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Resolving the Flaws of Residential Servitudes Associations: For Reformation Not Termination

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REPLY

RESOLVING THE FLAWS OF RESIDENTIAL SERVITUDES AND OWNERS ASSOCIATIONS: FOR REFORMATION NOT TERMINATION

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I. INTRODUCTION

Residential developers often impose servitude schemes on tract and high-rise developments to increase the desirability of the housing units. These servitudes usually create common use, building and construction restrictions on the lots.[1] They may also grant reciprocal rights in common facilities serving the development, such as parks, roads, utilities and recreational amenities, and may provide for the payment of fees by the owners to operate the facilities.[2]

Moreover, an increasing number of servitude regimes create an association of the development's property owners.[3] The association is empowered to administer the servitudes through decisions of the entire body or subgroups (such as a board and committees),[4] and functions as a private government pursuant to authority granted by the servitudes.[5] The association usually administers, maintains and, in some

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1. *See, e.g.*, 5011 Community Org. v. Harris, 16 Conn. App. 537, 548 A.2d 9 (1988) (residential construction only); Travis Heights Improvement Ass'n v. Small, 662 S.W.2d 406 (Tex. Ct. App. 1983) (residential uses only).

2. *See, e.g.*, Maddox v. Katzman, 332 N.W.2d 347 (Iowa Ct. App. 1982) (granting beach rights); Beech Mountain Property Owners' Ass'n v. Seifart, 48 N.C. App. 286, 269 S.E.2d 178 (1980) (dues covenant).

3. Some estimate that 130,000 such associations exist in the United States, governing the homes of between 12% and 15% of the population. *See* UNITED STATES ADVISORY COMMISSION ON INTERGOVERNMENTAL RELATIONS, RESIDENTIAL COMMUNITY ASSOCIATIONS: PRIVATE GOVERNMENTS IN THE INTERGOVERNMENTAL SYSTEM 1, 3 (May 1989) [hereinafter INTERGOVERNMENTAL RELATIONS].

4. Different legal devices are employed to create servitude regimes with common areas and a private government. These include covenants, conditions and easements, which are usually used in tract and townhouse developments, with the governing body called a homeowners association (*see* Gosnay v. Big Sky Owners Ass'n, 205 Mont. 221, 666 P.2d 1247 (1983)); condominiums, which create a condominium association and board (*see* Berger, *Condominium: Shelter on a Statutory Foundation*, 63 COLUM. L. REV. 987 (1963); N.Y. REAL PROP. LAW §§ 339-d to 339-ii (McKinney 1989)); and cooperatives, which are usually organized as a corporation with a board of directors (*see* Youman, *Some Legal Aspects of Cooperative Housing*, 12 LAW & CONTEMP. PROBS. 126 (1947)). While these forms vary, they share common doctrinal and policy issues relating to servitude enforcement and the use of private governments.

5. *See* Reichman, *Residential Private Governments: An Introductory Survery*, 43 U. CHI. L. REV. 253 (1976).

cases, holds title to the common areas.[6] An association may also exercise discretionary power over matters related to the servitudes, set rules and regulations pursuant to power granted in the servitudes, enforce violations, provide other services such as trash collection and security, and collect and disburse subdivision dues in connection with these activities.[7] The package of rights and duties of the owners and the association differs from development to development, based on the servitude provisions imposed by the developer.

Commentators have discussed the benefits and disadvantages of servitudes and private residential governments.[8] Many argue that the law should treat servitudes like contracts, validating and enforcing them if the parties' intentions are clear. These commentators also suggest that the intrusion of classic doctrines of easement, covenant and condition law on these consensual arrangements should be limited.[9] I have

6. *See, e.g.*, Neponsit Property Owners Ass'n v. Emigrant Indus. Sav. Bank, 278 N.Y. 248, 15 N.E.2d 793 (1938) (association administering common areas).

7. *See, e.g.*, Gosnay v. Big Sky Owners Ass'n, 205 Mont. 221, 666 P.2d 1247 (1983) (rules and regulations power); Smith v. Butler Mountain Estates Property Owners Ass'n, 90 N.C. App. 40, 367 S.E.2d 401 (1988), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989) (power to approve building plans); Perry v. Bridgetown Community Ass'n, 486 So. 2d 1230 (Miss. 1986) (subdivision dues); Garrison Apartments, Inc. v. Saourin, 113 Misc. 2d 674, 449 N.Y.S.2d 629 (Civ. Ct. 1982) (providing security).

8. *See, e.g.*, Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1988); C. Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323 (1982); L. Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337 (1986); Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12 (1978); Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681 (1973); Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988); Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982) [hereinafter Epstein, *Notice and Freedom*]; French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928 (1988); French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982) [hereinafter French, *Modern Law of Servitudes*]; French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213 (1988) [hereinafter French, *Design Proposal*]; McDougal, *Land-Use Planning by Private Volition: A Framework for Policy-Oriented Inquiry*, 16 ARIZ. L. REV. 1 (1974); Newman & Losey, *Covenants Running with the Land, and Equitable Servitudes: Two Concepts, or One?*, 21 HASTINGS L.J. 1319 (1970); Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982); Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403 (1982); Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956 (1988); Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985).

9. *See* C. Berger, *supra* note 8, at 1329 ("Unification theory clearly accords the intent of the parties a dominant position in the interpretation of agreements"); Epstein, *Notice and Freedom*, *supra* note 8, at 1358; Ellickson, *supra* note 8, at 713-24; French, *Modern Law of Servitudes*, *supra* note 8, at 1305 ("Agreements creating servitudes can be treated like other agreements: if the agreement itself is valid, the law should give effect to the parties' intentions, enforcing the agreement until it becomes obsolete or unreasonably burdensome."); McDougal, *supra* note 8, at 1-2; Reichman, *supra* note 8, at 1184; Reichman, *supra*, note 5, at 277.

argued, however, that although this contract-based policy is valid and must be effectuated, decision makers must balance freedom of contract notions against other important policies.[10] I have suggested that to protect other societal goals, such as efficient allocation of land and democratic participation in local land use decisions, and to guard future owners' individual autonomy, enforcement of servitudes should be denied in certain circumstances.

In his recent article in the *Wisconsin Law Review*, Professor James Winokur advances the dialogue on several levels.[11] Significantly, he focuses the debate by examining servitudes in the context of apparent increases in disputes and owner dissatisfaction within subdivision developments. He analyzes the costs and benefits of servitudes, and maintains, among his other observations, that servitudes may not be economically efficient and that they decrease personal autonomy. To address these problems, Professor Winokur suggests a number of changes in the substantive law of servitudes. His central recommendation is that, as a matter of law, negative servitudes should not be enforceable beyond twenty years; he would instead allow the covenants to continue if the parcels entitled to enforce after twenty years numbered ten or fewer.[12] Professor Winokur's analysis and proposals diverge from the contract model extolled by other commentators.

I have a different perspective. I believe that Professor Winokur does not sufficiently recognize and protect the contract benefits inuring from servitude enforcement (just as I have maintained that other com-

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10. *See* Korngold, *Single Family Use Covenants: For Achieving A Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS. L. REV. 951 (1989) [hereinafter Korngold, *Single Family Covenants*]; Korngold, *For Unifying Servitudes and Defeasible Fees: Property Law's Functional Equivalents*, 66 TEX. L. REV. 533 (1988) [hereinafter Korngold, *Servitudes and Defeasible Fees*]; Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984) [hereafter Korngold, *Conservation Servitudes*]; *see also* G. KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES 254-62 (1990).

11. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1. Professor Winokur includes much analysis and many proposals. I focus on only some aspects.

12. Winokur, *supra* note 11, at 79. He refers to these smaller units as "pods."

Professor Winokur proposes that monetary obligations for supporting common facilities should not be subject to the 20-year termination rule, on the theory that there has not been great dissatisfaction with these covenants and that, otherwise, facilities would deteriorate or some owners would have to bear an inequitable portion of the costs. *See id.* at 83. I do not find the distinction between restrictive and money (i.e., affirmative) covenants to be persuasive. These money covenants can also become oppressive to owners over time, as facilities wear out and new funds (above reserves) are required for substantial repairs. Moreover, especially as time passes, if no cap exists on the amounts that can be charged under such clauses, buyers may be dissuaded from purchasing in the subdivision; this may decrease the land's marketability. We need to craft solutions for the specific problems connected with negative and affirmative covenants instead of applying an automatic termination rule.

mentators ignore important societal and personal values which require that, in some cases, servitudes should not be rigorously enforced). Like Professor Winokur, I believe that the theoretical issues and empirical experience of servitude enforcement by residential community associations raise many important concerns. However, the disputes and dissatisfaction within private residential governments do not surprise me in light of the family home's importance in our society and our experience with strong emotions in the public land use regulation arena. These difficulties do not not require terminating servitudes as a matter of law at a fixed point—in most cases this would just mean losing a still viable and valuable servitude regime and private government. In addition, forced termination would not solve the problems that arise during the initial twenty-year period or after that point in the "pods."[13]

I believe that the contract benefits of servitudes require their continued enforcement in most cases. We must recognize, however, the problems and competing policy values inherent in servitude enforcement, especially when administered by private governments. We must then develop doctrines which strike the proper balance between contract benefits, individual autonomy and societal flexibility. We can reach a proper accomodation of these competing values by addressing three issues.[14] First, the law must identify and enforce appropriate limitations on the subject matter of servitudes. Second, we must articulate doctrines requiring equal treatment of individual owners, procedural fairness in association decision making, and rational exercise of discretionary power by the association. Third, we must explore alternate methods for resolving disputes between the private government and its citizens. I will describe why these issues are important and indicate how we might begin to resolve them.

II. Benefits of Servitudes and Private Governments

Although servitudes differ from bilateral contracts in many respects,[15] contracts and servitudes are both devices to effectuate private consensual arrangements. Servitudes should be enforced like other con-

13. *See supra* note 12. I have several other concerns with Professor Winokur's pod concept. It adds complexity to the servitude arrangement, even though he finds that current servitudes are already difficult for many purchasers to comprehend. Winokur, *supra* note 11, at 30. Also, pods of 10 or less lots seem to cover too small a geographical area to keep out harmful spillovers from beyond the pod's border. Moreover, the pod system would atomize the initial private government, with resulting losses of efficiencies of scale.

14. Other important issues include the changed conditions doctrine and termination and modification rules. *See* French, *Modern Law of Servitudes, supra* note 8, at 1313; Korngold, *Servitudes and Defeasible Fees, supra* note 10, at 557-58; *see also* G. Korngold, *supra* note 10, at 381-424.

15. *See* Korngold, *Conservation Servitudes, supra* note 10, at 448-50.

tracts for several reasons: efficiency, moral obligation and freedom of choice.[16] Moreover, flexibility and democratic self-control may be added benefits from reciprocal subdivision covenants and private governments. A twenty-year limitation imposed by law would deny these advantages.

A. Efficiency

Servitudes permit the transfer of nonpossessory rights in land. This increases the efficient allocation of land, since by using servitudes, people do not have to acquire more rights in land than they actually want. To prevent a neighbor from building a factory, for example, one need not buy the fee but can purchase a restriction. Moreover, the owner can liquidate a portion of her interest by selling a servitude, while retaining productive use of the property subject to the servitude. The law should encourage people to enter such efficiency-maximizing transactions by enforcing them without undue transaction costs.[17]

A servitude regime creating reciprocal burdens and benefits among the owners may also bring additional efficiency gains. Although a specific parcel loses value when it is burdened by covenants, the loss may be offset by the benefits of identical restrictions binding neighboring lots, which create a valuable residential community.[18] Moreover, developers can use servitudes to provide common facilities that individual owners could not afford.[19]

Reserving open space as a common amenity not only brings aesthetic benefits but also can lessen the developer's cost under planned unit development (PUD) zoning.[20] Additionally, when a homeowners association administers the facilities, the developer can avoid the expenses necessary to meet standards for dedication to local government.[21] These savings and efficiencies can be passed on to residential consumers.

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16. *See id.* at 450-54; Korngold, *Single Family Covenants*, *supra* note 10, at 958-62; Korngold, *Servitudes and Defeasible Fees*, *supra* note 10, at 539-42.

17. *See* Ellickson, *supra* note 8, at 713-14; Korngold, *Servitudes and Defeasible Fees*, *supra* note 10, at 541-42; Reichman, *supra* note 8, at 1231, 1234.

18. For courts recognizing the efficiency of servitudes in subdivisions, see Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459, 464 (Ind. App. 1987) (enhance value of benefited land); Rofe v. Robinson, 415 Mich. 345, 349, 329 N.W.2d 704, 707 (1982) (valuable "property rights").

19. Professor Winokur would not subject covenants to pay for common areas, and presumably the affirmative right to use the areas, to a 20-year termination rule. *See supra* note 12.

20. *See Findings*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 4. For a discussion of planned unit development, see *Symposium, Planned Unit Development*, 114 U. PA. L. REV. 1 (1965).

21. *Findings*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 4; *RCR Characteristics and Issues*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 10.

Professor Winokur, however, claims that servitude regimes create inefficiencies. He argues that free market analysis is inappropriate in many servitude cases, and that there are reasons to doubt whether a true consensual transaction existed.[22] For example, the complexity of the servitude documents prevents buyers from having notice of the restrictions,[23] and substantive limitations on alteration of servitudes and the number of parties entitled to enforce them make it unlikely that a purchaser can negotiate changes before buying.[24] Servitudes may also become obsolete, and holdouts may prevent consensual modifications.[25]

Some of these issues are certainly significant.[26] I believe, though, that servitudes' overall efficiencies and benefits outweigh their problems. The inefficiencies which Professor Winokur notes deserve attention but should be addressed with specific solutions, rather than with a rule requiring termination after twenty years. Consider, for example, the problems of notice and obsolescence. First, the recording acts can be enforced strictly, and rules of inquiry notice can be interpreted closely to prevent a purchaser without notice from being bound by a servitude.[27] Consumer protection laws and the emerging rule of disclosure in real estate transactions might be used to control nondisclosure of servitudes by developers, selling unit owners and associations.[28] In a rare case, monopoly analysis may be appropriate, although no evidence shows that current use of servitudes has reached that point. If, however, all we have is a buyer who simply does not read a servitude or employ an attorney to do so before buying, the servitude arrangement should not be disturbed. The other owners have relied on the transaction, and great market disruptions would occur if the law positively reinforced people who chose to act unreasonably or even foolishly.

