand, although both servitude and fee ownership require expenditures to monitor and enforce ownership rights,<sup>53</sup> these expenses may be greater with servitudes because the fee owner has free access to the burdened property and thus has greater opportunity to violate the restrictions.

2. *Benefits of Nongovernmental Ownership.*—In addition to the cost savings of servitudes over fees, private rather than governmental ownership of servitudes further alleviates the drain on the public purse because any cash outlay will not be directly from the government. But the federal government will still suffer a revenue loss from income tax deductions for contributions of qualifying conservation servitudes to private associations under section 170 of the Internal Revenue Code.<sup>54</sup> When servitudes are donated to governmental entities, however, the ensuing revenue loss through deductions<sup>55</sup> may be more acceptable because the government receives the donation and the public obtains direct control over the servitude.

Private ownership may be cheaper, however, because private associations may pay less than fair market value, especially if sellers share a concern with the association or receive tax benefits, and because these

50. See WORKSHOP, *supra* note 2, at 8 (remarks of Secretary of the Interior James Watt), 630 (statement of Andrew L. Johnson).

51. See *id.* at 4 (remarks of Sen. Malcolm Wallop). The Reagan administration has expressed concern over inadequate stewardship by the government and has proposed the shifting of funds from acquisition of new land to maintenance of currently owned property. See FEDERAL LAND ACQUISITION, *supra* note 26, at 7-9.

52. See WORKSHOP, *supra* note 2, at 448, 453; PRIVATE LANDS, *supra* note 2, at 25; Coughlin & Plaut, *supra* note 26, at 455.

53. Close monitoring is important because damage to conservation property may be irreparable and money damages may never compensate for the destruction of environmentally unique land. See Cunningham, *supra* note 2, at 182. The experience of the federal government indicates that without monitoring and enforcement the advantages of a conservation servitude can be quickly lost. See *infra* note 282.

54. I.R.C. § 170(f), (h) (1982). Private associations promote the availability of tax benefits to solicit donations of conservation servitudes. See FEDERAL LAND ACQUISITION, *supra* note 26, at 27; PROTECTING NATURE'S ESTATE: TECHNIQUES FOR SAVING LAND, *supra* note 2, at 46; W. WHYTE, *supra* note 2, at 36; American Farmland Trust, Farmland Facts: The Tax Benefits of Contributing Farmland and Farmland Easements, reprinted in WORKSHOP, *supra* note 2, at 750, 754-57, 759-60 (promotional brochure describing tax benefits of contributing conservation easements); Maryland Environmental Trust, *supra* note 2; The Nature Conservancy, *supra* note 2; New Jersey Conservation Foundation, *supra* note 3.

55. See I.R.C. § 170(b)(1)(A)(v) (1982); FEDERAL LAND ACQUISITION, *supra* note 26, at 6.

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associations may be able to complete transactions with landowners who prefer a private group's flexibility or simply dislike selling to the government. Public agencies can duplicate these savings, though, even if only by policies that encourage the use of private associations as intermediaries.<sup>56</sup>

### III. The Conflicting Values of Contract and Alienability

The failure of decisionmakers to accommodate the conflicting policies inherent in private conservation servitudes in gross is symptomatic of their failure to address such concerns when they are discussing general servitudes. When faced with the question of the validity or enforceability of various real covenants, courts often state their intention to accommodate two conflicting policies: freedom and enforceability of contract versus free alienability and unrestricted use of land.<sup>57</sup> Too often, however, this statement is a mechanical recitation, with the decision in fact resting on narrower grounds or on other (often unarticulated) policy concerns.<sup>58</sup> Rarely are these conflicting values explicated and applied to the specific facts of the case.<sup>59</sup> This Part analyzes how these contract and alienability doctrines bear on private conservation servitudes in gross.<sup>60</sup>

56. See *infra* notes 143-46 and accompanying text. There are cases in which private associations have acquired conservation servitudes and transferred them to governmental agencies. See, e.g., New Jersey Conservation Foundation, *supra* note 3, at 1. Federal land acquisition policy envisions such an arrangement. See Office of the Secretary of the Interior, Final Guidelines for Transactions Between Nonprofit Conservation Organizations and Federal Agencies, 48 Fed. Reg. 17,406 (1983).

57. See, e.g., *Hays v. St. Paul Methodist Episcopal Church*, 196 Ill. 633, 636, 63 N.E. 1040, 1042 (1902); *Latham v. Taylor*, 10 N.C. App. 268, 270, 178 S.E.2d 122, 124 (1970), cert. denied, 278 N.C. 104, 179 S.E.2d 452 (1971); *Voyager Village Property Owners Ass'n v. Johnson*, 97 Wis. 2d 747, 749, 295 N.W.2d 14, 15 (Ct. App. 1980).

58. See, e.g., *Benton v. Bush*, 644 S.W.2d 690, 691-92 (Tenn. Ct. App. 1982) (stating the broad contract/alienability dichotomy but ultimately relying on the policy of protecting land values, beauty, and uniformity to enjoin violation of a servitude).

59. But see *Swaggerty v. Petersen*, 280 Or. 739, 744, 572 P.2d 1309, 1313 (1977) (questioning whether the policy of untrammelled land use still applies in the era of public regulation of land). In *Phoenix Title & Trust Co. v. Smith*, 1 Ariz. App. 424, 403 P.2d 828 (1965), rev'd, 101 Ariz. 101, 416 P.2d 425 (1966), the Arizona Court of Appeals relied on the policy of "free and untrammelled use of the land," 1 Ariz. App. at 427, 403 P.2d at 831, to deny enforcement of "range use rights," but the Arizona Supreme Court reversed referring to the policies of freedom and enforceability of contract, 101 Ariz. at 108, 416 P.2d at 432. Each court could achieve the result it desired by citing to one of the competing doctrines, thus avoiding an examination of the policy concerns.

60. This Article does not focus on the touch and concern issue, another area in which policy issues of covenants come into play, see, e.g., *Berger, A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 207-33 (1970); *Krasnowiecki, Townhouses with Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711, 718 (1975), because conservation servitudes closely resemble building and use restrictive covenants, which are uniformly accepted as covenants that touch and concern. See 5 R. POWELL, *supra* note 10, ¶ 673[2][a]. Because conservation servitudes are negative covenants, the policy issues inherent in enforcement of affirmative covenants, see, e.g., *Browder, Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 26-30 (1978), are also not explored.

## A. *The Contract Value*

1. *Contract Theory and Real Covenants.*—Courts have stated that real covenants are enforceable “like other contracts.”<sup>61</sup> Because public policy “favors the fullest liberty of contract and the widest latitude possible on the disposition of one’s property,”<sup>62</sup> the parties’ intent must be effected. As one court forcefully stated: “We start with the proposition that private persons, in the exercise of their constitutional right of freedom of contract, may impose whatever restrictions upon the use of land which they convey to another that they desire to impose.”<sup>63</sup>

Real covenants, however, are different from traditional two-party contracts in both legal origins and policy imperatives. Real covenant law predates modern contract law.<sup>64</sup> Before the development of modern contract law, real property law formulated easement and lien doctrines, which, like real covenants, bind subsequent owners of land without their express consent.<sup>65</sup> Moreover, traditional bilateral contract analysis does not easily lend itself to the law of real covenants, which are enforceable not only by the original covenantee against the original covenantor but also by and against their assignees.<sup>66</sup> Rather, traditional contract law focuses on the bargain struck by parties dealing face to face. In contrast, the fundamental task of real covenant doctrine has been to impute promises to future generations who are not directly involved in the initial agreements. The criteria for finding that a covenant can run and the requirement that subsequent owners have notice of it may have developed in response to a discomfort about enforcing a promise against one who did not specifically agree to it.<sup>67</sup>

61. *Benton v. Bush*, 644 S.W.2d 690, 691 (Tenn. Ct. App. 1982). Some courts state also that enforcement is permitted only if no public policy would be breached thereby. *See, e.g., Weir v. Isenberg*, 95 Ill. App. 3d 839, 842, 420 N.E.2d 790, 793 (1981); *Crane Neck Ass’n v. New York City/Long Island County Servs. Group*, 92 A.D.2d 119, 127, 460 N.Y.S.2d 69, 75 (1983), *aff’d*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984); *Loeb v. Watkins*, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968). The difficult task is to determine when public policy is indeed offended.

62. *Sinclair Ref. Co. v. Watson*, 65 So. 2d 732, 733 (Fla. 1953).

63. *Gruble v. MacLaughlin*, 286 F. Supp. 24, 31 (D.V.I. 1968).

64. *See Browder, supra* note 60, at 14.

65. *See id.* at 12; Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1330 (1970). Proponents of a unified law of covenants and easements, *see infra* text accompanying note 73, conceive of a single concept “which primarily partakes the qualities of what is presently described as an easement.” Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1182 (1982).

66. For a discussion of the classic requirements for a covenant to run, *see* 5 R. POWELL, *supra* note 10, ¶ 673[2]. The transfer of the benefit of the covenant to the assignee of the covenantee’s interest may not pose so great a problem today, given third-party beneficiary contract theory. *See Browder, supra* note 60, at 12.

67. *See* RESTATEMENT OF PROPERTY § 537 comment h (1944) (justifying the touch and concern requirement as a means to reduce the number of permissible real covenants); Berger, *supra* note 60, at 208 (suggesting that the touch and concern requirement can be employed to limit the types of

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Despite the differences between traditional contracts and real covenants, however, both seek to effectuate arrangements created by private volition; thus, the policy of freedom of contract applies to a degree to real covenants. Recent scholarship suggests treating real covenants under general contract doctrine.<sup>68</sup> Commentators point to the benefits of consensual land use arrangements,<sup>69</sup> often preferring private agreements to public controls such as zoning and subdivision regulation<sup>70</sup> and urging enforcement by and against successors to the covenantee's and covenantor's interests. Freedom of contract is central to these arguments,<sup>71</sup> although many suggest that it be tempered by various policy concerns, and commentators differ significantly over whether real covenants should be subject to public regulation.<sup>72</sup> There are indications that the

promises binding remote parties); Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1360 (1982) (criticizing limitation of covenants through the touch and concern requirement); Krasnowiecki, *supra* note 60, at 718 (stating that touch and concern requirement ensures that only covenants closely related to the land will bind subsequent owners); Newman & Losey, *supra* note 65, at 1323 (suggesting the privity requirement is a meaningless attempt to provide doctrinal support for passing a contract burden to a nonconsenting purchaser). For support of the use of the touch and concern requirement, see Reichman, *supra* note 65, at 1233. Notice is required to protect subsequent bona fide purchasers in at-law enforcement, *see* Newman & Losey, *supra* note 65, at 1340, and equitable actions, *Boyle v. Lake Forest Property Owners Ass'n*, 538 F. Supp. 765, 769 (S.D. Ala. 1982); *Frey v. DeCordova Bend Estates Owners Ass'n*, 632 S.W.2d 877, 879 (Tex. App.—Fort Worth 1982, writ granted).

68. *See* Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323 (1982); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Epstein, *supra* note 67; French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982); McDougal, *Land-Use Planning by Private Volition: A Framework for Policy-Oriented Inquiry*, 16 ARIZ. L. REV. 1 (1974); Newman & Losey, *supra* note 65; Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978) [hereinafter cited as Reichman, *Judicial Supervision*]; Reichman, *supra* note 65; Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253 (1976) [hereinafter cited as Reichman, *Private Governments*]; Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403 (1982). *See generally* Berger, *supra* note 60 (demonstrating the advantages of treating all servitudes uniformly instead of treating real covenants, easements, and equitable servitudes as different classes).

69. *See, e.g.*, Ellickson, *supra* note 68, at 715-16; Krasnowiecki, *supra* note 60, at 711-12; McDougal, *supra* note 68, at 1-2; Reichman, *Private Governments*, *supra* note 68, at 253-54; Reichman, *supra* note 65, at 1184.

70. *See, e.g.*, Ellickson, *supra* note 68, at 682 (noting that "conflicts among neighboring landowners are generally better resolved by systems less centralized than master planning and zoning"); French, *supra* note 68, at 1263 ("[T]he inherent shortcomings of public regulation encourage private arrangements."); Lundberg, *Restrictive Covenants and Land Use Control: Private Zoning*, 34 MONT. L. REV. 199, 217 (1973); Siegan, *Non-Zoning in Houston*, 13 J.L. & ECON. 71, 91 (1970).

71. *See* Berger, *supra* note 68, at 1329, 1337 ("Unification theory clearly accords the intent of the parties a dominant position in the interpretation of agreements."); French, *supra* note 68, at 1305 ("Agreements creating servitudes can be treated like other agreements . . ."). The intent of both parties is relevant in construing a nongratuitous transfer, but only the grantor's intent is relevant in a gratuitous transfer. Thus it appears that in a gift of a conservation servitude, only the donor's intent should be considered. *See* RESTATEMENT OF PROPERTY § 483 comments g, h (1944).

72. There is debate, for example, over whether courts initially should refuse to recognize a promise as a real covenant for failure to meet certain technical requirements, such as touch and concern, *compare* Reichman, *supra* note 65, at 1231-33 (arguing that the touch and concern requirement promotes efficiency of termination and safeguards individual freedom), *with* Epstein, *supra*

recent groundswell of support for unifying covenants at law, equitable servitudes, and easements into a single law of "servitudes" springs from the desire to facilitate enforceable consensual land use arrangements free from unwarranted court interference.<sup>73</sup>

2. *The Theoretical Justifications and Applicability to Private Conservation Servitudes in Gross.*—Although few courts explain how the policy of freedom of contract applies to real covenant law, some cases and scholarship suggest the following reasons for enforcing real covenants like general contracts: moral imperative, social stability, certainty, economic utility, and freedom of choice. In determining the relevance of these values to privately held conservation servitudes in gross, one must keep in mind that such interests allow a private organization outside the democratic political process to control from a geographic and temporal distance the use by future generations of a potentially unlimited amount of land.

(a) *Moral obligation.*—Moral reasons are often urged for enforcing real covenants. Two levels of moral obligation are involved: one between the original covenantee and covenantor and another between the successors of each. As to the first level, some courts have held that the original covenantor should not be able to make a promise in exchange for consideration and then effectively extinguish the promise by conveying the land. One court remarked: "[I]t seems immoral for a party to be able to evade an obligation it may have squarely confronted in making its bargain."<sup>74</sup> If that is the concern, however, one wonders why the courts enforce an agreement against the covenantor's successor, rather than "punish" the original covenantor by holding him liable.<sup>75</sup>

note 67, at 1360-64 (rejecting the policies underlying the touch and concern test), and the use of public policy, compare Browder, *supra* note 60, at 34 (suggesting that "good reason does exist to find a burden on use unreasonable in some circumstances"), with Epstein, *supra* note 67, at 1364-68 (criticizing public intervention).

73. See, e.g., Berger, *supra* note 68, at 1337 (flexibility to accommodate special circumstances); Ellickson, *supra* note 68, at 716 ("The present judicial attitude fortunately seems to favor elimination of those unnecessary barriers to bargaining among neighbors."); French, *supra* note 68, at 1265 (advantages of simplification and modernization); McDougal, *supra* note 68, at 7 (encourage land-use planning); Reichman, *supra* note 65, at 1182 ("arbitrary categorization of servitudes").

74. 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 (1973) (quoting lower court opinion at 70 Misc. 2d 314, 319, 333 N.Y.S.2d 472, 479 (Sup. Ct. 1972)); see also Tulk v. Moxhay, 2 Phillips 774, 778, 41 Eng. Rep. 1143, 1144 (Ch. 1848) ("[N]othing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price."); RESTATEMENT OF PROPERTY § 539 comment f (1944) ("[M]en should be required to live up to their promises . . .").

75. Berger, *supra* note 68, at 1335-36. Courts also could encourage parties to agree that the covenantor bind his assignees in the same manner that he is bound. See, e.g., Finley v. Glenn, 303 Pa. 131, 137, 154 A. 299, 301 (1931).

As to the second level of moral obligation, some argue that the covenantor's successor, having notice of the covenant and presumably tailoring his bargain accordingly, should not be able to evade the promise.<sup>76</sup> This view, however, places the cart before the horse: only after one decides that a covenant can be enforced against a successor can one conclude that a person contracting with notice is morally bound to follow it.

Even accepting *arguendo* both levels of the morality rationale, two issues remain with respect to private conservation servitudes in gross. First, the public interest may outweigh the private morality of enforcement. Second, even if specific enforcement were denied, the servient owner could be held liable for damages and thus remain bound by his word.

(b) *Social stability*.—Social stability is another oft-adduced reason for the specific enforcement of real covenants. People vigorously resist any judicial attempt to limit their property rights. Reaction is especially strong when a person's interest in his home is diluted or taken by judicial decree.<sup>77</sup> The termination of a homeowner's real covenant right to prevent commercial development on an adjacent lot can create antipathy toward the judicial system and perhaps social unrest,<sup>78</sup> especially if the termination seems to favor powerful interests over lesser interests.

Certain distinctions, however, between general and conservation servitudes should not be ignored. The termination of an in gross conservation servitude in no way disturbs the holder's right of home ownership because the servitude is unrelated to a dominant parcel on which a home

76. See *Van Sant v. Rose*, 260 Ill. 401, 413, 103 N.E. 194, 198 (1913); *Welitoff v. Kohl*, 105 N.J. Eq. 181, 187-88, 147 A. 390, 393 (1929) ("[I]t would be unfair to permit one, who had bought presumably at a lower price because of the imposed restrictive covenant, to make a profit by selling at a higher price clear of the restriction."); *Tulk v. Moxhay*, 2 Phillips 774, 777-78, 41 Eng. Rep. 1143, 1144 (Ch. 1848) (holding that a court can enforce a "covenant being one which does not run with the land" if subsequent purchaser takes with notice of restriction).

77. See *Loeb v. Watkins*, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968) ("Where a man's land is concerned, he may impose . . . any restriction he pleases."); *Sullivan v. Jones & Laughlin Steel Co.*, 208 Pa. 540, 555, 57 A. 1065, 1071 (1904); O.W. HOLMES, *THE COMMON LAW* 167-68 (1923) (noting the strong psychological reaction against removal of property in one's possession).

78. See *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 166, 172 N.E. 455, 457 (1930) ("Rightly or wrongly he believes that the comfort of his *dwelling* will be imperiled . . .") (emphasis added); Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine of Equity*, 28 S. CAL. L. REV. 139, 144 (1955) ("[T]he doctrine persists, not because the plaintiff is a cottager or poor, but because of the underlying, the basic concept, that private ownership of a dwelling house is still the most inviolable of all property rights."). *But see* *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 225, 257 N.E.2d 870, 873, 309 N.Y.S.2d 312, 316-17 (1970). In *Boomer*, the court forced the homeowners to accept pollution of their neighborhood for the greater good of the whole community, but also granted the homeowners a permanent injunction conditioned on compensation for damage to their property.

could be built. Moreover, it is an oversimplification to cast judicial supervision as an assault against private ownership rights by a vague concept of the public interest. It is more accurately viewed as a conflict between the societal goals of full development and conservation.

Even assuming that social stability is an important value, enforcement of privately owned conservation servitudes in gross may not effectuate that goal. Judicial legitimation of an absent, undemocratic entity's veto power, frustrating the servient owner's interests and society's needs, will often foster disrespect for the legal system and thus actually may decrease social stability.

(c) *Certainty*.—Some commentators favor private land use arrangements over governmental land controls because “there is never any certitude that a particular scheme of [public] controls will remain unmodified over a period of time.”<sup>79</sup> Political and economic pressures may change governmental regulations, but private agreements protect against such “uncertainty.”<sup>80</sup> Others assert that strict enforcement of real covenants against future owners, without permitting defenses, increases “certainty” of result, because property rights may remain unsettled if judicial results depend on each judge’s “view of justice.”<sup>81</sup>

Conservation servitudes are certainly an attempt to preserve the environmental status quo; thus permanence is essential. But is the “certainty” of private land use controls more important than the flexibility of governmental regulation in the conservation servitude context? Because the purported justification for private conservation servitudes is that they serve the public interest,<sup>82</sup> it is incongruous to deride the judgment of society’s democratically elected representatives as to the best future use of land. Given the potentially large geographical scope of privately owned conservation servitudes in gross, flexibility should not be ignored. Even the social goals that private conservation servitudes aim to promote require constantly evolving responses.

79. Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612, 614.

80. WORKSHOP, *supra* note 2, at 488-89 (statement of Robert Coughlin); see Consigny & Zile, *supra* note 79, at 614; Ellickson, *supra* note 68, at 691-93; French, *supra* note 68, at 1263 n.6; Siegan, *supra* note 70, at 142-43.

81. C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND” 185 (2d ed. 1947); see Whalen v. Union Bag & Paper Co., 208 N.Y. 1, 5, 101 N.E. 805, 806 (1913); Rick v. West, 34 Misc. 2d 1002, 228 N.Y.S.2d 195 (Sup. Ct. 1962).

82. Direct public support of private conservation servitudes includes federal tax deductions for donations of conservation restrictions, see I.R.C. § 170(h)(2)(C) (1982), state property tax relief, see *supra* note 46, and statutory validation of such interests, see *supra* note 13. This support appears to be based on the “public benefit” of the servitude. See I.R.C. § 170(h)(4)(A)(iii)(II) (1982).

## Conservation Servitudes

(d) *Efficiency*.—Some commentators have argued that freedom of contract achieves efficient allocation of scarce land resources without wasteful acquisition of fee title.<sup>83</sup> Real covenants arise in the marketplace only if the value of the reduction in future disturbances exceeds the loss of flexibility and the administrative costs of enforcement. Continuity in the enforcement of real covenants encourages these utility-maximizing market transactions.

Even if one makes the normative assumption that efficiency is a valid goal,<sup>84</sup> it is not clear that a classic “free market transaction” takes place when a conservation servitude is donated to a nonprofit organization, because the public pays the monetary consideration through a federal tax deduction. Further, nonprofit groups working for open space conservation may not operate as “rational maximizers”; dedication to preserving unique land characteristics may cause decisions not based on maximization of wealth.<sup>85</sup> Nor is it clear that a concern for stability of investments<sup>86</sup> plays a significant role in private conservation servitudes in gross. A history of court decisions modifying conservation servitudes may not cause potential donors to withhold donations; rather, they may think their donations all the more necessary.<sup>87</sup> Moreover, if the donor is motivated by a tax deduction, rather than by concern for a particular parcel of land, the possibility of subsequent modification of the servitude for public policy reasons may not be a disincentive. Courts could require, for example, that the servient owner compensate the organization on judicial termination of the servitude; with the investments protected, judicial modification might not discourage associations from purchasing servitudes.<sup>88</sup> Even if some disincentive does result, other societal goals may be furthered.

Even those who argue that consensual servitudes are efficient recognize that much of their discussion rests on, and is limited to, a model of reciprocal servitudes in a previously undeveloped residential subdivi-

83. See, e.g., Ellickson, *supra* note 68, at 713-14 (arguing that covenants generated by market forces tend to promote efficiency); Reichman, *supra* note 65, at 1184, 1231-32; Reichman, *Private Governments*, *supra* note 68, at 302-03.

84. See Beckwith, *Developments in the Law of Historic Preservation and a Reflection on Liberty*, 12 WAKE FOREST L. REV. 93, 159 (1976); Reichman, *supra* note 65, at 1232.

85. See Gilmour, *Private Interests and Public Lands*, 59 CURRENT HIST. 36, 36 (1970) (“Most [private conservation societies] do have one important feature in common: they serve no special economic purposes nor do they attempt to claim economic benefits for their members.”).

86. Some commentators suggest that the certainty of use appurtenant to restrictive covenants and land-use regulations would release funds that otherwise would be used to ensure against the possible deleterious effects of a sudden change in land use. See, e.g., *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 166-68, 172 N.E. 455, 457 (1930); Kmiec, *Deregulating Land Use: An Alternative Free Enterprise Development System*, 130 U. PA. L. REV. 28, 40 (1981).

87. *But see* Berger, *supra* note 68, at 1331.

88. See *infra* subpart V(A)(2)(b).

sion,<sup>89</sup> which evokes none of the questions raised by conservation servitudes held by private organizations. Proponents also concede that covenants create problems "when they impose external costs on third parties, creating suboptimal resource allocation and unfairness."<sup>90</sup>

(e) *Freedom of choice.*—Freedom of contract in real covenants permits individuals to exercise freedom of choice with respect to their land,<sup>91</sup> a value so ingrained in our culture and legal tradition that it hardly needs elaboration. The difficult task is to determine its limitations and the extent of permissible societal control, for there is a danger that the contractual autonomy of one individual will usurp the ability of others to control their destinies and frustrate society's ability to provide for the common good. Consequently, close scrutiny of such contractual arrangements is required.

Some support for private ownership of conservation servitudes comes from the view that the government should avoid, if possible, taking land from private hands.<sup>92</sup> This view is based not only on the limited public purse but also on a normative and political preference for less active government.<sup>93</sup> Supporters of diminished government land acquisition note that the federal government owns approximately one-third of the surface rights of American land<sup>94</sup> and claim that "private sector" conservation efforts are more efficient than government stewardship.<sup>95</sup> But this is merely a normative preference without empirical justification. One can easily question whether privately owned conservation servitudes should be enforced in perpetuity without examination, or instead should be scrutinized for reasons of social policy.

89. See Ellickson, *supra* note 68, at 716-18; Reichman, *Private Governments*, *supra* note 68, at 263-65.

90. Ellickson, *supra* note 68, at 714.

91. See Epstein, *supra* note 67, at 1359 ("We may not understand why property owners want certain obligations to run with the land but as it is *their* land, not ours, some very strong reason should be advanced before *our* intentions are allowed to control.") (emphasis in original); Reichman, *Judicial Supervision*, *supra* note 68, at 158 (promoting domain of individual decisionmaking); Reichman, *Private Governments*, *supra* note 68, at 277, 303-04 (recognizing "freedom to transact" and "freedom of choice").

92. See WORKSHOP, *supra* note 2, at 8 (statement of Secretary of the Interior James Watt), 20 (statement of John B. Crowell, Jr.).

93. See *id.* at 12-14 (statement of Secretary of the Interior James Watt); *Cities Turn to Private Groups to Administer Local Services*, N.Y. Times, May 23, 1983, at A1, col. 2. In some respects, this position reflects the belief in "privatization"—the shift of traditionally governmental functions to the private sector.

94. See WORKSHOP, *supra* note 2, at 2 (statement of John B. Crowell, Jr.), 8 (statement of Secretary of the Interior James Watt).

95. See PRIVATE LANDS, *supra* note 2, at 33.

3. *Conclusion.*—The traditional rationales for freedom of contract—moral obligation, certainty, efficiency, and freedom of choice—are relevant to private conservation servitudes in gross. None appears so compelling, however, that it requires strict enforcement of private conservation servitudes in gross without judicial and legislative modifications in light of other policy considerations.

*B. The Policy Disfavoring Restrictions on Land*

1. *The Meaning of the Doctrine.*—In real covenant cases courts have balanced freedom of contract against a distrust of restrictions on land. Some refer to this distrust as a policy of free and unrestricted use of land.<sup>96</sup> Others call it a policy against restraints on alienability.<sup>97</sup> For simplicity, “antirestrictions policy” will be the term used here. The antirestrictions policy, though often briefly referred to under one name or another by courts, is seldom explicated in court opinions and actually addresses three distinct concerns: stalling economic development, hindering marketability, and thwarting future needs.

(a) *Economic development and ties on land.*—The nineteenth century view of full economic development<sup>98</sup> may explain why some courts support the antirestrictions policy.<sup>99</sup> Under this view, land is purely an article of commerce, valued neither for its feudal social power and prestige nor for its subjective importance as the family home.<sup>100</sup> Consequently, some claim that an antirestrictions policy allows land to be shifted to new uses required by business notwithstanding a pre-existing servitude.<sup>101</sup> Today, however, American society has generally

96. See *University Hill, Inc. v. Patton*, 427 F.2d 1094, 1099 (6th Cir. 1970); *Hays v. St. Paul Methodist Episcopal Church*, 196 Ill. 633, 636, 63 N.E. 1040, 1042 (1902); *Whitmarsh v. Richmond*, 179 Md. 523, 527, 20 A.2d 161, 163 (1941); *Kitching v. Brown*, 180 N.Y. 414, 427, 73 N.E. 241, 245 (1905); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 92 A.D.2d 119, 126, 466 N.Y.S.2d 69, 74 (1983), *aff'd*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984); *Ragland v. Overton*, 44 S.W.2d 768, 771 (Tex. Civ. App.—Amarillo 1931, no writ).

97. See *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 575, 196 A.2d 270, 277 (Ch. Div. 1963); *Eagle Enters. v. Gross*, 39 N.Y.2d 505, 510, 349 N.E.2d 816, 820, 384 N.Y.S.2d 717, 720-21 (1976).

98. See M. HORWITZ, *THE TRANSFORMATION OF AMERICAN LAW, 1780-1860*, at 31-34 (1977); Madden, *supra* note 33, at 9-18 (describing the commodity concept of land).

99. See *Bachman v. Colpaert Realty Corp.*, 101 Ind. App. 306, 315, 194 N.E. 783, 787 (1935); *Ragland v. Overton*, 44 S.W.2d 768, 771 (Tex. Civ. App.—Amarillo 1931, no writ); see also C. CLARK, *supra* note 81, at 72 (expressing the “ingrained view that land interests should be made freely available for commercial development”).

100. See, e.g., *Ragland v. Overton*, 44 S.W.2d 768, 771 (Tex. Civ. App.—Amarillo 1931, no writ). The court stated: “In this country real estate is an article of commerce. The uses to which it should be devoted are constantly changing as the business of the country increases, and as its new wants are developed.” *Id.* (quoting 4 G. THOMPSON, *REAL PROPERTY* § 3361, at 473 (1924)).

101. See, e.g., *RESTATEMENT OF PROPERTY* § 539 comment f (1944) (stating that a policy con-

rejected full development in favor of conservation. Thus, the full development rationale provides an inadequate justification for voiding conservation servitudes.

(b) *Hampering of marketability.*—Others contend that marketability is at the root of the antirestrictions policy.<sup>102</sup> Judge Clark stated that restrictions on land may “render titles unmarketable,”<sup>103</sup> or “hold up an advantageous sale,”<sup>104</sup> presumably because of the difficulty in locating owners of various interests and agreeing with them to remove the servitude.<sup>105</sup> Consequently, he opposed the assignment of servitudes in gross.<sup>106</sup> The American title system and the free market mechanism, however, ameliorate this problem.<sup>107</sup> Because the holder of a servitude must record it or risk losing it to a bona fide purchaser,<sup>108</sup> a potential purchaser easily can identify outstanding claims and negotiate for their removal or adjust his price accordingly. Hence, the marketability justification is not persuasive.

Some proponents of conservation servitudes have argued further that because marketability cannot justify servitudes, the antirestrictions policy is entirely invalid.<sup>109</sup> Freedom of contract, therefore, requires the enforcement of a consensual private conservation servitude as written. Although the marketable title issue is too minor to cause courts to void

cern in enforcing covenants is that “land should be developed to its normal . . . capacity”); NEW YORK LAW REVISION COMMISSION, *Acts, Recommendation and Study Relating to Recording, Extinguishment and Modification of Certain Restrictions on the Use of Land*, in REPORT OF THE LAW REVISION COMMISSION FOR 1958, at 211, 225-26 (1958) (recognizing that “business needs” are hindered by old restrictions). Some suggest that the rule against restraints on alienation serves to check transactions that cause grossly inefficient use of land. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* § 18.5, at 393 (2d ed. 1977); Reichman, *Private Governments*, *supra* note 68, at 282.

102. See UNIF. CONSERVATION EASEMENT ACT introductory note, 12 U.L.A. 51, 52 (Supp. 1984); RESTATEMENT OF PROPERTY 3160 (1944) (introductory note to Part III); C. CLARK, *supra* note 81, at 72, 82, 159-60; French, *supra* note 68, at 1283; Reichman, *supra* note 6, at 553-54; Reichman, *supra* note 65, at 1189-90;

103. C. CLARK, *supra* note 81, at 72.

104. *Id.* at 73.

105. See, e.g., *Boatman v. Lasley*, 23 Ohio St. 614, 618 (1873) (indicating the difficulties with the devolution of title of an easement in gross); E. CLARK, L. LUSKY & A. MURPHY, *GRATUITOUS TRANSFERS* 831-32 (2d ed. 1977) (discussing the difficulties in tracing owners of interests in property and the effect on alienability).

106. C. CLARK, *supra* note 81, at 73.

107. See UNIF. CONSERVATION EASEMENT ACT Commissioners' prefatory note, 12 U.L.A. 51, 51 (Supp. 1984) (“by eliminating certain outmoded easement impediments which are largely attributable to the absence of a land title recordation system in England centuries earlier”); French, *supra* note 68, at 1283; Netherton, *supra* note 6, at 553-54; Reichman, *supra* note 65, at 1190. Reichman asserts that because of the title system, the American legal system never developed the English law prejudice against servitudes. See *id.*

108. See Johnson, *Purpose and Scope of Recording Statutes*, 47 IOWA L. REV. 231 (1962) (describing the three major types of American recording acts: notice, race-notice, and race).

109. See UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 51, 52 (Supp. 1984); Netherton, *supra* note 6, at 553-54, 556-57, 566.

all in gross servitudes,<sup>110</sup> that is not the predominant concern underlying the antirestrictions policy; the more important goal of limiting dead hand control may outweigh the value of freedom of contract in the context of private conservation servitudes.

(c) *Limiting dead hand control.*—Limiting dead hand control is the most compelling reason for the antirestrictions policy.<sup>111</sup> Real covenants allow landowners to bind future owners of the servient tract; thus current owners may determine choices of future generations. In an era of shrinking resources, allowing former owners to frustrate the aspirations of current owners is of special concern. Proponents of freedom of contract argue that dead hand control is “fair” as long as there is notice,<sup>112</sup> but this begs the question whether the deprivation of individual opportunity and autonomy is itself “fair.” It would be difficult today to argue, for example, that enforcing a covenant of racial segregation is justified by notice.<sup>113</sup> Moreover, because of concerns of limited opportunity and potential for social unrest, the law sometimes superimposes on contracts its own view of fairness.<sup>114</sup>

The dead hand adversely affects not only individual owners, but also society as a whole. The market response of a future property owner to the future needs of society is likely to be more effective than a past owner’s fixed blueprint. Although the Rule Against Perpetuities generally does not control real covenants, the lesson of the rule concerning the need to limit the ties of former owners should not be ignored.<sup>115</sup> A balance should be struck that will uphold consensual land use arrangements without frustrating the needs of future generations.

2. *Conservation Servitudes and Dead Hand Control.*—Although some have doubted the relevance of free alienability and unrestricted use

110. *But see* *Minch v. Saymon*, 96 N.J. Super. 464, 470, 233 A.2d 385, 388 (Ch. Div. 1967) (difficulty in locating the owner of the benefit of a covenant in gross may cause problems in negotiations).

111. Professor Simes’ classic explanation of the policy against dead hand control in the context of the Rule Against Perpetuities appears in 3 L. SIMES & A. SMITH, *THE LAW OF FUTURE INTERESTS* § 11.17, at 13-14 (West 2d ed. 1956).

112. *See* French, *supra* note 68, at 1282 (discussing the value of “fairness” in the sense of protecting parties from the liability a reasonable person would not expect to incur and only imposing liability that meets parties’ reasonable expectations).

113. *See* *Shelley v. Kraemer*, 334 U.S. 1 (1948); Ellickson, *supra* note 68, at 715.

114. For example, consider the warranty of habitability discussed *infra* note 165.

115. For courts recognizing dead hand control in real covenants, see *Copelan v. Acree Oil Co.*, 249 Ga. 276, 278, 290 S.E.2d 94, 96 (1982); *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 368 (Minn. 1979). For a more complete list of authorities, see Browder, *supra* note 60, at 29-30, 34 & nn.87-88.

of land to conservation servitudes,<sup>116</sup> several factors cut against this view. First, because of land's unlimited life, real covenants, unlike many other contracts, theoretically control in perpetuity.<sup>117</sup> Second, although technology may increase the amount and uses of land under human control,<sup>118</sup> the supply is limited. Third, land ownership has a special importance in the American experience.<sup>119</sup> Finally, there is no inherent limit to the amount of land that can be restricted by private conservation servitudes in gross. In contrast, the appurtenance requirement in classic servitude law provides that only owners of neighboring properties can own covenants in the servient parcel.<sup>120</sup> This requirement limits the number of parties capable of exercising veto power over any particular tract.<sup>121</sup> More importantly, the appurtenance requirement limits the amount of veto power any one individual can obtain over land of others because of the practical difficulties and expense of acquiring adjacent land.

Traditionally, the power to control development of a broad geographical area has been reserved to the community through planning, zoning, and subdivision approval.<sup>122</sup> Although an individual could exert

116. See Browder, *supra* note 60, at 43; Epstein, *supra* note 67, at 1360 (rejecting the view that freedom of alienability is concerned only with the "condition of the land itself and its amenability to future disposition" and arguing instead that such "freedom" actually refers to the the owner's freedom to act as he chooses); Netherton, *supra* note 6, at 555 ("There is much to suggest that the area of justifiable restriction has widened significantly in the past twenty-five years. . . . [T]he present generation clearly recognizes that some situations call for putting a higher priority on *management* than on *development* of land.") (emphasis in original); Reichman, *supra* note 65, at 1237.

117. Certain legal doctrines, including changed conditions and relative hardship, allow termination of a seemingly perpetual real covenant or deny specific enforcement and allow only a damages remedy. See *infra* subpart V(A).

118. See D.H. MEADOWS, D.L. MEADOWS, J. RANDERS & W. BEHRENS, *THE LIMITS TO GROWTH* 51 (1972); *THE USE OF LAND*, *supra* note 33, at 13-14, 123-24; Scholle, *Will There Be Enough Land?*, *AGRIC. OUTLOOK*, Oct. 1981, at 18, 18-19. Proponents of conservation servitudes recognize the limited supply of land; it motivates the conservation ethic.

119. See C. BEARD & M. BEARD, *BASIC HISTORY OF THE UNITED STATES* 255-56, 294 (1950); Madden, *supra* note 33, at 13.

120. Appurtenant covenants have built in limitations on the area against which they can be enforced. See *Rogers v. Zwolak*, 12 Del. Ch. 200, 201-02, 110 A. 674, 675 (1920); *Stegall v. Housing Auth.*, 278 N.C. 95, 101-03, 178 S.E.2d 824, 828-29 (1971) (in stage development of sixty-acre tract, no intent to allow for enforcement by owners in one stage against another); *RESTATEMENT OF PROPERTY* § 537 illustration 4 (1944) (indicating that a distance of three blocks between the benefited and burdened parcels might prevent the covenant from running); A. DUNHAM, *supra* note 20, at 22.