Obsolescence of servitudes can be addressed with the "changed conditions" doctrine and a clearly articulated doctrine barring enforcement of covenants that violate public policy.[29] Additionally, holdouts

22. *See* Winokur, *supra* note 11, at 28-29.

23. *Id.* at 30.

24. *Id.* at 33.

25. *Id.* at 34.

26. *See* Korngold, *Single Family Covenants*, *supra* note 10; Korngold, *Servitudes and Defeasible Fees*, *supra* note 10; Korngold, *Conservation Servitudes*, *supra* note 10.

27. For example, courts might limit the scope of the chain of title (and so limit constructive notice). *See, e.g.*, Buffalo Academy of the Sacred Heart v. Boehm Bros., Inc., 267 N.Y. 242, 196 N.E. 42 (1935) (covenants burdening lot in question which appeared in deeds conveying other lots are not within chain of title); *contra* Bishop v. Rueff, 619 S.W.2d 718 (Ky. Ct. App. 1981). On limiting the chain of title, see Philbrick, *Limits of Record Search and Therefore of Notice*, 93 U. PA. L. REV. 125, 174 (1944).

28. *See* Thacker v. Tyree, 297 S.E.2d 885 (W. Va. 1982) (requiring disclosure of material, hidden defects); Condominium and Cooperative Conversion Protection and Abuse Relief Act, 15 U.S.C. §§ 3601-3616 (1988) (regulating substantive provisions of condominium and cooperative conversions).

29. *See* French, *Modern Law of Servitudes*, *supra* note 8, at 1300-02 (changed con-

can be reduced by including provisions that allow termination and modification of servitudes with less-than-unanimous consent.[30]

While I believe that servitudes usually increase land's efficient use, efficiency gains should not be the sole criterion for determining whether a specific servitude should be enforced. Rather, these benefits must be weighed against competing social policies.[31]

B. Moral Obligation

Courts have concluded that servitudes should be enforced for moral considerations. Courts do not want an original covenantor to pay a reduced price for land subject to a servitude, and then sell it free of the restriction for a higher price.[32] Moreover, since a buyer can protect himself by reducing the land's price to reflect the burden of existing servitudes, he should not be permitted to avoid the obligation and deprive the benefited owners of the value of the servitudes.[33] If, however, all buyers have notice of a twenty year limit on servitudes, it would not be "immoral" if those servitudes were not enforced after that point.

C. Freedom of Choice

Servitudes represent the parties' voluntary choice. They allow individuals to create an environment that they believe will maximize their self-fulfillment. In residential servitude regimes, an owner receives increased "health, happiness, and peace of mind" in exchange for accepting community restrictions and power.[34] The servitudes provide "character,"[35] "integrity and tranquility"[36] for the neighborhood. Ser-

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ditions); Korngold, *Single Family Covenants*, *supra* note 10, at 978-79 (urging increased development and use of doctrine voiding covenants that violate publice policy); Korngold, *Servitudes and Defeasible Fees*, *supra* note 10, at 557-58 (changed conditions); Korngold, *Conservation Servitudes*, *supra* note 10, at 484-86 (changed conditions); Reichman, *supra* note 8, at 1259.

30. *See infra* note 41.

31. *See* Korngold, *Single Family Covenants*, *supra* note 10, at 959-60; Korngold, *Conservation Servitudes*, *supra* note 10, at 453-54.

32. *See, e.g.*, Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp., 41 A.D.2d 950, 344 N.Y.S.2d 30 (1973); Tulk v. Moxhay, 2 Phillips 774, 778, 41 Eng. Rep. 1143, 1144 (Ch. 1848) ("nothing could be more inequitable than that the original purchaser should be able to sell the property the next day for a greater price").

33. *See, e.g.*, Franklin v. White Egret Condominium, 358 So. 2d 1084 (Fla. App. 1977), *aff'd*, 379 So. 2d 346 (Fla. 1979); Welitoff v. Kohl, 105 N.J. Eq. 181, 187-88, 147 A. 390, 393 (1929) ("it would be unfair to permit one who 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"); Kiernan v. Snowden, 123 N.Y.S.2d 895, 900 (Sup. Ct. 1953) ("in reliance upon the protection of the covenants, established their residences in the locality").

34. Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180 (Fla. Dist. Ct. App. 1975); *see RCA Characteristics and Issues*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 10 (describing consumer preference for servitude regimes).

35. *See* Jackson v. Williams, 714 P.2d 1017, 1024 (Okla. 1985).

36. Gregory v. State, 495 A.2d 997 (R.I. 1985).

vitude regimes and residential community associations also provide desired common facilities as well as a means to administer them.[37]

These covenants were relied upon by the purchasers and so should be enforced by the courts.[38] In the usual case, one noncomplying owner should not be permitted to deprive unilaterally the other owners of their personal satisfaction. In order to foster free choice, therefore, courts should enforce servitudes as a general matter. In some special cases, however, where the choices of one person preempt another from having free choice, the law may have to strike a balance.

D. Private Residential Governments

Reciprocal servitude regimes and private residential governments can provide additional benefits to the owners.[39] Flexibility, compromise and community autonomy may be increased in several ways. First, when covenants are reciprocal, owners may be willing to compromise to resolve questions relating to covenant violations and enforcement because of the social norm of cooperation between neighbors.[40] Furthermore, because all owners have the same benefits and burdens, an owner seeking to violate the covenant may be dissuaded from doing so upon realizing that her property would be devalued if her neighbors also breached the covenant; similarly, an owner enforcing a restriction may be willing to be flexible since she may seek a similar accommodation in the future. We should not forget, when looking at the situations where cooperation fails, that there are many instances where it succeeds.

When the servitude scheme can be modified and terminated by a less-than-unanimous vote of the owners, obsolete, inefficient and oppresssive servitudes can be removed more easily.[41] Such provisions prevent a small number of holdouts from blocking changes necessary to meet new conditions and needs of the community and to eliminate

37. *See RCA Characteristics and Issues*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 10.

38. *See* Adult Group Properties, Ltd. v. Imler, 505 N.E.2d 459 (Ind. Ct. App. 1987); Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980) (dissenting opinion).

39. The courts have stated that subdivision schemes deserve special protection. *See, e.g.*, Lake St. Louis Community Ass'n v. Kamper, 503 S.W.2d 447 (Mo. Ct. App. 1973); Town & County Estates v. Slater, 227 Mont. 489, 740 P.2d 668 (1987).

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

41. *See, e.g.*, Jaskiewicz v. Walton, 77 Md. App. 170, 549 A.2d 774 (Md. Ct. Spec. App. 1988) (amendment by a majority of owners); Sanderson v. Hidden Valley Fishing Club, 743 S.W.2d 486 (Mo. Ct. App. 1987) (amendment by two-thirds of owners); Smith v. Butler Mountain Estates Property Owners Ass'n, Inc., 324 N.C. 80, 375 S.E.2d 905 (1989) (termination by two-thirds of owners). *See* G. KORNGOLD, *supra* note 10, at 386-90, 419-24.

burdensome ties on land.[42] Thus, major land use issues affecting the community can be resolved through a democratic process.

Additional benefits arise when an association or designated body enforces servitudes and exercises discretionary powers.[43] No matter how fine the drafter, he cannot foresee all issues that the subdivision may face. By giving a degree of discretion to a governing body, there can be flexibility in the scheme's administration and enforcement. Moreover, some controls, such as aesthetic restrictions or dues covenants, require continuing administration and decision making. These democratically constituted groups can make choices within the guidelines of the servitude documents, and so achieve the community's goals. A lone holdout cannot veto community action.