121. See, e.g., *Caullett v. Stanley Stillwell & Sons, Inc.*, 67 N.J. Super. 111, 117, 170 A.2d 52, 56 (App. Div. 1961); *RESTATEMENT OF PROPERTY* § 537 comment h (1944).

122. See *Southern Burlington County NAACP v. Township of Mount Laurel*, 67 N.J. 151, 188-90, 336 A.2d 713, 732-33 (1975) (indicating that there must be consideration not only of the requirements of the local entity, but also of the needs of the region). *TEX. REV. CIV. STAT. ANN. arts. 974a-1, 974a-2* (Vernon Supp. 1983) provide for yet another way to involve the public in seemingly private land use controls. Art. 974a-1 allows for some local governments to enforce privately negotiated subdivision covenants; art. 974a-2 allows some local governments to refuse to issue a building permit on the grounds of violation of a private restrictive covenant.

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power over his neighbors through an appurtenant real covenant, decisions about nonneighboring land were reserved to government. If a fee owner chose to build, one who did not own neighboring property could not use a covenant to veto the development. Because the special features of private conservation servitudes in gross heighten the concerns of dead hand control, including intrusion on democratic values, exacerbation of class conflict, and reduction of flexibility in land use, traditional views of freedom of contract and consensual arrangement should be modified in this area.

(a) *Democratic values.*—American public opinion is split over the amount and type of community growth that is desirable.<sup>123</sup> Although society benefits from democratic debate over these controversial issues, the veto power held by owners of private conservation servitudes in gross preempts this debate. Current zoning and subdivision processes may deserve criticism,<sup>124</sup> but they do promote representative democracy, accountability, and full debate of the issues.<sup>125</sup> Each person can participate in determining the growth of the community; this participation reinforces personal autonomy<sup>126</sup> and social stability. Society may allow a person control over his neighbor's activities through an appurtenant real covenant because it is willing to accept the covenantee's judgment that the neighbor's activities may be harmful to the covenantee himself. It is quite different for a private group owning an in gross servitude to substitute its judgment for the community's, and to bar development even though the community's subdivision and zoning processes permit and even encourage it.

(b) *Class issues and the structure of private organizations.*—A decision to maintain the environmental status quo can disproportionately

123. See R. NASH, *supra* note 33, at 236-62. Nash discusses the bitter controversy over development and preservation in the 1960s and early 1970s. He also details Americans' ambivalence to wilderness, which he attributes to the fact that American national pride is based on both having and destroying wilderness. Consider, also, the battle between Congress and the Department of the Interior over the leasing of public wilderness lands for mineral exploration. See *Congress To Try To Ban Oil Leasing in Wild Areas*, N.Y. Times, Oct. 26, 1982, at 34, col. 1; *Wilderness Areas Are Debated Again*, N.Y. Times, Nov. 11, 1982, at 34, col. 1.

124. See Krasnowiecki, *Abolish Zoning*, 31 SYRACUSE L. REV. 719 (1980).

125. See Henning, *Natural Resources Administration and the Public Interest*, 30 PUB. AD. REV. 134 (1970) (discussing how bureaucratic decisions with respect to natural resources give effect to the public interest).

126. See Krasnowiecki, *supra* note 124, at 722 ("Local governments are the last direct contact that the average citizen has with the idea of government; it is the only place where the citizen still feels that his individual participation might make a difference."); Shore, *What Do People Want?*, in *THE GOOD EARTH OF AMERICA*, *supra* note 33, at 88, 96-99 (discussing the importance of direct public participation in land use planning).

affect the needs of the less affluent groups in society.<sup>127</sup> Recent events at Columbia University illustrate this problem. In 1968, after student protests that community needs were not being met, Columbia abandoned plans to build a gymnasium in a nearby park. A recent dispute has arisen, however, between Columbia students who seek to restore the park to its condition as first designed almost one hundred years ago and various Harlem community groups seeking more public facilities.<sup>128</sup>

Even William H. Whyte, Jr., one of the earliest proponents of conservation servitudes, described the "muted class and economic conflicts" involved,<sup>129</sup> asserting that the class donating conservation servitudes is generally the "gentry":

Characteristically, the gentry have a strong bias for the "natural" countryside, and it is the preservation of this that the easement device promises. When they think of open space, they usually don't think of parks, or lakes for recreation, or the landscaping along super-highways; they think of farmland, streams and meadows, white fences, and barns. Many such people feel they should be for park programs, but more from an abstract sense of obligation than from any personal impulse. If they're for parks, it's likely to be for parks somewhere else, and if they get to talking candidly, it's not long before they'll reveal a definite distaste for the idea of picnic benches and formal landscaping.<sup>130</sup>

The potentially turbulent nature of these class issues<sup>131</sup> is exacerbated when private foundations control land use through their ownership of conservation servitudes. Professor David A. Lipton describes non-profit foundations as "self-appointing, self-perpetuating . . . often parochial in composition . . . [and] neither selected by nor responsible to any constituency."<sup>132</sup> Private foundations lack the elective democracy and

127. See *Southern Burlington County NAACP v. Township of Mt. Laurel*, 67 N.J. 151, 174, 336 A.2d 713, 724 (1975) (indicating that a locality has a legal obligation to provide by its land regulations a realistic opportunity for the development of its regional fair share of low and moderate income housing).

128. See Carmody, *supra* note 30, at B1, col. 1.

129. W. WHYTE, *supra* note 2, at 37; see R. NASH, *supra* note 33, at 169; Rose, *Preservation and Community: New Directions in the Law of Historic Preservation*, 33 STAN. L. REV. 473, 478 (1981).

130. W. WHYTE, *supra* note 2, at 37. Whyte apparently expects a governmental entity to be the ultimate holder of conservation servitudes. See *id.* at 8, 9, 37, 50-52.

131. Professor Rose examines governmental efforts in historic preservation, such as government sponsored redevelopment, Rose, *supra* note 129, at 524-33, and landmark and district architectural controls, *id.* at 496-97. She persuasively argues that the "chief function of preservation is to strengthen local community ties and community organization," *id.* at 479, and advocates a public decisionmaking process to allow for the presentation of different views and to heighten self-governance, *id.* at 517-33. Although Professor Rose focuses on governmental, rather than private, activities and on historic, rather than environmental, preservation, her concern for democratic participation is relevant to privately held conservation servitudes in gross.

132. Lipton, *Significant Private Foundations and the Need For Public Selection of Their Trustees*, 64 VA. L. REV. 779, 781 (1978).

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accountability of the public land use regulation system.

The General Accounting Office, noting that nonprofit conservation groups acquire land and resell it to federal agencies, questioned whether the relationship between these private organizations and federal agencies “might be influencing how the Federal agencies establish their land acquisition priorities.”<sup>133</sup> The GAO and the Office of Management and Budget proposed guidelines providing that the purchasing agency’s plans for the land “must be paramount to those of the nonprofit conservation organizations” and that government land acquisitions through such organizations must be “in accord with priorities outlined by the agency.”<sup>134</sup> Public land purchase and control should not be governed by unilateral action by nonaccountable officials. Although private conservation servitudes do not involve public ownership of land rights, the concern about the interplay of nonelected individuals and public land use planning still merits consideration because of the potential for class abuse in such decisionmaking and the nonrepresentative structure of the decisionmakers.

(c) *Flexibility*.—Professor Jan Krasnowiecki argues persuasively that despite the common belief that development is best regulated by a group of “self-administering” rules established long before actual development begins, little development actually occurs under preexisting zoning.<sup>135</sup> Rather, the zoning system adjusts to permit development.<sup>136</sup> He argues that the zoning structure should be recast as primarily an adjudicatory system to achieve flexibility, the participation of all interested parties, and clearer decisionmaking.<sup>137</sup>

Various private land use arrangements also encourage flexibility. Setting a fixed duration for real covenants lessens dead hand control.<sup>138</sup> Allowing homeowner’s associations to alter and enforce subdivision restrictions promotes flexibility by removing veto power from the individual.<sup>139</sup>

Flexibility is necessary in conservation servitudes as well. Although

133. FEDERAL LAND ACQUISITION, *supra* note 26, at 26.

134. Office of the Secretary of the Interior, Proposed Guidelines for Transactions Between Nonprofit Conservation Organizations and Federal Agencies, 48 Fed. Reg. 4055 (1983); *see* Office of the Secretary of the Interior, Guidelines for Transactions Between Nonprofit Conservation Organizations and Federal Agencies, 48 Fed. Reg. 17,406 (1983); Office of the Secretary of the Interior, Guidelines for Transactions Between Nonprofit Conservation Organizations and Federal Agencies, 48 Fed. Reg. 36,342 (1983).

135. Krasnowiecki, *supra* note 124, at 719-20.

136. *See generally* Kmiec, *supra* note 86, at 53-57 (discussing zone variance, amendment, and conditional use as means of infusing flexibility into the zoning process).

137. Krasnowiecki, *supra* note 124, at 747.

138. For examples of fixed duration real covenants, *see infra* note 256.

139. *See infra* subpart IV(A)(1)(b).

current social needs call for preserving the environment and limiting development, this may not always be so. Even if conservation remains the dominant value, today's vision of what is environmentally significant may change tomorrow.<sup>140</sup>

Further, an overly rigid conservation servitude may undermine itself. Many of the violations of conservation servitudes arise from an inflexible response to the servient owner's need to obtain a reasonable use from his land.<sup>141</sup> Flexibility also can alleviate the personal hardship of servient owners.<sup>142</sup>

Public ownership of conservation servitudes combined with the democratic process is one way to avoid rigidity. Servitudes could be acquired under a plan, preventing haphazard accumulation of land ties that frustrate growth.<sup>143</sup> Additionally, supervision by government agencies could prevent loss of the covenants.<sup>144</sup> The government owner could order modification or termination of servitudes based on other pressing public requirements.<sup>145</sup> Private organizations could still advocate their

140. See Cunningham, *supra* note 2, at 208; Scenic Easements, *supra* note 27, at 12; Dunlop, *Landmarks, Too, Often Change With the Times*, N.Y. Times, Feb. 13, 1983, § 4, at 8, col. 1. The New York City Landmarks Preservation Law provides for modification of restrictions if, among other reasons, the property provides an "insufficient return." N.Y. CITY ADMIN. CODE ch. 8A, § 205-1.0(a) (1976); see *Penn Central Transp. Co. v. City of New York*, 438 U.S. 104, 108-13 (1978) (discussing the New York City preservation statute).

141. Coughlin and Plaut, *supra* note 26, at 460, assert that unless the servient owner is permitted some reasonable economic use of the land, and unless the servitude holder responds to changes, the servient owner may violate the servitude. For indications that violations of conservation servitudes occur with second generation servient owners and not the original covenantor, see *supra* note 27.

142. Examples of personal hardship arising from a conservation servitude include a covenant restriction barring the fee owner from building a second home on the property for the owner's children, see *Benton v. Bush*, 644 S.W.2d 690 (Tenn. Ct. App. 1982), and the inability of a fee title owner to use the land in a manner that provides adequate revenues to pay property taxes, see *Scenic Easements, supra* note 27, at 8-9.

143. See Acquisition Policy, *supra* note 2, at 24,793 (requiring each area of the National Park System with an active land acquisition program to have a land acquisition plan, outlining strategy, priorities, and schedule; during the development of the plan members of the public are to be given the opportunity to present their views); see also Cunningham, *supra* note 2, at 203-06 (describing the established criteria that an effective conservation servitude program uses in its selection). Local governments also could institute such programs.

144. Despite some past difficulties with governmental enforcement of conservation servitudes, there are no indications of inherent problems with government enforcement. See Higgins, *supra* note 2 (describing federal officials' supervision of conservation servitudes). Congress has expressed concern, however, about loss of the benefits of conservation servitudes through nonenforcement; it fears losing revenue by allowing a deduction without an accompanying public benefit. See S. REP. NO. 1007, *supra* note 2, at 14, reprinted in 1980 U.S. CODE CONG. & AD. NEWS at 6749.

145. Legislatures can alter the rules governing the acquisition and sale of land interests owned by the government to create new standards that reflect current societal concerns and meet emerging problems. A good example of federal government flexibility with respect to ownership of public land, including conservation servitudes, is the Act of Dec. 31, 1970, Pub. L. No. 91-609, § 401, 84 Stat. 1770, 1781 (formerly codified at 42 U.S.C. §§ 1500-1500e (1982) (omitted pursuant to 42 U.S.C. § 5316 (1982) (terminating authority to make grants under the Act)). 42 U.S.C. § 1500a (1982) authorizes grants to state and local governments to finance the acquisition of open space areas. Apparently servitudes can be purchased with such funds. *Id.* § 1500a(1) ("title to, or other

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positions and seek public support for their views.<sup>146</sup>

### C. Other Concerns

1. *Basis for Examining Servitudes.*—Why should a private organization's decision to bar development on Blackacre be accepted without question if it is the fee owner of the parcel, but subjected to scrutiny if it holds only a conservation servitude in gross? Although this is a difficult question, differences between servitudes and fees, as well as the practical ramifications of servitude ownership by conservation groups, require that conservation servitudes be examined more closely.

The potential magnitude of conservation servitudes as opposed to fee interests is one reason to treat the two interests differently. Because conservation servitudes can be purchased for as little as fifteen percent of the value of a fee interest,<sup>147</sup> private groups can subject more land to veto control by acquiring servitudes than by acquiring fees. Also, landowners may be more likely to donate a servitude than a fee simple because they retain title and the rights of use and possession.<sup>148</sup>

Further, the law is appropriately concerned with the unique relationship among those owning interests in the same piece of land. Conflicts arise because co-owners often wish to use the land in different ways. The law's accommodation of these divergent claims must be based not only on the parties' expectations but also on societal goals. Consider, for example, how society's view of land as a commercial asset plays an important part in the law of ameliorative waste;<sup>149</sup> how the increased auton-

interest, in"). A grant is made only if the acquisition is pursuant to a unified open space program, *id.* § 1500b, thus helping to prevent random land acquisition. Moreover, the local government can convert open space land bought with a grant to other uses if substitute open space is provided and "the conversion [is] . . . needed for orderly growth and development." *Id.* § 1500c(2). Thus, modification can address new societal requirements, and land patterns are not frozen in perpetuity. Yet the requirement that modifications accord with the comprehensive land use plan prevents communities from subverting the federal legislative purpose by using existing land rather than the more expensive route of purchasing private land. *See, e.g., Schicke v. Romney*, 474 F.2d 309, 316 (2d Cir. 1973); *see also* 16 U.S.C. § 460l-8(f)(3) (1982) (dealing with grants to states to acquire property and envisioning the conversion of such property to other uses subject to certain requirements); *id.* § 460l-22(a) (land acquired by the United States Secretary of the Interior for the National Park system can be transferred by the Secretary subject to terms that will assure use of the property consistent with the authorized purpose). The federal government also permits land not needed for national parks to be turned over to the General Services Administration for sale. *See FEDERAL LAND ACQUISITION, supra* note 26, at 8-9.

146. *See* *Sierra Club v. Palisades Interstate Park Comm'n*, 114 Misc. 2d 52, 450 N.Y.S.2d 677 (Sup. Ct. 1982) (private organization disputing governmental decision with respect to a government owned conservation servitude). *See generally* Hair, *The Roles of Nongovernmental Conservation Organizations*, FISH & WILDLIFE NEWS, Oct./Nov. 1981, at 12 (describing the role of private organizations in representing and educating the public).

147. *See supra* note 42 and accompanying text.

148. *See* W. WHYTE, *supra* note 2, at 36.

149. *See, e.g., Melms v. Pabst Brewing Co.*, 104 Wis. 7, 9-15, 79 N.W. 738, 739-40 (1899).

omy of wives in the recent law of tenancies by the entirety reflects the changes in American social structure,<sup>150</sup> and how the value of due process shapes the law of cooperatives and condominiums.<sup>151</sup> Because servitudes involve relative rights between fee holder and servitude owner, past experience with co-owned property supports special treatment for servitudes, as opposed to fees, held by conservation groups. Ownership of a piece of land in fee simple absolute does not present these problems.

Our society acknowledges that the fee owner of a piece of land has the right to decide present and, to some extent, future use of the land.<sup>152</sup> The power is justified by the increased autonomy it brings the fee holder. Thus, the right of a conservation group owning a fee simple interest in land to devote it to preservation purposes is protected. In contrast, a servitude in gross threatens the servient owner's autonomy, and thus deserves scrutiny.

The distinction between servitudes and fee interests held by private organizations also reflects a separate body of law dealing with real covenants that has existed at least since 1583.<sup>153</sup> Although traditional real

150. See, e.g., *Sawada v. Endo*, 57 Hawaii 608, 610-13, 561 P.2d 1291, 1294-95 (1977); *West v. First Agricultural Bank*, 382 Mass. 534, 542-50, 419 N.E.2d 262, 267-71 (1981).

151. See, e.g., *Johnson v. Keith*, 368 Mass. 316, 320, 331 N.E.2d 879, 882 (1975).

152. See *Mechem*, *supra* note 78, at 139-40.

153. This is the date of *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (K.B. 1583), one of the earliest real covenant cases. Other common-law devices could be used to achieve the same conservation purposes as a real covenant, such as the possibility of reverter reserved by the grantor, a power of termination retained by the grantor, and an executory interest granted to a third party. See R. BRENNEMAN, *supra* note 2, at 36-49; A. DUNHAM, *supra* note 20, at 5-31; Beckwith, *supra* note 84, at 126-30; Browder, *supra* note 60, at 43. Such interests would be subject to court scrutiny, however, and the same results suggested herein for conservation real covenants and easements probably would occur for these other common-law devices. First, because of concerns over forfeiture, courts construe these three interests strictly, see A. DUNHAM, *supra* note 20, at 13-14; Beckwith, *supra* note 84, at 127, and use constructional devices to limit their effect, see A. DUNHAM, *supra* note 20, at 12. Also, courts may employ the same public policy analysis for these interests as they do for real covenants. See L. SIMES & A. SMITH, *supra* note 111, § 286; Beckwith, *supra* note 84, at 130. The changed conditions doctrine may apply to possibilities of reverter and rights of entry. See A. DUNHAM, *supra* note 20, at 12. In addition, the Rule Against Perpetuities will control third party executory interests. See L. SIMES & A. SMITH, *supra* note 111, § 111, at 235-36.

As another alternative, a landowner willing to surrender fee title to the land could convey it in trust for conservation purposes to a charitable corporation or governmental entity subject to conditions on its use. See, e.g., *Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency*, 164 Conn. 337, 338-39, 321 A.2d 469, 470-71 (1973) (trust providing for purchase of school land, prohibiting mercantile or manufacturing activities); *Nickols v. Commissioners of Middlesex County*, 341 Mass. 13, 23-24, 166 N.E.2d 911, 919 (1960) (conveyance of Walden Pond shoreland subject to condition that it be preserved). Such trusts are not immune to close judicial scrutiny, however, and may be subject to termination or modification. See *Colonial Trust Co. v. Brown*, 105 Conn. 261, 286, 135 A. 555, 564 (1926) (voiding a portion of a trust restricting height of buildings and terms of leases on realty as violating "public policy" and injurious to the "public welfare"); RESTATEMENT (SECOND) OF TRUSTS § 62 (1959) (invalidating trust provisions when enforcement "would be against public policy").