Administrative efficiencies also result when decision making is delegated to private government. This arrangement prevents duplicative enforcement actions by individual owners, reduces transaction costs in the negotiation process, relieves the burden of obtaining consent from all owners, and may allow the community to take advantage of its members' expertise.

Servitude administration by associations, though, can be harmful when individual owners are unfairly affected by decisions. Nonetheless, we need to address these abuses, as I suggest below, without crippling the association structure and the benefits it brings.

Professor Winokur maintains that "the anticipated advantages of participatory democracy . . . have not materialized sufficiently to offset the limitations on individual autonomy inherent in multilateral promissory relationships."[44] He believes there is increased owner dissatisfaction with servitude regimes and cites low attendance at association meetings, dissension within associations, occasional violent confrontations between neighbors, and increased litigation involving association life.[45]

I have a different reaction to these phenomena. First, the data might be interpreted differently. Low owner attendance at meetings may simply show that people are satisfied with how the association is

42. Contrast this with Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930) (all owners but one in a 128 lot development consented to a modification of the covenants to allow the erection of a church).

43. *See, e.g.*, Gosnay v. Big Sky Owners Ass'n, 205 Mont. 221, 666 P.2d 1247 (1983) (power to regulate nuisances); Coral Gables Investments, Inc. v. Graham Co., 528 So. 2d 989 (Fla. Dist. Ct. App. 1988) (aesthetic regulation); Rodruck v. Sand Point Maintenance Comm'n, 48 Wash. 2d 565, 295 P.2d 714 (1956) (power to set subdivision assessments).

44. *See* Winokur, *supra* note 11, at 62. For other discussion of the lack of democracy in private residential governments, see Reichman, *supra* note 5, at 267-75; *see also* Ellickson, *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519 (1982); Michaelman, *Universal Suffrage: A Liberal Defense*, 130 U. PA. L. REV. 1581 (1982); Frug, *Cities and Homeowners Association: A Reply*, 130 U. PA. L. REV. 1589 (1982).

45. *See* Winokur, *supra* note 11, at 62-64.

functioning. I do not find low participation that surprising or troubling compared to low voter turnout in public local elections and small citizen participation in local government issues.[46] Additionally, increased association litigation *not only* may reflect the general increase in litigation over the period, but may also result from the expanded number of servitude regimes over recent years.[47]

Moreover, I believe that dissension within a subdivision scheme is to be expected and may even be beneficial. Both zoning and private government administration of servitudes involve a tension between private property rights and communal regulation, as well as a battle between differing visions of the group's land use goals.[48] Our experience with zoning shows how local land issues often trigger deep feelings and conflict among affected citizens.[49] This emotion and discord are real and cannot be wished away. The conflict may even form a valuable dialectic for evolving community land use polices. Much of zoning law focuses on developing a decision-making process that is fair to all parties and also allows dissent to be expressed.[50] If this were achieved, even the losers in the process might recognize the legitimacy of the ultimate decision.

Furthermore, disputes in residential private governments are not surprising since the family home—an important value in our culture—[51]is at stake. The potential for conflict is heightened because

46. For example, based on statistics compiled by the Cuyahoga County (Ohio) Board of Elections, in a closely fought mayoral election in Cleveland in November, 1989, only 53.5% of registered voters cast ballots (160,433 out of 299,740). In the City of Cleveland Heights, only 32.6% of registered voters cast ballots in that local election (11,047 out of 33,866). These statistics do not include people who were not even registered to vote.

47. *See* Winokur, *supra* note 11, at 64, n.264.

48. *Compare* Barton & Silverman, *The Political Life of Mandatory Homeowners' Associations*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 31 (describing tension in association situation) *with* R. EPSTEIN, TAKINGS: PRIVATE PROPERTY AND THE POWER OF EMINENT DOMAIN 93-104 (1985) (discussing conflict with governmental regulation).

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

50. *See* Topanga Ass'n for a Scenic Community v. County of Los Angeles, 11 Cal. 3d 506, 522 P.2d 12, 113 Cal. Rptr. 836 (1974) (requiring findings to support variance decisions); Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (finding that some decisions are quasi-judicial requiring increased judicial review); City of Eastlake v. Forest City Enters., Inc., 426 U.S. 668 (1976) (determining appropriate scope of voter ratification of zoning changes); *see also* Brownstein, *Illicit Legislative Motive in the Municipal Land Use Regulation Process*, 57 U. CIN. L. REV. 1 (1988).

51. *See* Crowley v. Knapp, 94 Wis. 2d 421, 288 N.W.2d 815 (1980) (dissenting opinion) ("a home, 'The American Dream' "); Evangelical Lutheran Church of the Ascension v. Sahlem, 254 N.Y. 161, 172 N.E. 455 (1930) ("Rightly or wrongly he believes that the comfort of his dwelling will be imperiled."); Mechem, *The Peasant in His Cottage: Some Comments on the Relative Hardship Doctrine of Equity*, 28 S. CAL. L. REV. 139, 144 (1955) ("the basic concept that private ownership of a dwelling house is still the most inviolable of all property rights"); M. GORDON, THE AMERICAN FAMILY: PAST, PRESENT, AND FUTURE 66-68 (1978) (discussing American family home as a private refuge).

of the parties' proximity to each other.[52] The goal in servitudes regimes, therefore, should not be to eliminate all conflicts. Rather, we need to provide a process that resolves the conflicts which do arise in a legitimate, fair, democratic and efficient manner.

Servitudes and private residential governments, therefore, provide various benefits. The law should, in the usual case, validate and enforce such consensual arrangements. At the same time, however, servitudes and residential associations have the potential of exacting unacceptable costs on individual freedom and rights and community action. As I will develop in the next section, the law must develop specific responses to these problems. Terminating servitudes as a matter of law at a fixed point is an overreaction to the potential negative fallout of servitudes. Moreover, such an approach does not address the problems that need to be resolved before the termination date arrives.

III. Substantive and Procedural Flaws of Servitude Regimes

Despite their benefits, servitudes and private governments can offend important policy considerations and have a deleterious effect on the goals of society and individual owners. This section will explore two areas in which such concerns arise—the permissible subject matter of servitudes and private government administration of servitudes—and suggest how these harms can be prevented while maintaining the general principle of servitude enforceability. Additionally, this section will consider alternate means to resolving disputes within residential community associations.

A. Subject Matter of Servitudes

1. THE PROBLEM AND SUGGESTED APPROACH

In servitude cases, some courts refer to a policy of free and unrestricted use of land[53] or a policy against restraints on alienability.[54]

52. *See generally* Sterk, *Neighbors in American Land Law*, 87 COLUM. L. REV. 55 (1987).

53. *See, e.g.*, Marion Road Ass'n v. Harlow, 1 Conn. App. 329, 472 A.2d 785 (1984); DeMund v. Lum, 5 Haw. App. 336, 690 P.2d 1316 (1984); Blevins v. Barry-Lawrence County Ass'n for Retarded Citizens, 707 S.W.2d 407 (Mo. 1986).