Conservation restrictions also might be created through leasehold interests. See R. BRENNEMAN, *supra* note 2, at 33-35. Leases that contain covenants restricting the property, however, would

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covenant rules may not have evolved from conscious social policy, the reduction of land ties achieved by these rules is of great concern today. If real covenant law is being relaxed for policy reasons to allow private conservation servitudes in gross, it seems appropriate to add limitations to help ensure that the public interest ultimately will be served. Moreover, the occasion of recognizing a new property interest is the best time to add a standard of scrutiny for public benefit, because only then is there no expectation that the new property interest will be free from such examination.

2. *The Role of Eminent Domain.*—Private conservation servitudes in gross raise two related issues involving eminent domain: First, would it be deemed a taking if a court refused to specifically enforce a privately held conservation servitude, limiting the covenantee's remedy to damages? Second, should formal eminent domain procedures be the exclusive means of effectuating the public interest in the efficient use of land?

(a) *Denial of injunction as a taking.*—Courts have expressly held that denying an injunction to specifically enforce a real covenant and limiting the covenantee to damages is not a taking requiring the exercise of eminent domain,<sup>154</sup> whether denial is based on judicial discretion<sup>155</sup> or on statutory guidelines for equitable enforcement of covenants.<sup>156</sup> The rationale for this holding is that the granting of an injunction is not a matter of right, but a matter of judicial discretion.<sup>157</sup> Moreover, even if the denial is a taking, there is an adequate public purpose, and compensation through money damages makes the taking constitutional.<sup>158</sup> An even broader curtailment of remedies—a real covenant extinguished by judicial decree with no right of damages—has been held not to violate the Constitution.<sup>159</sup> Thus, one of the approaches proposed

be subject to judicial scrutiny as covenants running with the land. See, e.g., *Spencer's Case*, 5 Co. 16a, 77 Eng. Rep. 72 (K.B. 1583).

154. See *Blakeley v. Gorin*, 365 Mass. 590, 595-601, 313 N.E.2d 903, 906-10 (1974); *Rossi v. Sierchio*, 30 N.J. Super. 575, 584, 105 A.2d 687, 692 (App. Div. 1954). For criticism of the *Gorin* decision, see *Rose*, *supra* note 68, at 1414 n.48. See generally M. HORWITZ, *supra* note 98, at 53 (discussing the issue of eminent domain inherent in the 19th century Mill Acts).

155. See *Rossi v. Sierchio*, 30 N.J. Super. 575, 581-83, 105 A.2d 687, 690-91 (App. Div. 1954).

156. See *Blakeley v. Gorin*, 365 Mass. 590, 604-07, 313 N.E.2d 903, 912-14 (1974).

157. One court has stated: "The Legislature has appropriately left the decision on specific enforcement of these rights where it has traditionally resided, in the sound discretion of a judge of a court of equity. It seems inappropriate to transform this discretionary remedy into a constitutional right." *Id.* at 598, 313 N.E.2d at 909. Injury to the public is a factor for the court to consider in its discretion to grant an injunction. See *Ames v. Schlaeger*, 386 Ill. 160, 166, 53 N.E.2d 937, 940 (1944); *G.H. Sternberg & Co. v. Cellini*, 16 Ill. App. 3d 1, 6, 305 N.E.2d 317, 321 (1973).

158. See *Blakeley v. Gorin*, 365 Mass. 590, 598-601, 313 N.E.2d 903, 909-10 (1974).

159. See *Amana Soc'y v. Colony Inn, Inc.*, 315 N.W.2d 101, 111-13 (Iowa 1982) (rejecting due process and contracts clause challenges to Iowa's "stale use" statute) (discussed *infra* subpart

by this Article—judicial limitation of the covenantee's remedy to damages if the public interest so requires<sup>160</sup>—passes constitutional muster.

(b) *Eminent domain as the sole remedy.*—A more difficult question is whether to permit judicial refusal to specifically enforce privately held conservation servitudes or to make the formal eminent domain procedure the exclusive route to effectuate society's interest. Eminent domain taking of an existing servitude is certainly possible.<sup>161</sup> Professor Richard Epstein opposes judicial modification or termination of servitudes because of changed conditions or because the servitude has become wasteful, obsolete, or unreasonable,<sup>162</sup> suggesting instead that "the state . . . intervene under its eminent domain powers, but only when it acts for 'public use.'"<sup>163</sup>

Yet there are policy reasons why expression of the public interest need not be limited to eminent domain. Human interactions and social reality are far too complex to leave only a choice between two extremes: unflinching adherence to an in gross servitude on one hand and resort to the cumbersome eminent domain process on the other.<sup>164</sup> Framing the issue as freedom of contract versus majoritarian intrusion ignores too

IV(C)); *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 373 (Minn. 1979) (dictum suggesting that a Minnesota statute placing a thirty-year limit on restrictive covenants is constitutional); see also *Duke Power Co. v. Carolina Env'tl. Study Group, Inc.*, 438 U.S. 59, 88 (1978) (suggesting in dictum that legislators can limit common-law remedies without violating the due process clause).

160. See *infra* subpart VI(A)(3).

161. See *Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency*, 164 Conn. 337, 341-44, 321 A.2d 469, 472-73 (1973); *Lake Forest District v. Freeska*, 85 Ill. App. 3d 610, 407 N.E.2d 137 (1980). Some statutes permit eminent domain as a means to terminate a conservation servitude. See ARK. STAT. ANN. § 50-1205(d) (Supp. 1983); CAL. GOV'T CODE § 51095 (West 1983); DEL. CODE ANN. tit. 7, § 6815 (1983); S.C. CODE ANN. § 27-9-20 (Law. Co-op. 1976); see also A. DUNHAM, *supra* note 20, at 6-7, 23, 27 (seeking to prevent eminent domain taking of private conservation servitudes); W. WHYTE, *supra* note 2, at 45-46 (proposing stipulation that later public domain condemnation void easement).

Eminent domain power can also be used to create conservation servitudes. See *Kamrowski v. State*, 31 Wis. 2d 256, 265-66, 142 N.W.2d 793, 797 (1966); MO. REV. STAT. § 67.885 (1978); PA. STAT. ANN. tit. 32, § 5008 (Purdon Supp. 1983); W. VA. CODE § 20-1-7(11) (Supp. 1984). *But see* FLA. STAT. ANN. § 704.06(2) (West Supp. 1983); KY. REV. STAT. § 65.460 (1980); TEX. NAT. RES. CODE ANN. § 181.060 (Vernon 1978); W. WHYTE, *supra* note 2, at 15-20; Costonis, *supra* note 10, at 612-17; Sax, *Helpless Giants: The National Parks and the Regulation of Private Lands*, 75 MICH. L. REV. 239, 264-65 (1976) (discussing reasons why government might hesitate to use its eminent domain power); *id.* at 270 (indicating that some conservation zoning may rise to the level of a taking requiring compensation).

162. Epstein, *supra* note 67, at 1358. Professor Epstein also states that once "notice [is] secured by recordation, freedom of contract should control." *Id.*

163. *Id.* at 1367; see Rose, *supra* note 68, at 1412 ("The right to hold out, for whatever idiotic reasons, is an aspect of the right to hold property. It is normally relaxed only through an eminent domain proceeding for a public purpose, a proceeding which is approved by the elected representatives of the community.").

164. See generally Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089 (1972) (describing different possible levels of protection of property rights).

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many other important concerns associated with private conservation servitudes in gross.

There are numerous examples of legal adjustment of the relative rights of contracting parties without resort to eminent domain.<sup>165</sup> Although it is difficult to define the public interest, and a danger of improperly favoring one private interest over another exists,<sup>166</sup> such problems have been handled satisfactorily before through common-law decisionmaking.<sup>167</sup>

Furthermore, the compensation requirement of eminent domain is troubling if a federal income tax deduction is allowed to those who donate conservation servitudes to charitable organizations. The public purse is then twice tapped for the benefit of the private organization.<sup>168</sup> This is ironic, because public benefit is the rationale for validation of privately held conservation servitudes and the income tax deductions.

### IV. The Specific Issues—In Gross Enforcement, Duration, and the Role of Public Policy

Rather than focusing on contract and alienability in servitude cases, courts usually rest their decisions on narrow legal grounds with close attention to precedent. Three of these grounds are of special relevance to conservation servitudes: the validity of servitudes in gross, the effect of unlimited duration, and the public policy considerations articulated by the courts. Analysis of these matters can guide legislatures in enacting or amending servitude statutes, aid courts in deciding whether the common law permits such interests, and enable policymakers to determine whether enforcement of legislatively or judicially authorized conservation servitudes should continue.

165. Consider the residential warranty of habitability that is implied into leases and cannot be waived by the tenant. See *Javins v. First Nat'l Realty Corp.*, 428 F.2d 1071, 1082 n.58 (D.C. Cir.), cert. denied, 400 U.S. 925 (1970); N.Y. REAL PROP. LAW § 235-b(2) (McKinney Supp. 1984-1985); 5 R. POWELL, *supra* note 10, ¶ 746 (listing numerous examples of diminution of property rights through judicial and legislative action).

166. See *Blakeley v. Gorin*, 365 Mass. 590, 616, 313 N.E.2d 903, 918 (1974) (Quirico, J., dissenting); *Poletown Neighborhood Council v. City of Detroit*, 410 Mich. 616, 634-35, 304 N.W.2d 455, 458-59 (1981).

167. These issues arise by necessity in easements in which ownership rights are shifted from one person to another to prevent the loss to society of landlocked land, see *Martino v. Fleenor*, 148 Colo. 136, 365 P.2d 247 (1961), and in the law of nuisance, see *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970).

168. CAL. GOV'T CODE § 51095 (West 1983) does not provide compensation for an eminent domain taking of a conservation servitude that has been donated to a private association. See also KY. REV. STAT. § 65.476 (1980) (providing compensation to landowner for taking of land burdened by scenic easement donated to local legislative body).

### A. *In Gross Versus Appurtenant Interests*

There are three distinct categories of real covenants. The first is the *in gross* interest, in which the benefit of the servitude is not appurtenant to a dominant parcel owned by the covenantee.<sup>169</sup> The second is an appurtenant real covenant burdening the land of the covenantor, *A*, for the benefit of neighboring property owned by the covenantee, *B*, whose own parcel is burdened by an identical covenant for the benefit of *A*'s land. This type of covenant will be called here a "reciprocal subdivision covenant." The third category consists of covenants with the benefit appurtenant to a nearby piece of land but without a reciprocal covenant benefiting the covenantor. This kind of covenant will be called here a "nonreciprocal appurtenant covenant." Examination of these categories of covenants illuminates how courts have treated and ought to treat the policy concerns inherent in private conservation servitudes *in gross*.

#### 1. *The Policy Concerns.*

(a) *Appurtenancy as promoting flexibility.*—Limiting covenants to neighbors encourages flexibility because neighbors, especially in adjoining residential lots, usually try to accommodate one another to maintain good relations.<sup>170</sup> Disputes are often settled informally. An owner seeking relief from a covenant can rely on this neighborhood goodwill. Similarly, the possibility of social sanctions from an intransigent owner's neighbors also encourages informal dispute resolution.

Reciprocal subdivision covenants generate a particularly strong incentive for flexibility because the owner asked to compromise today may seek compromise in the future. In contrast, the owner of an *in gross* servitude often is not near the land; the chances of flexibility through compromise are accordingly reduced.

(b) *Democracy and reciprocal subdivision covenants.*—Many subdivision arrangements give the power to enforce and modify the reciprocal subdivision provisions to a homeowners association.<sup>171</sup> Such decisions are voted upon by association members or delegated to elected officers.<sup>172</sup> This allows the community as a whole to act democratically,

169. See RESTATEMENT OF PROPERTY §§ 453-454 (1944); AMERICAN LAW OF PROPERTY, *supra* note 17, § 9.32.

170. See *Romans v. Nadler*, 217 Minn. 174, 14 N.W.2d 482 (1944); *Hassing v. Kline*, 91 A.D.2d 988, 457 N.Y.S.2d 847 (1983).

171. See *Merrionette Manor Homes Improvement Ass'n v. Heda*, 11 Ill. App. 2d 186, 187-88, 136 N.E.2d 556, 557 (1956); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 253-54, 15 N.E.2d 793, 794-95 (1938); *Krasnowiecki, supra* note 60, at 716.

172. See *Reichman, Private Governments, supra* note 68, at 254.

protected from an individual's veto.<sup>173</sup> Further, the association is an ongoing institution and may take a broader, more long-term view than any single member, thus enhancing flexibility and compromise.<sup>174</sup>

(c) *Self-determination*.—Both reciprocal and nonreciprocal appurtenant covenants allow the covenantee to prevent uses of the servient parcel that directly harm him or interfere with his control over his immediate environment. When a right is asserted under an appurtenant servitude, the dominant landowner decides what is in his interest; he, of course, is uniquely suited to make that decision. In contrast, when a private group enforces a conservation servitude in gross, it makes a judgment that society is being harmed, a decision about the needs of others that the private association is not clearly qualified to make.<sup>175</sup>

2. *Examination of the Cases*.—Although courts usually fail to address clearly these specific policy considerations (mentioning only the contract-alienability dichotomy), there are some exceptions. Moreover, from these cases a pattern emerges of favoring reciprocal arrangements between neighbors and disfavoring the broad-sweeping veto power of someone distant from the area.

(a) *Reciprocal subdivision covenants*.—Courts have expressly and impliedly supported reciprocal subdivision covenants. Some courts have focused appropriately on the specific subdivision policy considerations,<sup>176</sup> emphasizing benefits to the residential environment<sup>177</sup> as well as

173. See *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 172 N.E. 455 (1930) (128 lot development in which all owners but one consented to variance of the covenant to allow the erection of a church); Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982).

174. One jurisdiction even statutorily mandates community control over building restriction duration regardless of whether the restriction was originally perpetual. See LA. CIV. CODE ANN. art. 780 (West Supp. 1983).

175. Other explanations have been offered for the appurtenance requirement. Professor French claims that the appurtenance requirement serves to identify the owner of the servitude and thus fosters negotiation between the dominant and servient owners over removal or modification. French, *supra* note 68, at 1287, 1307. She offers an alternative to the appurtenance requirement to deal with these concerns. *Id.* at 1307; see also *Minch v. Saymon*, 96 N.J. Super. 464, 469-71, 233 A.2d 385, 388-89 (Ch. Div. 1967) (appurtenance requirement not met when covenant benefited unnamed corporation in which grantor owned stock; subsequent servient owner cannot identify dominant owner for negotiations).

176. See *Bob Layne Contractor, Inc. v. Buennagel*, 158 Ind. 43, 53, 301 N.E.2d 671, 678 (1973); *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 329-31, 317 N.W.2d 611, 613-14 (1982); *Swagerty v. Peterson*, 280 Or. 739, 744, 572 P.2d 1309, 1313 (1977); *Benton v. Bush*, 644 S.W.2d 690, 691-92 (Tenn. Ct. App. 1982); *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981).

177. See *Bob Layne Contractor, Inc. v. Buennagel*, 158 Ind. App. 43, 53, 301 N.E.2d 671, 678 (1973); *Lake St. Louis Community Ass'n v. Kamper*, 503 S.W.2d 447, 449 (Mo. Ct. App. 1973); *Benton v. Bush*, 644 S.W.2d 690, 692 (Tenn. Ct. App. 1982).

the increased value of the properties.<sup>178</sup> One court determined that "building and use restrictions in residential deeds are favored by public policy";<sup>179</sup> another thought it "doubtful" that "untrammelled land use" should be continued.<sup>180</sup> It would be even more helpful if courts would explicitly explore veto power, flexibility, and democracy.

Notwithstanding references to the free use of land and a historic suspicion of real covenants, there are opinions broadly interpreting the language of reciprocal subdivision covenants to exclude more activities by the servient owner than the language indicates on its face.<sup>181</sup> Courts willing to *imply* a reciprocal subdivision covenant in the absence of an express restriction<sup>182</sup> can hardly be biased against restrictions on land. Rather, these courts attach particular value to the reciprocal subdivision covenant. Some courts attach such significance to reciprocity that they refuse to enforce subdivision covenants in the absence of mutuality.<sup>183</sup>

(b) *In gross servitudes.*

(i) *Majority rule real covenant cases.*—If the benefit is in gross, most courts do not allow the real covenant to run,<sup>184</sup> whether in

178. See *Davis v. Huey*, 620 S.W.2d 561, 565 (Tex. 1981). Thus, restricting land in such cases increases, rather than decreases, the market value of residential property.

179. *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 325, 317 N.W.2d 611, 612 (1982).

180. *Swaggerty v. Petersen*, 280 Or. 739, 744, 572 P.2d 1309, 1313 (1977).

181. See *Mock v. Schulman*, 226 Cal. App. 2d 263, 267, 38 Cal. Rptr. 39, 42 (Dist. Ct. App. 1964) ("hedge" in height limitation included any natural growth); see also *Alexander Schroeder Lumber Co. v. Corona*, 288 S.W.2d 829, 834 (Tex. Civ. App.—Galveston 1956, writ ref'd n.r.e.) ("structure" in setback provision included a wooden fence); *Voyager Village Property Owners Ass'n v. Johnson*, 97 Wis. 2d 747, 748, 295 N.W.2d 14, 15 (Ct. App. 1980) (covenant barring placing of "camping equipment not in use" included travel trailer); see also *Annot.*, 13 A.L.R.4th 1346 (1982) (collecting cases discussing the application of restrictive covenants to trees and shrubbery); *Annot.*, 75 A.L.R.3d 1095, 1109-10 (1977) (citing cases holding that a mobile home constitutes a structure). But see *Colony Park Ass'n v. Dugas*, 44 Mich. App. 467, 468, 205 N.W.2d 234, 235 (1973) (finding covenant prohibiting "tent, camping outfit, or other temporary structure" did not include mobile home); *Phillips v. Schwartz*, 607 S.W.2d 203, 207-08 (Mo. Ct. App. 1980) (finding term "trailer" included mobile homes but not camper-trailers).

182. See *Snow v. Van Dam*, 291 Mass. 477, 481, 197 N.E. 224, 226 (1935); *Sanborn v. McLean*, 233 Mich. 227, 229-30, 206 N.W. 496, 497 (1925); *AMERICAN LAW OF PROPERTY*, *supra* note 17, § 9.32.

183. See *Welsch v. Goswick*, 130 Cal. App. 3d 398, 405, 181 Cal. Rptr. 703, 707 (1982) ("[M]utual equitable servitudes . . . become unenforceable absent mutuality of obligation."); *Davis v. Huey*, 620 S.W.2d 561, 568 (Tex. 1981) ("A contrary holding would be inconsistent with the basic concept underlying the use of restrictive covenants that each purchaser in a restricted subdivision is subjected to the burden and entitled to the benefit of the covenant.")

184. See *Marra v. Aetna Constr. Co.*, 15 Cal. 2d 375, 378, 101 P.2d 490, 492 (1940); *Berryman v. Savoy Co.*, 160 Cal. 559, 573, 117 P. 677, 682 (1911); *Chandler v. Smith*, 170 Cal. App. 2d 118, 120, 338 P.2d 522, 523-24 (1959); *Foreman v. Safe Deposit & Trust Co.*, 114 Md. 574, 579, 80 A. 298, 300 (1911); *Orenberg v. Johnston*, 269 Mass. 312, 315-16, 168 N.E. 794, 795 (1929); *Duncan v. Academy of the Sisters of the Sacred Heart*, 350 S.W.2d 814, 819 (Mo. 1961); *Weltoff v. Kohl*, 105 N.J. Eq. 181, 188-89, 147 A. 390, 393 (1929); *Minch v. Saymon*, 96 N.J. Super. 464, 468-69, 233 A.2d 385, 387-88 (Ch. Div. 1967); *Caullett v. Stanley Stillwell & Sons, Inc.*, 67 N.J. Super. 111, 116, 170 A.2d 52, 54-55 (1961); *Wilmurt v. McGrane*, 16 A.D. 412, 416-17, 45 N.Y.S. 32, 34 (1897);

actions seeking damages,<sup>185</sup> an injunction for breach<sup>186</sup> or threatened breach,<sup>187</sup> to quiet title,<sup>188</sup> or to specifically enforce a contract of sale.<sup>189</sup> These opinions are troubling for their lack of a clear rationale and their failure to consider the relevant policies. Most rely on stare decisis or precedents from other jurisdictions.<sup>190</sup> Yet some cases cited in these opinions did not involve in gross real covenants and do not explain why in gross enforcement should be denied. For example, *DeGray v. Monmouth Beach Club House Co.*<sup>191</sup> is often cited for the proposition that in gross real covenants are unenforceable.<sup>192</sup> This case actually deals with an *appurtenant* real covenant and makes only a passing allusion to in gross covenants by way of quoting yet another court's opinion.<sup>193</sup> Similarly, *Badger v. Boardman*,<sup>194</sup> also cited for the nonenforceability of in gross real covenants,<sup>195</sup> prevented what appeared to be an *appurtenant* covenant from running because there was no intent to benefit the dominant parcel.

A few majority rule cases do attempt to explain the rule's basis, but their efforts are far from satisfactory. Some make brief references to free use of land.<sup>196</sup> Others, with circular logic, declare that because the original covenantee no longer owns land to which the benefit inures, he no

Stegall v. Housing Auth., 278 N.C. 95, 102, 178 S.E.2d 824, 829 (1971); Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 516-17, 75 S.E.2d 620, 631 (1953).

185. See Conduit v. Ross, 102 Ind. 166, 26 N.E. 198 (1885); Inhabitants of Middlefield v. Church Mills Knitting Co., 160 Mass. 267, 35 N.E. 780 (1894).

186. See Storey v. Brush, 256 Mass. 101, 152 N.E. 225 (1926).

187. See Van Sant v. Rose, 260 Ill. 401, 103 N.E. 194 (1913).

188. See Chandler v. Smith, 170 Cal. App. 2d 118, 338 P.2d 522 (1959); Caullett v. Stanley Stillwell & Sons, Inc., 67 N.J. Super. 111, 170 A.2d 52 (App. Div. 1961); Welitoff v. Kohl, 105 N.J. Eq. 181, 147 A. 390 (1929).

189. See Craven County v. First-Citizens Bank & Trust Co., 237 N.C. 502, 75 S.E.2d 620 (1953); Wilmurt v. McGrane, 16 A.D. 412, 45 N.Y.S. 32 (1897).

190. See Marra v. Aetna Constr. Co., 15 Cal. 2d 375, 378, 101 P.2d 490, 492 (1940) ("It is true . . . that a servitude cannot exist in gross . . ."); Chandler v. Smith, 170 Cal. App. 2d 118, 119-20, 338 P.2d 522, 523 (1959) (citing *Marra* and *Berryman v. Savoy Co.*, 160 Cal. 559, 117 P. 677 (1911)); Orenberg v. Johnston, 269 Mass. 312, 315, 168 N.E. 794, 795 (1929) ("the tradition of the law"); Wilmurt v. McGrane, 16 A.D. 412, 416, 45 N.Y.S. 32, 34 (1897) ("a well-settled principle of law").

191. 50 N.J. Eq. 329, 24 A. 388 (1892).

192. See, e.g., *Kotesky v. Davis*, 355 Mich. 536, 539-40, 94 N.W.2d 796, 798 (1959); *Genung v. Harvey*, 79 N.J. Eq. 57, 59, 80 A. 955, 956 (1911); *Caullett v. Stanley Stillwell & Sons, Inc.*, 67 N.J. Super. 111, 118, 170 A.2d 52, 56 (App. Div. 1961); *Roger v. Reimann*, 277 Or. 62, 67-69, 361 P.2d 101, 103 (1961); *Annot.*, 51 A.L.R.3d 556, 573 n.69 (1973); *Annot.*, 21 A.L.R. 1281, 1285-86 (1922).

193. 50 N.J. Eq. at 337, 24 A. at 392 (1892) (quoting *Nottingham Patent Brick & Tile Co. v. Butler*, 15 Q.B.D. 261, 268 (Q.B. 1885) (Wills, J.)).

194. 82 Mass. (16 Gray) 559 (1860).

195. See *Orenberg v. Johnston*, 269 Mass. 312, 316, 168 N.E. 794, 795 (1929); *Craven County v. First-Citizens Bank & Trust Co.*, 237 N.C. 502, 517, 75 S.E.2d 620, 631 (1953).

196. See *Kent v. Koch*, 166 Cal. App. 2d 579, 585-86, 333 P.2d 411, 415 (1958); *Caullett v. Stanley Stillwell & Sons, Inc.*, 67 N.J. Super. 111, 118, 170 A.2d 52, 56 (App. Div. 1961); *Craven County v. First-Citizens Bank & Trust Co.*, 237 N.C. 502, 513-14, 75 S.E.2d 620, 629 (1953).

longer has a protectable interest.<sup>197</sup> This reasoning fits a reciprocal subdivision covenant designed to guarantee the community's environment—once a homeowner sells and leaves, a violation of the covenant can no longer harm him, and he should no longer be allowed to enforce it<sup>198</sup>—but does not adequately address whether the burden should run if (as in the case of in gross conservation servitudes) there is never a benefited parcel.<sup>199</sup>

Although the majority rule avoids dead hand control, lack of clear analysis hampers predictability and also could lead to the voiding of in gross conservation servitudes that should be upheld. *Orenberg v. Johnston*<sup>200</sup> illustrates the predictability problem. *Orenberg* is an early “historic preservation easement” case. Land was conveyed by Harvard Church to the defendant with a covenant obligating the grantee to “keep the tower clock in its present position or substantially so or to erect it in some other conspicuous place.”<sup>201</sup> The church owned no other real property to which the benefit of the servitude could be appurtenant. The land was sold by the defendant to the plaintiff, who upon learning of the covenant, sought to recover the consideration paid on grounds that the covenant was a defect in title. The court held that because the benefit of the covenant was in gross, it could not be enforced against the plaintiff. Although this result fosters flexibility and democracy and blocks dead hand control, the court did not evaluate these issues. Rather, it relied on stare decisis: “[N]o reason whatsoever is shown for departing from the tradition of the law in order to make [the covenant's benefit] follow the land with its burden.”<sup>202</sup>

*Wilmurt v. McGrane*<sup>203</sup> is another example. The defendant objected to the title tendered by the plaintiff, claiming that the plaintiff's predecessor in title, Graham, had built a tenement house on an adjoining lot in violation of the city's ordinance requiring space between buildings. In return for the city's waiver of this violation, Graham had covenanted

197. See *Genung v. Harvey*, 79 N.J. Eq. 57, 59, 80 A. 955, 956 (1911) (“ceased to concern him”); *Stegall v. Housing Auth.*, 278 N.C. 95, 102, 178 S.E.2d 824, 829 (1971) (“a mere intruder”).

198. See *Kent v. Koch*, 166 Cal. App. 2d 579, 586, 333 P.2d 411, 416 (1958); *Genung v. Harvey*, 79 N.J. Eq. 57, 59, 80 A. 955, 956 (1911); *Graham v. Beermunder*, 93 A.D.2d 254, 260, 462 N.Y.S.2d 231, 235-36 (1983); *Stegall v. Housing Auth.*, 278 N.C. 95, 102, 178 S.E.2d 824, 829 (1971).

199. See *Orenberg v. Johnston*, 269 Mass. 312, 168 N.E. 794 (1929) (in gross covenant requiring maintenance of a tower clock); *Caullett v. Stanley Stillwell & Sons, Inc.*, 67 N.J. Super. 111, 170 A.2d 52 (App. Div. 1961) (in gross covenant granting covenantee the right to erect the original dwelling on covenantor's land); *Wilmurt v. McGrane*, 16 A.D. 412, 45 N.Y.S. 32 (1897) (in gross covenant prohibiting construction along a two foot corridor).

200. 269 Mass. 312, 168 N.E. 794 (1929).

201. *Id.* at 313, 168 N.E. at 795.

202. *Id.* at 315, 168 N.E. at 795.

203. 16 A.D. 412, 45 N.Y.S. 32 (1897).

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with the Board of Health, which owned no other property in the area,<sup>204</sup> to not erect any building along the two foot corridor at the rear of his lots. The Appellate Division of the New York Supreme Court held for the plaintiff, finding the covenant unenforceable because the Board of Health held the benefit in gross. The court based its decision on this "well-settled principle of law"<sup>205</sup> and did not explain its decision beyond citing other cases.

*Wilmurt* is a case in which failure to analyze the reasoning behind the majority rule caused an unsatisfactory result. Servitudes in gross yielding a public benefit should be valid if held by a governmental entity, because the concerns about dead hand control and lack of flexibility are alleviated; the democratic process ensures that these entities will be responsive to the changing needs of society. It is ironic that wooden reliance on *stare decisis* caused the public to lose the benefit of this consensual land use covenant, especially because it was a substitute for the legislative directive that the covenantor had violated.

(ii) *Minority rule real covenant cases.*—Some courts have held specifically that the burden of a real covenant may run although the benefit is in gross.<sup>206</sup> Other courts, while not expressly addressing the in gross issue, have enforced covenants in which the benefit was in gross.<sup>207</sup> The facts and reasoning of these opinions, however, offer little support for enforcement of perpetual privately held conservation servitudes in gross.<sup>208</sup> Rather, they are specific responses to circumscribed situations, upholding covenants limited in scope and without significant individual veto power. The fact patterns fall into five groups.

First, there are cases that rely on an agency or alter ego theory to allow enforcement of a real covenant by a party not owning a neighboring parcel.<sup>209</sup> These are not really in gross cases; they involve appurtenant reciprocal subdivision covenants in which the enforcement right

204. See *id.* at 415-16, 45 N.Y.S. at 33-34.

205. *Id.* at 416, 45 N.Y.S. at 34.

206. See *Van Sant v. Rose*, 260 Ill. 401, 404-06, 103 N.E. 194, 195-96 (1913); *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 223, 95 N.E. 216, 219 (1911); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 259-60, 15 N.E.2d 793, 795-97 (1938).

207. See *Staebler-Kempf Oil Co. v. Mac's Auto Mart*, 329 Mich. 351, 356, 45 N.W.2d 316, 318 (1951); *Bald Eagle Valley R.R. v. Nittany Valley R.R.*, 171 Pa. 284, 293-97, 33 A. 239, 241-42 (1895).

208. Some proponents of conservation servitudes have relied on these cases. See, e.g., R. BRENEMAN, *supra* note 2, at 58; A. DUNHAM, *supra* note 20, at 17-18.

209. See *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 223, 95 N.E. 216, 219 (1911); *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 254-60, 15 N.E.2d 793, 795-97 (1938).

was delegated to another,<sup>210</sup> or in which the court permitted the subdivision developer—the original covenantee—“to aid in [the covenant’s] enforcement for the benefit of [its] grantees.”<sup>211</sup>

Second, there are cases in which the covenantee, although she does not own a fee simple interest in a nearby lot, owns a different type of property interest either in a neighboring parcel<sup>212</sup> or in the servient lot.<sup>213</sup> In one case, a court held that the original subdividers, who created reciprocal subdivision covenants but had sold all the lots, could enforce the servitude because they held purchase money mortgages on some of the lots and so had “a direct interest in the subject matter of [the] suit.”<sup>214</sup> Such cases involve a special variety of appurtenant covenants, rather than true in gross interests, and engender different concerns about dead hand control.

Third, there is the often cited<sup>215</sup> minority rule case of *Van Sant v. Rose*,<sup>216</sup> in which the conveyed land carried a covenant prohibiting tenement buildings. The covenantee owned no other land in the area. The covenantor subsequently conveyed the burdened parcel to his wife, who sought to build an apartment house in violation of the restriction. The court granted the covenantee’s request for an injunction, specifically rejecting the claim that in gross enforcement was not permitted.<sup>217</sup> To claim that *Van Sant* stands for permitting the burden of a covenant to run even if the benefit is in gross overstates the case. The covenantee had a cause of action against the covenantor based on traditional contract theory without need of real covenant law.<sup>218</sup> The court merely prevented the covenantor from evading the obligation by conveying the property to his spouse. *Van Sant* thus teaches little about private conservation servitudes in gross.

Fourth, there are cases in which the covenant requires the covenantor or his successors to pay the original covenantee a share of the cost of a party wall erected by the covenantee, if and when the covenantor or his

210. See *Neponsit Property Owners’ Ass’n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 253, 15 N.E.2d 793, 794 (1938).

211. *Riverbank Improvement Co. v. Bancroft*, 209 Mass. 217, 223, 95 N.E. 216, 219 (1911).

212. See *Storey v. Brush*, 256 Mass. 101, 106, 152 N.E. 225, 226 (1925) (mortgagee of neighboring lot); *Welitoff v. Kohl*, 105 N.J. Eq. 181, 187-89, 147 A. 390, 393 (1929) (same).

213. See *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 951, 344 N.Y.S.2d 30, 31 (1973) (mortgagee).

214. *Storey v. Brush*, 256 Mass. 101, 106, 152 N.E. 225, 226 (1925).

215. See *R. BRENNEMAN*, *supra* note 2, at 58; *A. DUNHAM*, *supra* note 20, at 17-18.

216. 260 Ill. 401, 103 N.E. 194 (1913).

217. See *id.* at 403-05, 103 N.E. at 195.

218. See *Christiansen v. Casey*, 613 S.W.2d 906, 909 (Mo. Ct. App. 1981).

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successors make use of the wall,<sup>219</sup> even though the covenantee may no longer hold land in the area. Courts have held the covenants valid.<sup>220</sup> Such covenants differ from private conservation servitudes in gross in that no veto is exerted and there is no restriction on the use of the servient parcel. The successor to the covenantor pays only once and only if he benefits from the labor of the covenantee; such a one-time payment in an ascertainable amount imposes no ongoing burden on the land.

Finally, there are cases allowing in gross enforcement of requirements covenants.<sup>221</sup> A number of these involve gasoline station premises conveyed with a promise by the grantee to purchase the grantor's gasoline and related products. The courts have enforced these covenants against successors to the covenantor.<sup>222</sup> Requirements covenants are unlike conservation servitudes, however, in that they provide for a limited duration, measured either by a specific expiration date<sup>223</sup> or by the period in which the covenantee engages in the business.<sup>224</sup> Courts note the reasonableness of the duration before allowing the covenant to run,<sup>225</sup> demonstrating a concern about perpetual land ties. Further, the covenantee often has a special relationship with the covenantor<sup>226</sup>—he may help the covenantor to finance his business, for example—that justifies enforcement on the ground of encouraging business.<sup>227</sup>

*Inhabitants of Middlefield v. Church Mills Knitting Co.*,<sup>228</sup> a case enforcing an unusual covenant in gross, is worth attention. For many years a road passed through Middlefield and over a bridge that the town was obligated to repair. The owner of a parcel of land along the stream wanted to erect a dam to provide power for a mill on his land. The

219. See *Gibson v. Holden*, 115 Ill. 199, 209-10, 3 N.E. 282, 286 (1885); *Conduit v. Ross*, 102 Ind. 166, 171, 26 N.E. 198, 199 (1885).

220. *Gibson v. Holden*, 115 Ill. 199, 206-07, 3 N.E. 282, 284-85 (1885); *Conduit v. Ross*, 102 Ind. 166, 170, 26 N.E. 198, 199 (1885).

221. See *Trosper v. Shoemaker*, 312 Ky. 344, 346-48, 227 S.W.2d 176, 178 (1949); *Stabler-Kempf Oil Co. v. Mac's Auto Mart*, 329 Mich. 351, 356, 45 N.W.2d 316, 318 (1951); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 951-52, 344 N.Y.S.2d 30, 31-32 (1973); see also *Smith v. Gulf Ref. Co.*, 162 Ga. 191, 194-95, 134 S.E. 446, 448 (1926) (leasehold covenant); *Pratte v. Balatos*, 99 N.H. 430, 433-34, 113 A.2d 492, 494-95 (1955) (same).

222. *Trosper v. Shoemaker*, 312 Ky. 344, 347-48, 227 S.W.2d 176, 178-79 (1949); *Stabler-Kempf Oil Co. v. Mac's Auto Mart*, 329 Mich. 351, 356, 45 N.W.2d 316, 318 (1951); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 951, 344 N.Y.S.2d 30, 32 (1973).

223. See *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 950, 344 N.Y.S.2d 30, 31 (1973) (ten years).

224. See *Trosper v. Shoemaker*, 312 Ky. 344, 347-48, 227 S.W.2d 176, 179 (1949).

225. See *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 41 A.D.2d 950, 951-52, 344 N.Y.S.2d 30, 31-32 (1973).

226. See *Bald Eagle R.R. v. Nittany Valley R.R.*, 171 Pa. 284, 297, 33 A. 239, 242 (1895).

227. See *Stabler-Kempf Oil Co. v. Mac's Auto Mart*, 329 Mich. 351, 358, 45 N.W.2d 316, 319 (1951).

228. 160 Mass. 267, 35 N.E. 780 (1894).

landowner agreed with the town to pay for building and maintaining a new bridge, because the raised water level would submerge the old bridge. The miller subsequently conveyed title to the defendant, who refused to maintain the new bridge. The town made necessary repairs and sought damages for the cost, claiming the agreement ran with the land.<sup>229</sup> The defendant demurred to the complaint, and the trial court held in his favor. The Massachusetts Supreme Judicial Court reversed, finding that the agreement could run even though the benefit to the town was in gross.<sup>230</sup> Justice Holmes, writing for the court, observed:

[A]lthough ordinarily the corresponding right could not exist in gross, yet, in the case of a way which a town is bound to keep in repair for the benefit of the public, the town is the natural and convenient protector of the obligation, and being immortal, and locally fixed, may enforce a covenant originally made to it, without being shown to be strictly the owner of the highway.<sup>231</sup>

The opinion is of interest because it recognizes that when servitudes in gross fill a particular public need, they merit enforcement rather than an inflexible denial based on precedent. Similarly, because of their economic advantages and their service to the conservation ethic, conservation servitudes often deserve recognition even though they conflict with traditional rules against in gross interests.

*Middlefield* also recognizes the unique role of *government* in holding and enforcing servitudes in gross created for the benefit of the public; Justice Holmes describes the town as the "natural and convenient protector" of the servitude.<sup>232</sup> In *Orenberg v. Johnston*,<sup>233</sup> on the other hand, the owner of the servitude in gross was a private party, and enforcement was denied. Together, the cases lend support to conservation servitudes, but militate against unfettered *private* ownership of conservation servitudes in gross.

(iii) *In gross easement cases.*—Unlike covenants in gross, a classic easement in gross usually binds future owners of the servient parcel.<sup>234</sup> The law of servitudes thus has two distinct strains with respect to in gross benefits. This division is not surprising, because covenants traditionally have been regarded with suspicion, while easements have been

229. *See id.* at 268-69, 35 N.E. at 781.

230. *See id.* at 271-72, 35 N.E. at 782.