54. *See, e.g.*, Eagle Enters. v. Gross, 39 N.Y.2d 505, 384 N.Y.S.2d 717, 349 N.E.2d 816 (1976); Cain v. Powers, 100 N.M. 184, 668 P.2d 300 (1983).

I refer to it as the "antirestrictions policy."[55] Although the courts do not explain the policy clearly, I believe that its central concern is limiting control of the dead hand.[56] This antirestrictions policy must be balanced against the freedom of contract and subdivision benefits of servitudes.

Covenants permit control by the dead hand since they bind not only the original purchaser but also future owners, perhaps in perpetuity. This may impose serious costs for two reasons. First, current owners are prevented from changing the use of their land to meet current needs of society as reflected in the marketplace. This may frustrate efficient use of our limited supply of land.[57] Second, judicial enforcement of a servitude effectuates the vision of a previous generation, which may thwart the aspirations and personal autonomy of the current owner. Especially in a time of decreasing opportunities—such as access to housing—imposing the wishes of past generations on the present owner may be especially disrupting. We must take care that in enforcing servitudes to achieve communal goals that we do not ignore our society's vision of the family home as a private refuge from the larger world.[58]

Although virtually every restriction limits the current owner's personal autonomy, this does not mean that all servitudes should be unenforceable or that dead hand concerns require that all subdivision servitudes should be voided after twenty years. Rather, a balance must be struck between the antirestrictions policy and the contract and communal benefits of servitudes in developing rules that limit restrictions within servitude regimes. In order to accommodate these competing interests, a restriction should be enforced only to the extent that it regulates the owner's external behavior (measured by objective criteria) rather than her status or private conduct. Courts should, therefore, uphold restrictions that control harmful spillovers on the subdivision that arise from an owner's use of her property (e.g., excessive noise or

55. *See* Korngold, *Single Family Covenants*, *supra* note 10, at 962-69; Korngold, *Servitudes and Defeasible Fees*, *supra* note 10, at 542-46; Korngold, *Conservation Servitudes*, *supra* note 10, at 455-57.

Related to the antirestrictions policy are the courts' declarations that covenants are not favored by the law. *See, e.g.*, Genovese Drug Stores, Inc. v. Connecticut Packing Co., 732 F.2d 286 (2d Cir. 1984); Frander & Frander, Inc. v. Griffen, 457 So. 2d 375 (Ala. 1984); Marks v. Wingfield, 229 Va. 573, 331 S.E.2d 463 (1985).

56. Marketability concerns are usually not important with reciprocal subdivision covenants. *See* Korngold, *Single Family Covenants*, *supra* note 10, at 962-69; Korngold, *Servitudes and Defeasible Fees*, *supra* note 10, at 542-46; Korngold, *Conservation Servitudes*, *supra* note 10, at 455-57. *But see supra* note 12 (indicating possible marketability problems with dues covenants).

57. *See* Copelan v. Acree Oil Co., 249 Ga. 276, 290 S.E.2d 94 (1982). The changed conditions doctrine attempts to respond to this concern by voiding obsolete covenants. *See supra* note 14 and accompanying text.

58. On the role of the family home, see M. GORDON, *supra* note 51, at 66-68; *see generally* Teitelbaum, *Family History and Family Law*, 1985 WIS. L. REV. 1135 (1985).

traffic), but should not enforce controls on personal choices within a home. Under this rule, not only would the neighborhood's integrity be protected, which would preserve contractual and communal benefits, but also past generations' values would not be imposed on present owners.

This rule would prohibit, for example, enforcing a subdivision servitude limiting occupancy of a residence to a "traditional" family.[59] Such covenants attempt to control behavior within the home that does not directly affect the neighborhood.[60] My proposed rule would also have barred prior enforcement of racial covenants.[61] Professor Winokur objects to servitudes regulating aesthetics as

> severely regiment[ing] conduct in one's immediate home environment. Respect for, and promotion of, individual identity requires protection of each resident's right, for example, to determine when he or she takes out the trash, to select the color of the family swing set, to fly the American (or other) flag from the balcony, to choose his or her own interior curtains and liners, and to decide how many sixteenths of an inch thick the plexiglass shall be on a balcony enclosure.[62]

This position undervalues the contract and communal benefits of servitudes and goes too far in protecting the individual owner. Indeed, it is hard to think of a restriction that would not impermissibly offend Professor Winokur's view of individual identity.

Under my proposed rule, I would reach a different result on most of the examples which Professor Winokur gives. Servitudes should be valid to the extent that they control harmful spill overs from individual owners. Thus, the community should be able to enforce covenants that regulate external aesthetic features, which can harm neighborhood ambience and property values.[63] It should also be permitted to use cov-

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59. *See, e.g.*, London v. Handicapped Facilities Bd., 637 S.W.2d 212 (Mo. Ct. App. 1982) (group home for the handicappped); Feely v Birenbaum, 554 S.W.2d 432 (Mo. Ct. App. 1977) (two male co-owners); Omega Corp. v. Malloy, 228 Va. 12, 319 S.E.2d 728 (1984), *cert. denied*, 469 U.S. 1192 (1985) (group home for the handicapped); *see also* Korngold, *Single Family Covenants*, *supra* note 10, at 967.

60. Nonenforcement would, however, prevent the creation of a certain "moral ambience" in the neighborhood. *See* Michaelman, *Political Markets and Community Self-Determination: Competing Judicial Models of Local Government Legitimacy*, 53 IND. L.J. 145, 194 (1977-78). That cost is acceptable. Korngold, *Single Family Covenants*, *supra* note 10, at 967.

61. Enforcement of such covenants was barred by an expansive use of state action. *See, e.g.*, Shelley v. Kraemer, 334 U.S. 1 (1948). *See* G. KORNGOLD, *supra* note 10, at 351. The inability of the law of servitudes to deal with such covenants serves as a painful reminder for the need to develop doctrines denying enforcement of covenants intruding on the privacy of the home.

62. *See* Winokur, *supra* note 11, at 74.

63. *See* Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 449 P.2d 361 (1969); Town & Country Estates Ass'n v. Slater, 227 Mont. 489, 740 P.2d 668 (1987); Palmetto Dunes Resort v. Brown, 287 S.C. 1, 336 S.E.2d 15 (Ct. App. 1985).

enants to prevent threats to common health and safety (likely goals of trash and glass regulations). With the possible exception of the flag flying restriction,[64] there is no unacceptable imposition of the wishes and values of past generations on current owners.[65] Our society accepts public regulation of these same activities, despite the inherent limitations on personal action, because of the offsetting benefits to the larger community.[66] Such restrictions should be tolerated in servitudes, as long as they are fairly administered by the association.[67] If an owner does not like these restrictions, she should not buy a home in the community in the first place or, if she did, she should sell and leave. She should not, however, be permitted to devalue the scheme for the rest of the owners. The burdens of a subdivision arrangement are not for everyone (despite the corresponding benefits); some people might be happier living on unrestricted land.

2. IMPLEMENTING THE SOLUTION

The courts can limit the subject matter of covenants in various ways. First, the touch and concern test, a traditional tool for controlling the types of permissible covenants, can be clarified to permit only servitudes that control land utilization.[68] Servitudes imposing "ideologically prescribed modes of behavior" would not be enforced.[69] The touch and concern test as currently conceptualized needs reworking since it does not squarely confront important policy issues. Instead, the test employs an arcane framework in rendering decisions. A reformulated touch and concern test, or a substitute doctrine limiting subject

64. *See* Gerber v. Longboat Harbor N. Condominium, Inc., 724 F. Supp. 884 (M.D. Fla. 1989) (finding state action in condominium rule against flag flying). Even without use of state action, the importance of self-expression may require judicial limits on such rules even though the action causes communal fallout.