231. *Id.* at 272, 35 N.E. at 782.

232. *Id.*

233. 269 Mass. 312, 168 N.E. 79 (1929).

234. *See Kleinheider v. Phillips Pipe Line Co.*, 528 F.2d 837, 840 (8th Cir. 1975); *Upper Eagle Valley Sanitation Dist. v. Carnie*, 634 P.2d 1008, 1009 (Colo. Ct. App. 1981); *Farrell v. Hodges Stock Yards*, 343 So. 2d 1364, 1371 (La. 1977).

avored.<sup>235</sup>

Proponents of private conservation servitudes in gross seek support from the law of classic easements in gross.<sup>236</sup> Additionally, both the current movement for a unification of the law of easements and real covenants and the tendency of courts to confuse the two interests<sup>237</sup> may cause application of the classic easement rule to validate private conservation servitudes in gross. But this application should be resisted. Although the integration of easements and real covenants is desirable as a general matter, classic easement in gross cases involve facts and policies different from those in conservation servitude cases. The choice of the term "easement"<sup>238</sup> by supporters of conservation servitudes is unfortunate if it leads some to believe that classic easement law should control; results should turn not on labels but on factual contexts and policy concerns.

One difference between classic easements and privately held conservation servitudes in gross is that easements usually do not involve veto power over the land of another. Typical easements in gross involve the grant of sewer lines,<sup>239</sup> railroad corridors,<sup>240</sup> oil and gas pipelines,<sup>241</sup> water lines,<sup>242</sup> and rights of way<sup>243</sup>—clearly defined, limited interests, affecting only a portion of the servient land. They are usually affirmative easements, which allow the easement owner to act on the servient land, rather than negative easements, which allow the easement owner to prohibit the servient owner from acting. Thus, although the servient

235. See RESTATEMENT OF PROPERTY § 450(b) & comment h; Berger, *supra* note 68, at 1330 ("[C]ourts traditionally accord greater deference to easement rights than to rights which derive from covenants and servitudes.") (citing Waldrop v. Brevard, 233 N.C. 26, 31, 62 S.E.2d 512, 515 (1950)); Browder, *supra* note 60, at 35.

236. See R. BRENNEMAN, *supra* note 2, at 20-25; Cunningham, *supra* note 2, at 180 ("[S]ince American courts have uniformly recognized *legal* easements in gross, there is reason to suppose that equitable servitudes in gross will also be recognized . . .") (emphasis in original); Netherton, *supra* note 6, at 545-50.

237. See Hartford Nat'l Bank & Trust Co. v. Redevelopment Agency, 164 Conn. 337, 341, 321 A.2d 469, 471 (1973) (treating covenant as easement); Gilbert v. Repertory, Inc., 302 Mass. 105, 107, 18 N.E.2d 437, 438 (1939) (viewing a setback covenant to grant "a right in the general nature of an easement"); Porter v. Johnson, 232 Mo. App. 1150, 1154, 115 S.W.2d 529, 531 (1938) (deeming a use restriction to create an "easement enforceable in equity"); Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N.Y. 161, 169, 172 N.E. 455, 458 (1930) (asserting covenants are "rights analogous to easements").

238. See COLO. REV. STAT. § 38-30.5-101 (1973); UNIF. CONSERVATION EASEMENT ACT, 12 U.L.A. 51, 52 (Supp. 1984); W. WHYTE, *supra* note 2, at 7-9.

239. See Upper Eagle Valley Sanitation Dist. v. Carnie, 634 P.2d 1008, 1008 (Colo. Ct. App. 1981).

240. See Farrell v. Hodges Stock Yards, 343 So. 2d 1364, 1365 (La. 1977).

241. See Kleinheider v. Phillips Pipe Line Co., 528 F.2d 837, 838-39 (8th Cir. 1975).

242. See City of Pasadena v. California-Michigan Land & Water Co., 17 Cal. 2d 576, 581, 110 P.2d 983, 986 (1941).

243. See Boatman v. Lasley, 23 Ohio St. 614, 615 (1873).

owner's use is controlled to some extent, there is usually no limitation on the fundamental rights to use of the property.

Another difference is that certain classic easements, such as pipelines and railroads, are so "important"<sup>244</sup> to commercial development<sup>245</sup> that courts must allow the easement holder to assign the benefit. There is no similar market justification for private conservation servitudes in gross.

Finally, the classic easement, despite its status as a property interest,<sup>246</sup> is nevertheless subject to the policies of flexibility and limitation of dead hand control. In *Kleinheider v. Phillips Pipe Line Co.*,<sup>247</sup> for example, the court dealt with an easement in gross executed by a predecessor in title of the servient owner. The easement was to be used for subsurface pipelines. The easement owner had installed two pipelines and sought to install a third. The court permitted the installation, finding the language of the agreement indifferent to number.<sup>248</sup> Yet, the court noted that the burden on the servient parcel was a relevant concern and that the easement owner was not necessarily entitled to install additional pipelines in the future.<sup>249</sup> The court added that the third pipeline was commercially justified:

This record shows that the 1973 pipeline was necessary to the accomplishment of Phillips' business needs. Moreover, there is nothing in this record to show that the exercise of Phillips' rights under the contracts in installing that pipeline was *unreasonable or unduly burdensome to the rights of appellants to use their property*.<sup>250</sup>

Classic easement in gross cases, therefore, lend little support to the claim that private conservation servitudes in gross should be enforced.

(c) *Nonreciprocal appurtenant covenants*.—Nonreciprocal appurtenant covenants resemble reciprocal subdivision covenants in that both involve neighbors—and thus have a built-in limit on the veto power of a single person—and both allow the flexibility of neighbor relationships. Nonreciprocal appurtenant covenants also resemble in gross interests, however, in that both give the holder a nonreciprocal veto. Given the ambiguous policy foundation and the varied fact patterns and language of nonreciprocal appurtenant covenants, it is not surprising to find

244. C. CLARK, *supra* note 81, at 81-89.

245. See RESTATEMENT OF PROPERTY § 489 comments a & b (1944).

246. See *id.* § 450 comment h.

247. 528 F.2d 837 (8th Cir. 1975).

248. See *id.* at 841-42.

249. See *id.* at 842 n.4.

250. *Id.* at 842 (emphasis added).

## Conservation Servitudes

a wide range of results in the case law.<sup>251</sup> Consequently, that case law provides little guidance for policymakers considering private conservation servitudes in gross.

### B. Duration

Conservation servitudes are meant to have a perpetual life. Some statutes expressly permit<sup>252</sup> and may even indicate a presumption of<sup>253</sup> unlimited duration. Proponents argue that perpetuity is necessary to the conservation goal.<sup>254</sup> The Internal Revenue Code creates an additional incentive by allowing deductions only for conservation servitudes “granted in perpetuity.”<sup>255</sup>

Many parties to real covenants, however, cognizant of the threat of perpetual land ties, stipulate express termination dates.<sup>256</sup> The regulations of various federal mortgage insurance agencies also contemplate covenants of limited life.<sup>257</sup> Still, many covenants are drafted without express termination dates. Questions then arise whether and how courts should terminate them in light of antirestrictions concerns. There are two basic responses: courts may imply a time limit, or rely in part on the unlimited duration to deny enforcement.

251. In *Billington v. Riffe*, 492 S.W.2d 343 (Tex. Civ. App.—Amarillo 1973, no writ), the court prohibited the running of a nonreciprocal appurtenant covenant barring the servient owner from drilling an irrigation well on her property. Although the court based its decision on narrow grounds, policy concerns about veto power of one owner over the productive use of another's land probably played a role. Even if the court upheld the covenant because it would allow better exploitation of the dominant parcel, *id.* at 347, would the court so rule if there were not such a direct benefit to that dominant land? The answer to that question would tell much about the validity of private conservation servitudes in gross.

252. MASS. GEN. LAWS ANN. ch. 184, § 31 (West Supp. 1983); MINN. STAT. § 84.64 (1982); MONT. CODE ANN. § 76-6-202 (1983).

253. See COLO. REV. STAT. § 38-30.5-103(3) (1982); GA. CODE ANN. § 44-10-4 (1982); IND. CODE ANN. § 32-5-2.6-2(c) (West Supp. 1984); WIS. STAT. ANN. § 700.40(2)(c) (West Supp. 1983); see also CAL. GOV'T CODE § 51081 (West 1983) (ten year maximum, and thereafter until notice of termination given).

254. In *North Dakota v. United States*, 103 S. Ct. 1095 (1983), the Supreme Court stated:

To ensure that essential habitats will remain protected, the United States has adopted the practice of acquiring permanent easements whenever possible. . . . The automatic termination of federal wetlands easements after 99 years would make impossible the “[c]ertainty and finality” that we have regarded as “critical when . . . federal officials carrying out the mandate of Congress irrevocably commit scarce funds.”

*Id.* at 1106-07 (quoting *United States v. Little Lake Misere Land Co.*, 412 U.S. 580, 597 (1972)) (brackets in *North Dakota* opinion); see R. BRENNEMAN, *supra* note 2, at 20; A. DUNHAM, *supra* note 20, at 5; Netherton, *supra* note 6, at 542.

255. I.R.C. § 170(h)(2)(C) (1982); see Secretary of the Treasury, Proposed Regulation 1.170A-13(a), (b)(3), 48 Fed. Reg. 22,940, 22,942 (1983) (defining “qualified conservation contribution” as perpetual and allowing perpetual conservation restrictions as qualified real property interests).

256. See *Welshire, Inc. v. Harbison*, 33 Del. Ch. 199, 91 A.2d 404 (1952) (30 years); *Van Sant v. Rose*, 260 Ill. 401, 103 N.E. 194 (1913) (43 years); *Easton v. Careybrook Co.*, 210 Md. 286, 123 A.2d 342 (1956) (8 year initial term, then continues until modification by vote of majority of owners).

257. See *Siegan*, *supra* note 70, at 81.

If the court implies a "reasonable" duration for the covenant,<sup>258</sup> it then must determine what is reasonable under the circumstances. This question is usually answered by looking to the purpose of the covenant and to whether that purpose can still be accomplished;<sup>259</sup> this is basically the changed conditions doctrine.<sup>260</sup> Policy considerations enter only to the extent that the changed conditions theory incorporates a concern for obsolete restraints on land. The changed conditions doctrine, however, is unlikely to curtail conservation servitudes. Conservation servitudes assume that open-space land is valuable simply because it is undeveloped, especially if it contrasts with surrounding land. Thus, if the neighboring area becomes developed (a "changed condition"), the conservation servitude's purpose is even better served than before. The "reasonable" duration approach is, therefore, an inadequate response to perpetual conservation servitudes.

Other courts treat unlimited life of a covenant as a factor in denying enforcement, together with concerns about restraint of trade,<sup>261</sup> affirmative covenants,<sup>262</sup> or direct restraints on alienation.<sup>263</sup> Although these latter concerns do not arise in conservation servitudes, the sensitivity to creating "an onerous burden in perpetuity"<sup>264</sup> should be respected.<sup>265</sup>

### C. *Articulation of Public Policy*

A few real covenant cases turn on articulated public policy concerns.<sup>266</sup> One such case is *Amana Society v. Colony Inn, Inc.*<sup>267</sup> Although other grounds also figure in the decision, the discussion of pub-

258. See *Cruciano v. Ceccarone*, 36 Del. Ch. 485, 489-90, 133 A.2d 911, 914 (1957); *Acopian v. Haley*, 387 So. 2d 999, 1001 (Fla. Dist. Ct. App. 1980); *Norris v. Williams*, 189 Md. 73, 76-77, 54 A.2d 331, 333 (1947); *Duncan v. Academy of the Sisters of the Sacred Heart*, 350 S.W.2d 814, 819-20 (Mo. 1961). Some jurisdictions have passed statutes creating limitations on the permissible duration of real covenants. See, e.g., LA. CIV. CODE ANN. art. 780 (West Supp. 1983); see also GA. CODE § 44-5-60(b), (c) (1982) (does not apply to privately held appurtenant covenant servitudes).

259. See *Barton v. Moline Properties, Inc.*, 121 Fla. 683, 694, 164 So. 551, 556 (1935) (denying enforcement of the covenant); *Acopian v. Haley*, 387 So. 2d 999, 1001 (Fla. Dist. Ct. App. 1980) (permitting enforcement).

260. See *infra* subpart V(A)(1).

261. See *Hall v. American Oil Co.*, 504 S.W.2d 313, 316-18 (Mo. Ct. App. 1973).

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

263. See *Mountain Springs Ass'n v. Wilson*, 81 N.J. Super. 564, 196 A.2d 270 (Ch. Div. 1963).

264. *Eagle Enters. v. Gross*, 39 N.Y.2d 505, 510, 349 N.E.2d 816, 820, 384 N.Y.S.2d 717, 720 (1976) (quoting *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 246, 164 N.E.2d 832, 835, 196 N.Y.S.2d 945, 950 (1959)).

265. There are some indications that courts may closely scrutinize a real covenant that provides for a broad geographical coverage. See RESTATEMENT OF PROPERTY § 539 comment f (1944); *supra* note 120. A few cases dealing with anticompetitive covenants have expressly required a reasonable territory as a prerequisite to enforcement. See *Knight v. Hamilton*, 313 Ky. 858, 233 S.W.2d 969 (1950); *Webster v. Star Distrib. Co.*, 241 Ga. 270, 244 S.E.2d 826 (1978).

266. See *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982); *Beverly Island Ass'n v. Zinger*, 113 Mich. App. 322, 317 N.W.2d 611 (1982); *Crane Neck Ass'n v. New York City/*

lic policy—which is relevant to privately held conservation servitudes in gross—deserves attention.

A nonprofit religious group founded in Germany in 1714, the Amana Society came to Iowa in the 1850s, acquired land that became known as the Colonies or Villages, and began operation as “a true communistic society.”<sup>268</sup> In 1932 economic pressures forced a reorganization. Secular assets were transferred to a profit-making corporation, the Amana Society, which in six hundred separate conveyances immediately deeded assets to the original Society’s members as private owners. These deeds contained a form restrictive covenant prohibiting the owner from operating or maintaining a business, trade, or occupation on the property without prior written consent of the Society. For forty years such business permits were routinely granted. In the 1970s, however, the number of tourist-oriented businesses greatly increased, and the Society’s directors in effect banned new tourist-oriented businesses. At the time of the litigation, the Society owned 26,000 acres of land, as well as manufacturing, merchandising, and service enterprises. The Society itself was involved in tourist-oriented businesses and admitted that the restrictions were meant to limit competition. The Society sued to enjoin violations of use restrictions in the original deeds. The court held that the action was barred under the Iowa Stale Use Statute<sup>269</sup> because the Society failed to refile its restriction within the twenty-one year statutory period.

In its opinion, the court addressed significant policy issues, including a mistrust of private vetoes over the land of others. The court recognized “the vast potential of the Society’s power over land use control: It may discriminate in the issuance of business permits and may arbitrarily refuse their issuance.”<sup>270</sup> Although the benefits were appurtenant and were intended to benefit the community, the court rejected the Society’s claim as fostering “instability” and “unfairness.”<sup>271</sup>

The Society argued that the unique physical and social character of the Colonies was a priceless asset, preservable only by the restrictions because there was no applicable zoning.<sup>272</sup> The court noted the historical, cultural, and architectural value of the Colonies, but rejected the Society’s argument that no alternative for control existed, citing an Iowa stat-

Long Island County Servs. Group, 92 A.D.2d 119, 460 N.Y.S.2d 69 (1983), *aff’d*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984).

267. 315 N.W.2d 101 (Iowa 1982).

268. *Id.* at 105.

269. IOWA CODE § 614.24 (1977).

270. 315 N.W.2d at 107.

271. *Id.* at 117.

272. *See id.* at 118.

ute<sup>273</sup> protecting areas of historical significance through the creation of districts not exceeding one-hundred-sixty acres in size:

The purpose of the 160-acre limitation was said to be to allow each of the colonies to decide for itself whether to become a district. Control of future development would be the responsibility of commissions in each district, rather than the Society, and the membership of the commissions would be elected by the residents of the districts, in contrast to the present system, in which only Society members elect its directors. (Less than one-third of the present residents of the colonies are members of the Society.)<sup>274</sup>

As applied to conservation servitudes, *Amana* suggests that the means chosen to preserve the status quo must accommodate other values, especially democratic concerns.<sup>275</sup> *Amana* also demonstrates that difficult land use decisions are best made by examining the relevant policy concerns.<sup>276</sup> To be sure, the *Amana* opinion rests on the narrow ground of the Stale Use Statute, but the court had to specifically reject the Society's narrow construction of the statute in reaching its decision.<sup>277</sup> Presumably, policy concerns informed the court's expansive reading of the legislation.<sup>278</sup>

## V. Current Techniques for Termination of Servitudes

### A. Termination Doctrines

Doctrines for termination of servitudes fall into two groups. The first includes those triggered by the action or inaction of the servitude owner. The doctrines of abandonment,<sup>279</sup> estoppel,<sup>280</sup> and release<sup>281</sup> are

273. See *id.* at 119 (citing IOWA CODE § 303.20-24 (1977)).

274. *Id.*

275. The *Amana* court voided the covenant despite the religious nature of the societies. See *Taormina Theosophical Community, Inc. v. Silver*, 140 Cal. App. 3d 964, 190 Cal. Rptr. 38 (1983) (voiding a restraint on alienation limited to a specific spiritual society, although the restrictions were related to religious beliefs).

276. For other courts expressly relying on public policy, see *Welsch v. Goswick*, 130 Cal. App. 3d 398, 181 Cal. Rptr. 703 (1982) (group home for handicapped, retarded, and elderly); *Crane Neck Ass'n v. New York City/Long Island County Servs. Group*, 92 A.D.2d 119, 123-30, 460 N.Y.S.2d 69, 72-76 (1983) (relying upon public policy favoring community group residences for the mentally disabled), *aff'd*, 61 N.Y.2d 154, 460 N.E.2d 1336, 472 N.Y.S.2d 901 (1984).

277. See 315 N.W.2d at 109-10, 113-16.

278. See generally Kernochan, *Statutory Interpretation: An Outline of Method*, 3 DALHOUSIE L.J. 333, 355-58 (1976) (discussing the role of public policy in statutory interpretation).

279. See *Sobolewski v. Brown*, 405 So. 2d 1254, 1255 (La. Ct. App. 1981) (real covenants); *Rossi v. Sierchio*, 30 N.J. Super. 575, 578-80, 105 A.2d 687, 689-90 (App. Div. 1954) (easements); *Brady v. Yodanza*, 493 Pa. 186, 189-90 n.2, 425 A.2d 726, 727 n.2 (1981) (easements); *Cowling v. Colligan*, 158 Tex. 458, 461-62, 312 S.W.2d 943, 945 (1958) (real covenants); *Scott v. Rheudasil*, 614 S.W.2d 626, 630 (Tex. Civ. App.—Fort Worth 1981, no writ) (real covenants); RESTATEMENT OF PROPERTY § 504 (1944) (easements); *id.* § 558 (real covenants).