65. I assume that the window treatments to which Professor Winokur refers are visible outside of the house.

66. *See, e.g.*, Metromedia, Inc. v. San Diego, 453 U.S. 490 (1981) (aesthetic regulation of billboards); State ex rel. Stoyanoff v. Berkeley, 458 S.W.2d 305 (Mo. 1970) (public architectural review).

67. *See infra* text accompanying notes 75-103.

68. *See* Korngold, *Single Family Covenants*, *supra* note 10, at 977; Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 150 (1978). For formulations of the touch and concern test, see Mercantile-Safe Deposit & Trust Co. v. Mayor & City Council of Baltimore, 308 Md. 627, 521 A.2d 734 (1987); Albright v. Fish, 136 Vt. 387, 394 A.2d 1117 (1978); Feider v. Feider, 40 Wash. App. 589, 699 P.2d 801 (1985); C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 99 (2d ed. 1947); Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 644-45 (1913-14). Some commentators have recently questioned the need for the touch and concern requirement. *See, e.g.*, Epstein, *Notice and Freedom*, *supra* note 8, at 1360 (objecting to touch and concern as intrusion on free choice); French, *Design Proposal*, *supra* note 8, at 1220 n. 18 (cases); French, *Modern Law of Servitudes*, *supra* note 8, at 1308 (preferring increased use of modification doctrines).

69. Reichman, *supra* note 8, at 1233.

matter of covenants, can effectively balance the benefits and costs of servitudes.[70]

Second, courts often declare that covenants violating public policy are not enforceable.[71] While most of these cases lack significant policy analysis,[72] courts could better articulate and employ that doctrine to void covenants permitting inappropriate dead hand power. Similarly, some legislatures and courts have barred specific enforcement of covenants when the public interest would not be served.[73]

Finally, a modern law of servitudes could articulate clear controls on subject matter that reflect the accommodation of the costs and benefits of servitudes which I outlined above. Perhaps the *Restatement (Third) of Property—Servitudes* could include such issues in sections on subject matter and covenants violating public policy.

Professor Winokur finds that such "[i]nherently unpredictable discretionary doctrines are to be avoided or, where substantially important . . ., circumscribed to the degree possible."[74] However, if these doctrines limiting subject matter are clearly articulated and applied by the courts in the ways I have suggested, greater predictability can be achieved. Moreover, if some predictability is lost, that is an acceptable price for accomplishing major societal objectives. The approach I have offered has the benefit of flexibility. It avoids the arbitrary loss of servitude benefits from a flat twenty-year rule. It also allows the courts to police inappropriate servitudes during the initial twenty-year period as well.

B. Actions of the Private Government

When administering and enforcing servitudes, a private government can exercise its discretion in a manner that violates the policy and doctrinal bases supporting servitude enforcement. The governing body can deny equal treatment or procedural fairness or act ultra vires or irrationally. Such actions can exact tremendous costs from individuals, the community and the larger society.

1. EQUAL TREATMENT AND FAIR PROCEDURES

A private government might treat similarly situated owners uncqually[75] or make decisions without following fair procedures[76] or

70. *See* Korngold, *Servitudes and Defeasible Fees*, *supra* note 10, at 571-72.

71. *See, e.g.*, Wier v. Isenberg, 95 Ill. App. 3d 839, 842, 420 N.E.2d 790, 793 (1981); Bob Layne Contractor, Inc. v. Buennagel, 158 Ind. App. 43, 53, 301 N.E.2d 671, 678 (1973); Loeb v. Watkins, 428 Pa. 480, 484, 240 A.2d 513, 516 (1968).

72. *See* Korngold, *Single Family Covenants*, *supra* note 11, at 978-79.

73. *See, e.g.*, Blakely v. Gorin, 365 Mass. 590, 313 N.E.2d 903 (1974) (applying MASS. GEN. LAWS ANN. ch. 184 § 30); Holmes Harbor Water Co. v. Page, 8 Wash. App. 600, 508 P.2d 628 (1973) (citing RESTATEMENT OF TORTS § 941 (1939)).

74. *See* Winokur, *supra* note 11, at 77-78.

75. *See, e.g.*, Garrison Apartments, Inc. v. Sabourin, 113 Misc. 2d 674, 449 N.Y.S.2d

based on bias.[77] This should not be permitted for both freedom of contract and antirestrictions policy reasons. First, there are efficiency concerns. When entering into a reciprocal restrictions scheme, parties usually contemplate that each will bear the same burdens in exchange for the same offsetting benefits.[78] When a private government treats owners unevenly, it inappropriately rearranges the understanding. People will likely be less willing to buy property subject to servitude regimes if this happens. Society and individuals will thus lose the efficiency benefits of such arrangements.

Furthermore, many people in our society generally expect fair and equal treatment in commercial dealings and expect decisions not based on bias, perhaps as part of constitutional values. A person entering into a servitude transaction likely has this expectation.[79] We can thus justify servitude enforcement as a free choice and moral obligation of the purchaser only if it includes a requirement of equal and fair treatment. Additionally, the benefits of communal living and participatory democracy will be hard to achieve in an atmosphere of uneven treatment and tainted decision making.

Finally, it is hard enough in the usual case to permit the limitation of personal autonomy that servitudes bring. Given our social norms of equality and procedural fairness, it seems unjustifiable, however, to enforce servitudes that subject the present owner to unfair and unequal dead hand control. This is particularly so in light of the important property that is involved—the family home.

Therefore, in order to obtain the policy objectives of servitudes, courts must supervise private governments' conduct to ensure equal

629 (Civ. Ct. 1982) (claim that cooperative rule requiring monthly charge for security or tenant serving as guard in lieu of fee discriminated against elderly and infirm); Killearn Lakes Homeowners Ass'n v. Sneller, 418 So. 2d 1214 (Fla. Dist. Ct. App. 1982) (owner complained of disproportionate impact from locating playground near his residence); *see* S. BARTON & C. SILVERMAN, COMMON INTEREST HOMEOWNERS' ASSOCIATIONS MANAGEMENT STUDY 10, 22-23 (1987) (describing difficulty in allocating maintenance expenses among owners); *RCA Characteristics and Issues*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 14 (describing unequal treatment in provision of services). For other examples of unequal treatment, see *infra* note 80.

76. Defects may include failure to follow specified procedures, lack of notice and opportunity to be heard, and flaws with the voting process. *See* S. BARTON & C. SILVERMAN, *supra* note 75, at 11-12 (describing failure to follow procedures). See *infra* notes 83-84 and accompanying text.

77. There may be conflicts of interest and fraud. *See infra* note 86 and accompanying text.

78. If the documents clearly provide for unequal treatment of different classes of owners, those differences should be upheld as a consensual arrangement, barring any collateral attack on the agreement. *See, e.g.*, Sanderson v. Hidden Valley Fishing Club, 743 S.W.2d 486 (Mo. Ct. App. 1987) (upholding different dues amounts among purchasers contained in servitudes); Birchwood Lakes Community Ass'n v. Comis, 296 Pa. Super. 77, 442 A.2d 304 (1982) (same).