280. See *Meierhenry v. Smith*, 208 Neb. 88, 88-89, 302 N.W.2d 365, 366 (1981) (restrictive covenants); *Rossi v. Sierchio*, 30 N.J. Super. 575, 578, 105 A.2d 687, 689 (App. Div. 1954) (ease-

in this category. Because the problem with a private conservation servitude in gross is the servitude owner's assertion of a veto over the servient owner's preferences, these doctrines are not relevant here.<sup>282</sup> The second group includes those termination doctrines triggered by something other than action or inaction by the servitude owner, such as changed conditions or relative hardship. The crucial question is whether these doctrines can solve problems generated by conservation servitudes.<sup>283</sup>

The black letter law provides that the doctrines of changed conditions and relative hardship apply to real covenants, but not to easements.<sup>284</sup> It appears, therefore, that a court could determine the outcome of a case simply by choosing to categorize a servitude as an "easement" rather than as a "covenant." Close examination of the relevant law, however, reveals that the changed conditions and relative hardship doctrines actually do apply to easements. Under a theory analogous to the changed conditions rule, an easement can be extinguished if its purpose becomes impossible to accomplish or if its intent is no longer served.<sup>285</sup> Moreover, there is case law applying the relative hardship doctrine to easements.<sup>286</sup> In fact, Professor Unel Reichman has argued that the rule of relative hardship controls easements as a part of general tort principles governing property rights.<sup>287</sup> Finally, even though decision by categorization should be rejected in favor of developing termina-

ments); RESTATEMENT OF PROPERTY § 559 (1944) (real covenants); *see also* Valhouli v. Coulouras, 101 N.H. 320, 322, 142 A.2d 711, 712 (1958) (laches); RESTATEMENT OF PROPERTY § 562 (1944) (laches).

281. *See* RESTATEMENT OF PROPERTY § 501 (1944) (easements); *id* § 556 (real covenants).

282. A private association's failure to enforce a conservation restriction that benefits the public is disturbing, especially because public benefit justifies private ownership of such interests. *See* Conservation Rights in Real Property Act § 4, ILL. ANN. STAT. ch. 30, § 404 (Smith-Hurd Supp. 1983); S. REP. NO. 1007, *supra* note 2, at 10-11, *reprinted in* 1980 U.S. CODE CONG. & AD. NEWS at 6746. Governmental entities could be pushed by the political process to enforce their servitudes. For details of the government's enforcement record, *see* PRIVATE LANDS, *supra* note 2, at 23, 26-27; Scenic Easements, *supra* note 27, at 3, 8; Cunningham, *supra* note 2, at 182-83; Higgins, *supra* note 2. There is no indication of an insurmountable difficulty with governmental enforcement.

283. *See* UNIF. CONSERVATION EASEMENT ACT § 3 comment, 12 U.L.A. 51, 55-56 (Supp. 1984) (suggesting that the *cy pres* doctrine may be applicable to conservation servitudes). Some authorities, however, have rejected the applicability of this doctrine to real covenants, *see, e.g.*, Lake Wauwanoka, Inc. v. Spain, 622 S.W.2d 309 (Mo. Ct. App. 1981), and easements, *see, e.g.*, R. BRENNEMAN, *supra* note 2, at 20.

284. *See* Rossi v. Sierchio, 30 N.J. Super. 575, 582, 105 A.2d 687, 691 (App. Div. 1954) (hardship); Board of Educ. v. French, 8 Misc. 2d 208, 210, 166 N.Y.S.2d 181, 184 (Sup. Ct. 1957) (changed conditions); First Nat'l Trust & Sav. Bank v. Raphael, 201 Va. 718, 723, 113 S.E.2d 683, 687 (1960) (changed conditions).

285. *See* A. DUNHAM, *supra* note 20, at 20; 3 R. POWELL, *supra* note 10, ¶ 422; Cunningham, *supra* note 2, at 263; Reichman, *supra* note 65, at 1258-59.

286. *See* Bayless Inv. & Trading Co. v. Bekins Moving & Storage Co., 26 Ariz. App. 265, 271 n.6, 547 P.2d 1065, 1071 n.6 (1976); Gilpin v. Jacob Ellis Realities, Inc., 47 N.J. Super. 26, 35, 135 A.2d 204, 209 (App. Div. 1957).

287. Reichman, *supra* note 65, at 1255-56.

tion and modification doctrines based on policy concerns, it is likely that courts will treat conservation servitudes as covenants<sup>288</sup> and thus apply the changed conditions and relative hardship rules.

### 1. *The Changed Conditions Doctrine.*

(a) *Statement of the theory.*—Courts have declared that specific enforcement of a real covenant is not available “if conditions have so changed since the making of the promise as to make it impossible to secure in a substantial degree the benefits intended to be secured by the promise.”<sup>289</sup> A few cases indicate that the changed conditions doctrine bars only equitable relief and that a right to damages remains.<sup>290</sup> This position has been criticized,<sup>291</sup> however, and some courts also have denied damages under the changed conditions theory.<sup>292</sup> Indeed, if conditions have changed so that enforcement of the covenant yields little or no benefit to the covenantee, then damages will be slight in any case.

Few courts have offered an explanation for the changed conditions rule;<sup>293</sup> of those that have offered a rationale for the doctrine, most have stated it in contract terms, finding either that the contractual obligation is discharged by frustration of contractual purpose<sup>294</sup> or by implication that the parties intended the covenant to last only as long as its purpose could be achieved.<sup>295</sup> Recent commentators explain the doctrine as “assuring that the permanency of servitudes does not prevent economic productivity of land”<sup>296</sup> and as preventing the use of an obsolete servitude to

288. See *supra* note 9.

289. This test is proposed in the RESTATEMENT OF PROPERTY § 564 (1944). For courts applying this test, see *Owens v. Camfield*, 614 S.W.2d 698 (Ark. Ct. App. 1981); *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 313 (Mo. Ct. App. 1981); *Rick v. West*, 34 Misc. 2d 1002, 1006, 228 N.Y.S.2d 195, 199 (Sup. Ct. 1962); *Cowling v. Colligan*, 158 Tex. 458, 461-62, 312 S.W.2d 943, 945 (1958).

290. See *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 313 (Mo. Ct. App. 1981); *Welitoff v. Kohl*, 105 N.J. Eq. 181, 186, 147 A. 390, 392 (1929); RESTATEMENT OF PROPERTY § 564 comment d (1944).

291. See C. CLARK, *supra* note 81, at 185-86; *Browder*, *supra* note 60, at 38; *French*, *supra* note 68, at 1276.

292. See *Barton v. Moline Properties, Inc.*, 121 Fla. 683, 692, 164 So. 551, 555 (1935); *Osius v. Barton*, 109 Fla. 556, 563-64, 147 So. 862, 865 (1933).

293. Some courts attempt to explain the rule merely by restating it. See, e.g., *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 313 (Mo. Ct. App. 1981) (“This refusal [to enforce the covenant] is because the changed conditions forbid equitable intervention.”)

294. See *Osius v. Barton*, 109 Fla. 556, 569-70, 147 So. 862, 867 (1933). *But see* *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 313 (Mo. Ct. App. 1981).

295. See *Barton v. Moline Properties, Inc.*, 121 Fla. 683, 694, 164 So. 551, 556 (1935).

296. *French*, *supra* note 68, at 1300; see *Berger*, *supra* note 68, at 1331; *Reichman*, *supra* note 65, at 1258-59. The changed conditions doctrine has been criticized by *Ellickson*, *supra* note 68, at 716-17, and *Rose*, *supra* note 68, at 1409-16.

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exact a heavy extinguishment fee.<sup>297</sup>

(b) *Applicability to private conservation servitudes in gross.*— Two questions arise with respect to the changed conditions rule and privately held conservation servitudes in gross. First, does the changed conditions rule ever apply to conservation servitudes? The answer is that it does,<sup>298</sup> which has troubled some proponents of conservation servitudes, who have sought to avoid the rule's effect.<sup>299</sup> Second, does the changed conditions doctrine allow courts to police and terminate privately held conservation servitudes in gross in light of the policy concerns raised in this Article? The answer to this question, which apparently has not been discussed before,<sup>300</sup> is that it does not.

There are several reasons why the changed conditions rule is inadequate to regulate conservation servitudes. First, by its own terms, the rule apparently would not apply to many privately held conservation servitudes in gross. The assumption underlying many conservation servitudes is that open-space land is beneficial in its own right.<sup>301</sup> If the realty surrounding the servient parcel becomes developed, the servitude's purpose will be even better served. In such cases, the changed conditions doctrine is inapplicable.<sup>302</sup> Further, even if the surrounding noise and pollution harm the flora, wildlife, and topography of the parcel, it is difficult to say in most cases that it is "impossible to secure to a substantial degree the benefits"<sup>303</sup> of the covenant. As one court said, "[A]n island

297. See Reichman, *supra* note 65, at 1258. But see Berger, *supra* note 68, at 1330; Rose, *supra* note 68, at 1412-13.

298. See Cunningham, *supra* note 2, at 263 (erection of billboards on nonrestricted land blocking view of land subject to scenic easement); Netherton, *supra* note 6, at 559 (private association owning conservation servitude ceases to operate).

299. See A. DUNHAM, *supra* note 20, at 18-19; Netherton, *supra* note 6, at 559; Maryland Environmental Trust, *supra* note 2, at 10. Some statutes provide for automatic vesting of a private conservation servitude in government if the private group ceases to exist. See, e.g., MD. REAL PROP. CODE ANN. § 2-118 (1981); MINN. STAT. § 84.65(3) (1982).

300. See generally UNIF. CONSERVATION EASEMENT ACT § 3 comment, 12 U.L.A. 51, 55 (Supp. 1984) (indicating that changed conditions doctrine can be applied to conservation servitudes). Some statutes, however, expressly prohibit application of changed conditions, see, e.g., TENN. CODE ANN. § 66-9-306 (1982), or any other common law rule, see, e.g., N.Y. GEN. MUN. LAW § 247(4) (McKinney Supp. 1984-1985); N.Y. ENVTL. CONSERV. LAW § 49-0305(5) (McKinney Supp. 1984-1985), to terminate a conservation servitude. Analysis of conservation servitudes in gross under changed conditions doctrine is different from the usual appurtenant covenant cases because the benefit is evaluated in terms of public benefit, not benefit to a particular dominant parcel.

301. See *supra* notes 35-37 and accompanying text (discussing value of open space).

302. See *Sandstrom v. Larsen*, 59 Hawaii 491, 498, 583 P.2d 971, 977 (1978). *Sandstrom* involved an action to enforce a height limitation by one owner in a residential subdivision against another. Defendants sought to avoid an injunction on the theory of changed conditions, pointing to the construction of a thirteen-story condominium near the subdivision, which resulted in partial obstruction of the view from the subdivision. The court rejected this argument, noting that the presence of the condominium made preservation of the neighborhood even more important. *Id.*

303. RESTATEMENT OF PROPERTY § 564 (1944).

is not made a swamp simply because waves lick at its shores."<sup>304</sup> Finally, the changed conditions theory simply does not apply if no change in circumstances occurs, even if relaxation of the servitude is warranted for reasons of dead hand control, flexibility, or democracy.

## 2. *The Relative Hardship Doctrine.*

(a) *The scope of the rule.*—Some courts construe the relative hardship doctrine broadly and others narrowly.<sup>305</sup> The *Restatement of Property* contemplates a broad interpretation: an injunction should not be granted for violation of a real covenant "if the harm done by granting will be disproportionate to the benefits secured thereby."<sup>306</sup> Under this standard courts have denied an injunction merely if the hardship of the injunction is disproportionate to its benefit.<sup>307</sup> In contrast, other courts have declared that they will not simply balance the equities,<sup>308</sup> but will deny an injunction only if there is "gross" or "great" disproportion between the benefit and the harm, or a "shocking" hardship.<sup>309</sup>

Courts differ over other facets of the relative hardship doctrine as well. Some courts focus on easing the burden on the servient owner, while others strive to protect the dominant owner's property right.<sup>310</sup> The necessity of demonstrating injury to obtain an injunction splits the courts further.<sup>311</sup> Finally, some courts focus on the moral blameworthiness of the parties, refusing to apply the relative hardship doctrine unless

304. *Hawthorne v. Realty Syndicate, Inc.*, 300 N.C. 660, 667, 268 S.E.2d 494, 499 (1980).

305. See *Gilpin v. Jacob Ellis Realities, Inc.*, 47 N.J. Super. 26, 31-32, 135 A.2d 204, 207 (App. Div. 1957) (indicating that there is confusion over the availability of the relative hardship doctrine even within the same jurisdiction); *Loeb v. Watkins*, 428 Pa. 480, 240 A.2d 513 (1968) (showing a court divided over relative hardship doctrine); see also French, *supra* note 68, at 1280 (arguing that the relative hardship rule is a reformulation of the "changed conditions" doctrine).

306. RESTATEMENT OF PROPERTY § 563 (1944).

307. See *Valhouli v. Coulouras*, 101 N.H. 320, 321-23, 142 A.2d 711, 713 (1958); *Holmes Harbor Water Co. v. Page*, 8 Wash. App. 600, 603-04, 508 P.2d 628, 631 (1973).

308. See *Decker v. Hendricks*, 97 Ariz. 36, 41-42, 396 P.2d 609, 612 (1964) (rejecting *Restatement* test); *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 167-69, 172 N.E. 455, 457 (1930).

309. See *Bauby v. Krasow*, 107 Conn. 109, 115, 139 A. 508, 510 (1927); *Union County Indus. Park v. Union County Park Comm'n*, 95 N.J. Super. 448, 454, 231 A.2d 812, 815 (App. Div. 1967); *Gaskin v. Harris*, 82 N.M. 336, 338, 481 P.2d 698, 700 (1971); *New Jerusalem Baptist Church, Inc. v. City of Houston*, 598 S.W.2d 666, 668 (Tex. Civ. App.—Houston [14th Dist.] 1980, no writ).

310. Compare *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 168, 172 N.E. 455, 457 (1930) ("His neighbors are willing to modify the restriction . . . . He refuses to go with them . . . . The choice is for him only."), with *Holmes Harbor Water Co. v. Page*, 8 Wash. App. 600, 606, 508 P.2d 628, 632 (1973) ("The [servient] landowner acted innocently . . . his violation . . . was unintentional.").

311. Compare *Wier v. Isenberg*, 95 Ill. App. 3d 839, 845, 420 N.E.2d 790, 795 (1981) (plaintiffs not required to show injury to prove breach of covenant), with *Easton v. Careybrook Co.*, 210 Md. 280, 291-92, 123 A.2d 342, 345 (1956) (damage required for injunctive relief).

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the servient owner has acted innocently<sup>312</sup> or the dominant owner inequitably,<sup>313</sup> while other courts disregard the moral question.<sup>314</sup>

The confusion this mixed bag of opinions creates increases if the actual decisions are compared with the articulated rationales. A court may phrase the rule broadly, but decide the case on grounds that fit the narrow view,<sup>315</sup> or state the rule narrowly, but rely on factors that do not constitute gross disproportion between the harm and the benefit.<sup>316</sup> A court may deny an injunction asking for costly removal of a structure violating a restriction when even narrow construction of the rule would require it.<sup>317</sup> Finally, as Powell notes, courts typically do not rely exclusively on the relative hardship doctrine; usually other factors, such as acquiescence or changed conditions, also are involved.<sup>318</sup>

Such confusion is not surprising. The relative hardship rule is subject to the general fluidity of all equitable doctrines.<sup>319</sup> The conflict between freedom of contract and the antirestrictions policy destabilizes matters further. Although that conflict is seldom discussed, some courts do consider related values in relative hardship cases. Thus, courts have noted that a covenant is a moral obligation,<sup>320</sup> that the economic ex-

312. *Bauby v. Krasow*, 107 Conn. 109, 116, 139 A. 508, 510-11 (1927); *Ortega Co. v. Justiss*, 175 So. 2d 554, 560 (Fla. Dist. Ct. App. 1965); *Forstmann v. Joray Holding Co.*, 244 N.Y. 22, 31, 154 N.E. 652, 654 (1926).

313. *Welshire, Inc. v. Harbison*, 33 Del. Ch. 199, 206-07, 91 A.2d 404, 408 (1952); *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 901 (Sup. Ct. 1953).

314. *See Valhouli v. Coulouras*, 101 N.H. 320, 142 A.2d 711 (1938).

315. *See Holmes Harbor Water Co. v. Page*, 8 Wash. App. 600, 603-06, 508 P.2d 628, 631-32 (1973) (quoting *Restatement's* broad standard with approval, but denying injunction because "cost of removing the violation was exorbitant when compared with the slight violation of the covenant").

316. In *Gilpin v. Jacob Ellis Realities, Inc.*, 47 N.J. Super. 26, 135 A.2d 204 (App. Div. 1957), the court rejected a mere balancing of the equities and required gross disproportion, but concluded that the damage to plaintiff of \$1,000 compared to defendant's damages of \$11,500 (plus lost rents) was "grossly disproportionate." *Id.* at 35-36, 135 A.2d at 209.

317. *See Bauby v. Krasow*, 107 Conn. 109, 139 A. 508 (1927); *Gilpin v. Jacob Ellis Realities, Inc.*, 47 N.J. Super. 26, 135 A.2d 204 (App. Div. 1957). *But see Decker v. Hendricks*, 97 Ariz. 36, 396 P.2d 609 (1964). Although such decisions may help prevent forfeiture, it is troubling that these cases reinforce the actions of one who violates the covenant without ascertaining the servitude owner's rights, but penalize the person who, to avoid unilaterally prejudicing another's rights, seeks a declaratory judgment before acting.

318. *See Valhouli v. Coulouras*, 101 N.H. 320, 323, 142 A.2d 711, 713 (1958); *Holmes Harbor Water Co. v. Page*, 8 Wash. App. 600, 605-06, 508 P.2d 628, 632 (1973); 5 R. POWELL, *supra* note 10, ¶ 679[3], at 60-142.

319. This idea is best known from the precept that granting an injunction is within the discretion of a court of equity. *See, e.g.*, *Gilpin v. Jacob Ellis Realities, Inc.*, 47 N.J. Super. 26, 29-31, 135 A.2d 204, 206 (App. Div. 1957).

320. *Decker v. Hendricks*, 97 Ariz. 36, 41-42, 396 P.2d 609, 612 (1964) ("perpetrator of a wrong"); *Bauby v. Krasow*, 107 Conn. 109, 115, 139 A. 508, 510 (1927) ("wrongfully in a willful invasion of another's rights in real property"); *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 166, 172 N.E. 455, 457 (1930) (referring to a "knowing violation . . . the wrongdoer [and] his victim").

change between parties should be respected,<sup>321</sup> that freedom of choice should be preserved,<sup>322</sup> that contract enforcement promotes social stability,<sup>323</sup> and that restrictions can hinder reasonable use of land,<sup>324</sup> making it unprofitable for development.<sup>325</sup> To eliminate conflicting and self-contradictory decisions, courts should decide relative hardship cases differently than they do now, articulating the policy basis for their decisions rather than applying a wooden rule without explanation.

(b) *Applicability to private conservation servitudes in gross.*—

There are several reasons why the relative hardship rule is inadequate for terminating conservation servitudes in gross. The law of relative hardship is murky and difficult for a court to apply, and there is little reason to think the policy considerations discussed here would be examined. Moreover, the focus of the relative hardship doctrine on the conflict between individual landowners is too narrow to encompass the public interest, which must be considered in the case of private conservation servitudes.<sup>326</sup> The rule does, however, offer a lesson: the servitude

321. *Welshire, Inc. v. Harbison*, 33 Del. Ch. 199, 206, 91 A.2d 404, 407-08 (1952) (denying declaratory judgment relaxing restrictions); *Lake Wauwanoka, Inc. v. Spain*, 622 S.W.2d 309, 314 (Mo. Ct. App. 1981) (denying claim for reformation); *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 166-67, 172 N.E. 455, 457 (1930) (denying enforcement of existing covenants).