79. La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz., 142 Ariz. 235, 689 P.2d 178 (Ct. App. 1984). *See supra* note 78.

treatment and fair procedures. Some courts have already begun to do so. For example, amendments passed by the association on less-than-unanimous consent of the owners must apply uniformly to all residences.[80] This would protect an individual owner's rights from being reduced by the other owners. Thus, an owner does not have to accept an amendment allowing her neighbor to build a store that will make the neighbor's land more valuable and the other owners' shopping more convenient, since the amendment will decrease the value of the owner's residence. Additionally, the rule that requires governing bodies to apply aesthetic controls fairly and reasonably also helps to prevent an owner from being treated unfairly as compared to other owners.[81] Thus, a key factor for many courts is whether the private government's decision coincides with other residences and the plan of development.[82]

Some courts have also addressed process issues. They require that express procedures in the servitudes must be followed.[83] If no procedures are provided, the courts have required notice and an opportunity to be heard.[84] Courts mandate that decisions be made in good faith[85] and will investigate for impermissible bias.[86]

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80. *See, e.g.*, Jaskiewicz v. Walton, 77 Md. App. 170, 549 A.2d 774 (1988) (amendment attempting to release only one lot from restriction was void); Ridge Park Home Owners v. Pena, 88 N.M. 563, 544 P.2d 278 (1975) (amendment to allow only one lot to be used for commercial purposes was void); *see* La Esperanza Townhome Ass'n, Inc. v. Title Sec. Agency of Ariz., 142 Ariz. 235, 689 P.2d 178 (Ct. App. 1984); LaBrayere v. LaBrayere, 676 S.W.2d 522 (Mo. Ct. App. 1984).

81. *See, e.g.*, Coral Gables Invs., Inc. v. Graham Cos., 528 So. 2d 989 (Fla. Ct. App. 1988); Town & Country Estates Ass'n v. Slater, 227 Mont. 489, 740 P.2d 668 (1987); Dodge v. Carauna, 127 Wis. 2d 62, 377 N.W.2d 208 (Ct. App. 1985).

82. *See, e.g.*, Smith v. Butler Mountain Estates Property Owners Ass'n, 90 N.C. App. 40, 367 S.E.2d 401 (1988), *aff'd*, 324 N.C. 80, 375 S.E.2d 905 (1989) (geodesic home out of character with neighboring houses); Town & Country Estates Ass'n v. Slater, 227 Mont. 489, 740 P.2d 668 (1987) (decision of board overruled by court since home was not discordant with others); Ross v. Newman, 206 Neb. 42, 291 N.W.2d 228 (1980) (minor changes in design which were similar to those which other owners made). *See* G. KORNGOLD, *supra* note 10, at 368-72.

83. *See, e.g.*, Ironwood Owners Ass'n IX v. Solomon, 178 Cal. App. 3d 766, 224 Cal. Rptr. 18 (1986) (board must comply with its own procedures in making decisions); Johnson v. Keith, 368 Mass. 316, 331 N.E.2d 879 (1975) (under the governing documents, declaration amendment, not a regulation, was required to effectuate the proposed change).

84. *See, e.g.*, Ashelford v. Baltrusaitis, 600 S.W.2d 581 (Mo. Ct. App. 1980) (notice of hearing on application and reasons for denial were required); Hanchett v. East Sunnyside Civic League, 696 S.W.2d 613 (Tex. Ct. App. 1985) (notice and opportunity to be heard required before association amendment).

85. *See, e.g.*, Cohen v. Kite Hill Community Ass'n, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983); Souza v. Columbia Park & Recreation Ass'n, Inc., 70 Md. App. 655, 522 A.2d 1376, *cert. denied*, 310 Md. 130, 527 A.2d 51 (1987); Whiteco Metrocom, Inc. v. Industry Properties Corp., 711 S.W.2d 81 (Tex. Ct. App. 1986).

86. *See, e.g.*, Souza v. Columbia Park & Recreation Ass'n, Inc., 70 Md. App. 655, 522 A.2d 1376, *cert. denied*, 310 Md. 130, 527 A.2d 51 (1987); Garrison Apartments, Inc. v. Sabourin, 113 Misc. 2d 674, 449 N.Y.S.2d 629 (Civ. Ct. 1982). Courts will also investigate whether signatures in vote were falsified or obtained by fraud. *See, e.g.*, Windom v. Easley, 495 So. 2d 46 (Ala. 1986).

Unfortunately, the courts have not clearly stated a theoretical or doctrinal ground for imposing these obligations on private governments. Still, courts might explore sevcral doctrinal bases. First, fair treatment and procedures in servitude arrangements could be conceptualized as part of "good faith and fair dealing" generally required in contracts.[87] Second, the courts could examine more clearly the board members' fiduciary duty to prevent bias.[88] They could also utilize traditional servitude doctrines, such as estoppel, to prevent unfair behavior by the private government.[89] Inequality of bargaining power and consumer protection goals may also be invoked in some cases, especially if there is developer involvement. While the issues of equal treatment and fair procedures by associations parallel those of constitutional law, these doctrines cannot be applied literally to private governments because of a lack of state action.[90] However, the courts can use the values inherent in these constitutional guarantees as analogies for private governments.[91]

Most important, the doctrinal rules developed by the courts must reach a proper accommodation of the competing policy choices that I have articulated. Only a policy-based rule of law can respond rationally to the problems of private governments.

2. ULTRA VIRES AND IRRATIONAL DECISIONS

Private governments might also impose restrictions that exceed the body's power as granted in the servitudes. This offends several policy considerations. Ultra vires decisions may destroy the efficiencies of the servitude scheme, such as when a board allows outsiders to use recreational facilities that the servitudes reserved for the sole use of owners.[92] Moreover, since the owner did not consent to be bound in this manner, freedom of contract notions require that such decisions by the governing body be invalidated. The benefits of democratic par-

87. *See* A. FARNSWORTH, CONTRACTS 526-28 (1982).

88. Only a few courts currently do that. *See, e.g.*, Cohen v. Kite Hill Community Ass'n, 142 Cal. App. 3d 642, 191 Cal. Rptr. 209 (1983); Thanasoulis v. Winston Tower 200 Ass'n, Inc., 214 N.J. Super. 408, 519 A.2d 911 (App. Div. 1986).

89. A few decisions use that theory. *See, e.g.*, First Hyland Greens Ass'n v. Griffith, 618 P.2d 745 (Colo. Ct. App. 1980); *but see* Beaver Lake Ass'n v. Sorenson, 231 Neb. 75, 434 N.W.2d 703 (1989).

90. *See* Korngold, *Single Family Covenants*, *supra* note 10, at 974-75; Rosenberry, *The Application of the Federal and State Constitutions to Condominiums, Cooperatives and Planned Developments*, 19 REAL PROP. PROB. & TR. J. 1 (1984).

91. Even in some cases where governmental zoning creates unfair burdens, courts often do not rely on the constitutional provision but rather employ a general rule of fair treatment. *See, e.g.*, Viso v. State, 92 Cal. App. 3d 15, 154 Cal. Rptr. 580 (1979) (spot zoning); Jurgens v. Town of Huntington, 53 A.D.2d 661, 384 N.Y.S.2d 870 (N.Y. App. Div. 1976) (same).