322. See *Kiernan v. Snowden*, 123 N.Y.S.2d 895, 901 (Sup. Ct. 1953) (owners should not be denied relief merely because realty values were not impaired by the use restrictions); *Loeb v. Watkins*, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968) (individual's aesthetic values should be protected).

323. See *Gilpin v. Jacob Ellis Realties, Inc.*, 47 N.J. Super. 26, 35, 135 A.2d 204, 209 (App. Div. 1957) ("The [relative hardship] doctrine is, we think, particularly applicable to a case, such as this, where we are dealing with two commercial properties; personal interests, or the pleasure that may be secured in the enjoyment of an equitable servitude of a certain type, is in no way involved").

324. See *Easton v. Careybrook Co.*, 210 Md. 286, 290-91, 123 A.2d 342, 344 (1956) (servient owner cannot build, but must pay taxes and upkeep); *Orange & Rockland Utils. v. Philwold Estates*, 52 N.Y.2d 253, 258, 418 N.E.2d 1310, 1315, 437 N.Y.S.2d 291, 296 (1981) (owner must have some reasonable use of land).

325. See *Forstmann v. Joray Holding Co.*, 244 N.Y. 22, 30, 154 N.E. 652, 654 (1926) (stating that value of property is important because "either it must be utilized for business purposes or it must remain idle"); *Katzman v. Anderson*, 359 Pa. 280, 285, 59 A.2d 85, 87 (1948) (stating that equity will not enforce a restriction that is "unfit or unprofitable for use and development").

326. See *Wier v. Isenberg*, 95 Ill. App. 3d 839, 842, 420 N.E. 790, 793 (1981) ("While a change in the character of the surrounding property might preclude injunctive relief, a court does not balance the equities as it would in an ordinary nuisance case or in a request for rezoning."); *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 168, 172 N.E. 455, 457 (1930) ("Neither at law nor in equity is it written that a license has been granted to religious corporations, by reason of the high purpose of their being, to set covenants at naught."); *Katzman v. Anderson*, 359 Pa. 280, 285, 59 A.2d 85, 87 (1948) ("greater hardship to the *servient* than a benefit to the *dominant tenement*") (emphasis added). *But see* *Blakeley v. Gorin*, 365 Mass. 590, 313 N.E.2d 903 (1974) (discussing MASS. GEN. LAWS ANN. ch. 184, § 30 (West 1977) (current version at MASS. GEN. LAWS ANN. ch. 184, §30 (West Supp. 1984)), which allows denial of an injunction to enforce a real covenant if the public interest requires); *Holmes Harbor Water Co. v. Page*, 8 Wash. App. 600, 603, 508 P.2d 628, 631 (1973). In tort law, unlike real covenant law, the interest of the public is a factor in determining the appropriateness of an injunction.

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owner may still recover damages even though injunctive relief is barred.<sup>327</sup> Thus, a court not wishing to specifically enforce a private conservation servitude in gross could order damages.<sup>328</sup> Presumably, the award could be used to acquire a new conservation servitude not in conflict with societal needs.

### B. *Acquisition and Termination Provisions in Conservation Servitude Statutes*

1. *Acquisition of Servitudes.*—Of the twenty-six state statutes authorizing private conservation servitudes in gross,<sup>329</sup> only four<sup>330</sup> appear to require any public participation in the acquisition of such interests. Two of these, the Montana and Delaware provisions, are inadequate to resolve the problems raised by private conservation servitudes in gross. To minimize conflicts in local planning, the Montana legislation subjects private conservation servitudes to review by the appropriate local planning authority prior to recording. The statute is triggered by recording rather than acquisition, however, and expressly provides that the planning board's comments "will not be binding . . . but shall be merely advisory in nature."<sup>331</sup> The Delaware statute requires the agency or department "having jurisdiction over the subject matter of the easement"<sup>332</sup> to accept private servitudes pursuant to certain standards, but does not indicate which agencies or departments have jurisdiction, if any.

The two remaining statutes—California and Massachusetts—adequately provide for public participation in the acquisition of private conservation servitudes in gross,<sup>333</sup> requiring approval by the legislature of the locality in which the land is located and, in Massachusetts, by the

327. See *Gilpin v. Jacob Ellis Realties, Inc.*, 47 N.J. Super. 26, 34-35, 135 A.2d 204, 208-09 (App. Div. 1957); *Forstmann v. Joray Holding Co.*, 244 N.Y. 22, 31, 154 N.E. 652, 654 (1926); *Bauby v. Krasow*, 107 Conn. 109, 115, 139 A. 508, 511 (1927); RESTATEMENT OF PROPERTY § 563 comment b (1944).

328. Concerning the measure of damages, see *Bauby v. Krasow*, 107 Conn. 109, 116, 139 A. 508, 511 (1927) (damages equal "the depreciation in the value of [the] property caused by the violation of the restrictive covenant"); *infra* note 354 (discussing calculation of damages for breach of conservation servitudes in gross which, by definition, do not involve a dominant tenement).

329. See *supra* note 17 (citing statutes that allow private conservation servitudes in gross).

330. CAL. GOV'T CODE §§ 51083.5, 51084 (West 1983); DEL. CODE ANN. tit. 7, § 6814 (1983); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984); MONT. CODE ANN. § 76-6-206 (1983). MINN. STAT. § 84.65(1) (1982) requires that nonprofit charitable corporations and home rule charter or statutory cities file a notice with the department of natural resources within 90 days of acquisition of a conservation servitude. There is, however, no requirement that the acquisition be approved.

331. MONT. CODE ANN. § 76-6-206 (1983).

332. DEL. CODE ANN. tit. 7, § 6814 (1983).

333. Although these statutes adequately provide for *acquisition* of private conservation servitudes in gross, they are not similarly successful concerning *termination* of such interests. See *infra* text accompanying note 346.

executive as well.<sup>334</sup> The California statute requires the governing body to find by resolution that "the preservation of the land as open space is in the best interest of the county or city," in light of three specific factors.<sup>335</sup> The Massachusetts statute instructs the governmental body to determine that the conservation restriction is in "the public interest" before approving the servitude.<sup>336</sup>

The failure of virtually all private conservation servitude statutes to provide for adequate public control over acquisition contrasts with statutory governmental conservation servitudes. The political accountability of public officials helps ensure that governmental servitudes are in the public interest, and numerous governmental servitude statutes have express provisions—setting priorities for conservation servitude acquisition,<sup>337</sup> authorizing state agencies to establish guidelines for servitude purchases,<sup>338</sup> or requiring public hearings prior to acquisition decisions<sup>339</sup>—that aid in protecting the public interest. Although the public interest is no less important with respect to private conservation servitudes, some statutes authorizing both governmental and private conservation servitudes<sup>340</sup> provide for public hearings<sup>341</sup> or acquisition regulations<sup>342</sup> for governmental servitudes but not for private conservation servitudes.

2. *Termination of Servitudes.*—The statutes authorizing private conservation servitudes in gross do not provide an adequate means of terminating such interests when the public interest requires. Only ten of the twenty-six statutes address the termination issue.<sup>343</sup> Eight of these indicate that termination can be effected under traditional servitude

334. MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984) (approval required by mayor or city manager and city council, selectmen, or town meeting); CAL. GOV'T CODE §§ 51083.5, 51084 (West 1983) (approval by governing body).

335. CAL. GOV'T CODE § 51084 (West 1983). To determine that the open space preservation is in the best interest of the public in the terms of this statute, the land must have scenic value to the public or be valuable as a watershed or wildlife preserve, have value as open space because it is near urban areas or preserves rural character, or must otherwise serve the public interest.

336. MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984).

337. See, e.g., ARK. STAT. ANN. §§ 9-1409(c), 9-1410 (1976); KY. REV. STAT. § 65.466 (1980).

338. See, e.g., ARK. STAT. ANN. § 50-1202(e) (Supp. 1983); OR. REV. STAT. § 271.725 (1983); TENN. CODE ANN. § 11-15-107 (1982).

339. See, e.g., OR. REV. STAT. § 271.735 (1983); PA. STAT. ANN. tit. 16, § 11942 (Purdon Supp. 1983); *id.* tit. 32, §§ 5003, 5006.

340. See ARK. STAT. ANN. §§ 50-1201 to 1206 (Supp. 1983); OR. REV. STAT. §§ 271.715-795 (1983).

341. OR. REV. STAT. § 271.735 (1983).

342. ARK. STAT. ANN. § 50-1202(e) (Supp. 1983).

343. *Id.* § 50-1203(b); CAL. GOV'T CODE §§ 51090-51094 (West 1983); COLO. REV. STAT. § 38-30.5-107 (1982); GA. CODE ANN. § 44-10-4 (1982); MD. REAL PROP. CODE ANN. § 2-118(d) (1981); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984); N.H. REV. STAT. ANN. § 477:46 (1983); N.Y. ENVTL. CONSERV. LAW § 49-0307 (McKinney Supp. 1984-1985); R.I. GEN. LAWS

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law,<sup>344</sup> which is inadequate for responding to the public policy concerns.<sup>345</sup> The other two—Massachusetts and California—offer more liberal termination rules than traditional servitude law allows.<sup>346</sup> Even these provisions are inadequate, however, because they are concerned mostly with limiting a private association's authority to release the restriction; the statutes provide no method to terminate a servitude that the private association seeks to continue.

Governmental conservation servitudes are more adequately treated. Some statutes allow release "if the public interest would be better served by the cancellation of the easement,"<sup>347</sup> if "change of circumstances shall render such easement no longer beneficial to the public,"<sup>348</sup> or if essential to orderly growth and development.<sup>349</sup> Moreover, a few provisions require public hearings before termination of governmental conservation servitudes.<sup>350</sup>

## VI. A Proposal of Alternative Solutions

There is more than one way to solve the problems presented by the

§ 34-39-5 (Supp. 1983); WIS. STAT. ANN. § 700.40(3)(b) (West Supp. 1984-1985); see UNIF. CONSERVATION EASEMENT ACT § 3(b), 12 U.L.A. 51, 55 (Supp. 1984).

344. For statutes indicating that termination of private conservation servitudes in gross should be in the manner in which easements generally are terminated, see COLO. REV. STAT. § 38-30.5-107 (1982); GA. CODE ANN. § 44-10-4 (1982); MD. REAL PROP. CODE ANN. § 2-118(d) (1981); N.H. REV. STAT. ANN. § 477:46 (1983). For statutes indicating that termination should be in accordance with principles of law and equity, see ARK. STAT. ANN. § 50-1203(b) (Supp. 1983); WIS. STAT. ANN. § 700.40(3)(b) (West Supp. 1984); UNIF. CONSERVATION EASEMENT ACT § 3(b), 12 U.L.A. 51, 55 (Supp. 1984). Rhode Island provides for termination of restrictions in accordance with applicable statutes and regulations. R.I. GEN. LAWS § 34-39-5 (Supp. 1983). Finally, N.Y. ENVTL. CONSERV. LAW § 49-0307(1)(b) (McKinney Supp. 1984-1985), indicates that termination for private servitudes is to be pursuant to N.Y. REAL PROP. ACTS. § 1951 (McKinney 1983), the state's termination procedure for general servitudes. Additional termination procedures for conservation servitudes may be sought in New York. See McFadden, *Cab and Land Measures Required 6 Months Talks*, *Cuomo Aide Says*, N.Y. Times, Jan. 3, 1984, at B2, col. 5.

345. See *supra* subpart V(A).

346. CAL. GOV'T CODE § 51093 (West 1983); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984); see McFadden, *supra* note 344 (discussing proposed changes in New York).

347. TENN. CODE ANN. § 11-15-108(2) (1982). This statute includes other conditions, such as a requirement that the easement has been in effect for at least 10 years. *Id.* For similar statutes, see ARK. STAT. ANN. § 50-1202(e) (Supp. 1983); CAL. GOV'T CODE § 51093 (West 1983); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984).

348. IOWA CODE § 111D.2 (1984) (rejects "comparative economic test"); see WIS. STAT. ANN. § 61.34(3m) (West Supp. 1984); cf. N.Y. ENVTL. CONSERV. LAW § 49-0307(3)(d) (McKinney Supp. 1984-1985) (allowing public notice, a hearing, evidence that the easement can no longer serve a conservation purpose, and legislative approval to extinguish perpetual duration easements held by the state in the Adirondack and Catskill parks).

349. PA. STAT. ANN. tit. 32, § 5010 (Purdon Supp. 1983); VA. CODE § 10-153 (1978); see ARK. STAT. ANN. § 9-1413 (1976); N.Y. ENVTL. CONSERV. LAW § 49-0307(3)(e) (McKinney Supp. 1984-1985) (providing for release for necessary major transmission facilities if public interest in conservation has been considered).

350. See ARK. STAT. ANN. § 50-1202(e) (Supp. 1983); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984).

private conservation servitude owner's veto power over the servient owner's land use decisions. Legislatures and courts can choose from several alternatives based upon various factors, including the balance each approach strikes among the competing policies of conservation, freedom of contract, and limiting dead hand control. Generally, a legislative response seems preferable to a judicial one.<sup>351</sup>

#### A. *Legislative Solutions*

1. *Limitation to Government Ownership.*—One solution to the veto power problem is to permit only the government to hold conservation servitudes in gross, statutorily prohibiting private ownership. This would submit the choice between development and preservation to the democratic process, not private veto. Mandating predecision public hearings would enhance the process.

The disadvantage of this approach is that it may reduce the amount of land brought under conservation restrictions. Furthermore, private action should not be prohibited altogether unless there are no viable alternatives that can limit the dead hand. Thus, this type of legislative solution is a rough remedy and not an optimal solution.

2. *Limited Duration Private Ownership.*—Another approach is to allow ownership of conservation servitudes by nonprofit trusts, associations, and corporations (in addition to government), but to limit statutorily the servitude's duration. The provision also could permit transfer of the interest to the government, after which it would become perpetual. Additionally, the statute could provide that servitudes drafted to last longer than the statutory maximum would, upon reaching the maximum, automatically vest in the state. A reasonable maximum for private ownership is twenty years; problems of dead hand control become significant after that. The maximum duration could be as low as one year if the legislature wishes to allow private interests only as a means to increase governmental servitudes through voluntary transfer by private groups or through automatic vesting in government.

Under this approach, society benefits from the special conservation skills of private associations without undue dead hand control. Termination would occur automatically; no judicial intervention would be necessary. Thus, a clear framework for negotiation would be established and claims of uncertainty avoided. Disadvantages include possible abandon-

351. If a legislative scheme is adopted, the statute should expressly include all private conservation interests created after the date of enactment, thus preventing the creation of new common-law interests.

ment of conservation efforts by those who believe that only perpetual ties are adequate, the disincentive of compulsion (although some private associations have voluntarily assigned their interests to the government), the automatic termination of conservation servitudes that still serve the public interest, the possible loss of federal tax deductions because conservation servitudes could no longer be created "in perpetuity" as the Internal Revenue Code requires,<sup>352</sup> and potential confusion over land titles.

3. *Termination Based on the Public Interest.*—Another solution is to allow both government and nonprofit groups to own conservation servitudes in gross, but to deny equitable enforcement of private interests when an injunction is not "in the public interest,"<sup>353</sup> allowing damages as the only remedy.<sup>354</sup> Such a statute could allow local and state governments to intervene in actions seeking specific enforcement of a private conservation servitude in gross, providing greater representation of the public voice.<sup>355</sup> Moreover, the legislation could require government approval before a private conservation servitude in gross could be created.

This approach provides a mechanism for terminating private vetoes without disrespect for private property rights and conservation values. The benefits of private endeavors are retained. Although some land may be withdrawn from preserved status under the public interest standard, there need be no great disincentive to private action: the standard could be made rigorous, and the compensatory damages would allow acquisition of new conservation servitudes. To be sure, the public interest standard is not capable of precise definition. The policy concerns are clear, however, and attention to them would ensure no less predictability and judicial economy than is found in other common-law decisionmaking. This solution can be easily added to existing state legislation authorizing private conservation servitudes and to the Uniform Conservation Easement Act.

352. I.R.C. § 170(h)(5)(A) (1982).

353. Cf. IOWA CODE § 111D.2 (1984) (discussed *supra* note 348 and accompanying text); MASS. GEN. LAWS ANN. ch. 184, § 32 (West Supp. 1984) (discussed *supra* notes 334, 336, and accompanying text).

354. Calculation of the damages for breach of a real covenant in gross cannot be based on the loss suffered by the dominant parcel because there is no dominant parcel with respect to in gross interests. A court could base damages on the difference between the market value of the burdened parcel with the servitude and the market value of the burdened parcel without the servitude. See Secretary of the Treasury, Proposed Regulation 1.170, 48 Fed. Reg. 22,940, 22,947 (1983).

355. See Conservation Rights in Real Property Act § 4, ILL. ANN. STAT. ch. 30, § 404 (Smith-Hurd Supp. 1983).

## B. Judicial Responses

1. *Prohibition of Private in Gross Interests.*—The simple judicial solution to the servitude owner's veto power is to refuse to allow the burden of a private conservation servitude in gross to run.<sup>356</sup> This approach limits the duration of private veto power, because only the original covenantor is bound. Moreover, a flat refusal by the courts would force proponents of such interests before the legislature to seek a comprehensive solution.

Despite its attractive simplicity, this approach is probably too drastic. Private conservation efforts again would be frustrated. It seems preferable to legitimate private conservation servitudes in gross while controlling the harmful effects that they can generate. In addition, governmental conservation servitudes in gross would have to be carefully exempted from the rule. Finally, this flat prohibition would not be adequate to meet all dead hand control concerns: it is possible that even against the original covenantor, the public interest would be so great as to justify denial of enforcement.

2. *A Public Interest Test.*—Even without express statutory guidelines, courts could apply a public interest standard in cases of both common-law<sup>357</sup> and statutory private conservation servitudes in gross. This position finds support in the traditional view that real covenants violating public policy cannot be enforced.<sup>358</sup> The public interest component of the law of nuisance<sup>359</sup> and the rules relating to easements for public utilities<sup>360</sup> provide useful analogies in developing this standard. Such an approach has the flexibility of the legislative public interest standard.

## VII. Conclusion

Private conservation servitudes in gross appropriately foster conservation and private initiative, but they also can contravene the public policy and judicial precedent of limiting dead hand ties on land and encouraging flexibility and democracy in land use controls. This Article

356. There is precedent for this solution. See *supra* subpart IV(A)(2)(b)(i).

357. See *supra* note 20.

358. See *supra* note 61.

359. *Harrisonville v. W.S. Dickey Clay Mfg. Co.*, 289 U.S. 334, 338 (1933); *Boomer v. Atlantic Cement Co.*, 26 N.Y.2d 219, 227-28, 257 N.E.2d 870, 874-75, 309 N.Y.S.2d 312, 318-19 (1970); *Bove v. Donner-Hanna Coke Corp.*, 236 A.D. 37, 40-43, 258 N.Y.S. 229, 233-35 (1932); *RESTATEMENT (SECOND) OF TORTS* § 941 (1977).

360. *Consumers Power Co. v. Costle*, 468 F. Supp. 375, 379 (E.D. Mich. 1979) ("The easements granted to utilities are in trust for the public and not a grant of right to private individuals."). Similarly, it can be argued that private conservation servitudes in gross are held in trust for the public, subject to controls based on the public interest.

## Conservation Servitudes

has proposed several means of alleviating this tension without abandoning the goals of conservationists or compromising long-standing policy. It remains for legislatures and courts to implement solutions that properly balance the competing values.