92. *See* Bauer v. Harn, 223 Va. 31, 286 S.E.2d 192 (1982).

ticipation are also maximized by preventing a board from usurping decision-making power specifically reserved to the membership at large.[93] Additionally, courts should not permit associations to extend the reach of the dead hand over individuals beyond what is stated in the servitudes.[94] Judicial decisions restricting ultra vires acts by the association or subgroup serve these policy goals.[95]

Some owners may object to the wisdom of a decision made by the private government. Although as a general rule decisions within the association's power should be upheld, the courts should not enforce decisions that cause inefficient land use—that is, those that reduce the community's welfare by imposing burdens on the community without corresponding benefits. The difficult question, however, is the degree of deference that the complaining owners and the reviewing court should give to the private government's calculation of the costs and benefits of its action. The courts have struggled with this issue.[96] Two patterns of decisions have emerged, neither of which adequately recognizes the competing policies. One group of cases indicates that the association cannot adopt rules that bear "no relationship to the health, happiness, and enjoyment of life of the various unit owners."[97] This is similar to the substantive due process test used by the courts in reviewing zoning ordinances (although the substantive due process requirement is harder to meet on its face as it typically requires a *substantial* relationship to a valid legislative goal).[98] If the courts in private government cases follow the pattern of substantive due process decisions, few if any regulations will fail to meet the test.[99] Other courts have reviewed association decisions under the business judgment rule, requiring only a good faith exercise of decision-making power.[100] Some

93. *See* Ticor Title Ins. Co. v. Rancho Santa Fe Ass'n, 177 Cal. App. 3d 726, 223 Cal. Rptr. 175 (1986).

94. *See* Makeever v. Lyle, 125 Ariz. 384, 609 P.2d 1084 (Ct. App. 1980) (owner cannot be deprived his right in common elements by board unless power granted by documents).

95. *See, e.g.*, Wilson v. Goldman, 699 P.2d 420 (Colo. Ct. App. 1985); Johnson v. Hobson, 505 A.2d 1313 (D.C. 1986); Killearn Lakes Homeowners Ass'n v. Sneller, 418 So. 2d 1214 (Fla. Ct. App. 1982). *See* G. KORNGOLD, *supra* note 10, at 372-75.

96. For an excellent discussion of this issue, see Note, *Judicial Review of Condominium Rulemaking*, 94 HARV. L. REV. 647 (1981).

97. Hidden Harbour Estates, Inc. v. Norman, 309 So. 2d 180, 182 (Fla. Ct. App. 1975). *Accord* Johnson v. Hobson, 505 A.2d 1313 (D.C. 1986); Ryan v. Baptiste, 565 S.W.2d 196 (Mo. Ct. App. 1978); Garrison Apartments, Inc. v. Sabourin, 113 Misc. 2d 674, 449 N.Y.S.2d 629 (Civ. Ct. 1982); Justice Court Mut. Hous. Coop., Inc. v. Sandow, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (N.Y. Sup. Ct. 1966).

98. *See, e.g.*, Euclid v. Ambler Realty Co., 272 U.S. 365 (1926); Moore v. East Cleveland, 431 U.S. 494 (1977).

99. *See* Stratford v. State-House, Inc., 542 F. Supp. 1008 (E.D. Ky. 1982).

100. *See, e.g.*, Rywalt v. Writer Corp., 34 Colo. App. 334, 526 P.2d 316 (1974); Thanasoulis v. Winston Tower 200 Ass'n, 214 N.J. Super. 408, 519 A.2d 911 (App. Div. 1986); Linden Hill No. 3 Coop. Corp. v. Berkman, 61 Misc. 2d 275, 305 N.Y.S.2d 623 (N.Y. Sup. Ct. 1969); *see* Note, *supra* note 96, at 663-67.

have noted that the business judgment test as currently constituted adds little protection.[101]

The courts need to examine more clearly the standards for review of private government decisions in light of the competing policies. In addition to the usual reasons for deference—for example, the expertise of the private government compared to the courts and the prohibitive cost of reviewing all determinations—the policies underlying servitude enforcement require that courts exhibit great caution before imposing their judgment. The private government should be sustained in all but the most extraordinary cases, because the efficiencies of delegating decisions to a private government should not be undermined, the owners' free choice to enter into a community relationship should be respected, and the democratic participatory process of the private government should be supported by the courts. The courts should override only those judgments that are clearly irrational, on the theory that such grossly unreasonable and inefficient decisions violate the legitimate expectations of a purchaser.[102]

Although this would limit challenges claiming that the community's cost/benefit decision is incorrect, an individual is not left without protection. As discussed above, decisions could be challenged because of unequal treatment, lack of process and excessive dead hand control.[103] Such a scheme strikes an appropriate balance between communal goals and individual rights.

Decisions by private governments, therefore, may be detrimental to the extent that they lack process, permit unequal treatment of owners, are ultra vires or are wholly irrational. These problems, however, do not require the arbitrary termination of servitudes after twenty years. Such a step would not, on the one hand, alleviate the problems that arise during the initial twenty-year period and, on the other hand, it would terminate beneficial servitudes prematurely. Courts can develop doctrines to address the specific problems with servitude enforcement by private associations if courts more clearly address and accommodate competing policies.

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101. *See* Thanasoulis v. Winston Tower 200 Ass'n, 214 N.J. Super. 408, 412, 519 A.2d 911, 913 (App. Div. 1986) (dissenting opinion).

102. The decision in Justice Court Mut. Hous. Coop., Inc. v. Sandow, 50 Misc. 2d 541, 270 N.Y.S.2d 829 (1966), was such a restriction. A rule limiting the playing of musical instruments by any individual to one and one-half hours a day was too roughly drawn to address legitimate noise problems and merely put a burden on the owners.

103. The courts' role might especially be limited when the private government's action is legislative in nature, applying to the larger community, as opposed to quasi-judicial, dealing with one particular owner. *See* Fasano v. Board of County Comm'rs, 264 Or. 574, 507 P.2d 23 (1973) (requiring increased judicial scrutiny of local legislature's quasi-judicial zoning decisions).

C. Methods of Dispute Resolution

Disputes over servitudes administered by a private government can involve different parties and a wide variety of issues. The assoeiation can have a grievance with an individual owner, such as a failure to pay assessments or violation of a servitude or rule;[104] an owner can object to the association's action, for example, the denial of approval of architectural plans or failure to provide services;[105] or two owners can be in conflict over alleged anti-social behavior, such as noise.[106] As I have indicated earlier, we should not be alarmed by such disputes. Rather, we should consider how to resolve efficiently such conflicts in ways that preserve individual autonomy and reinforce the communal structure. Over recent years alternate dispute resolution devices have grown. Now a wide array of choices exist, ranging from negotiation between the parties to mediation to binding arbitration to formal adjudication.[107] We need to explore further using alternate techniques to resolve conflicts within private governments.

In determining the best method for solving a given dispute, the particular disputants, issues, and underlying goals must be considered. In addition to the efficiency and low cost of alternate dispute resolution,[108] the ongoing relationship among owners and the association may make negotiation and mediation preferable to adjudication.[109] The parties to a servitude scheme have a stake in preserving a continuing, cooperative relationship and avoiding bitter and protracted litigation. Nonadjudicatory resolution might reinforce ties and reconciliation among neighbors.[110] It might be especially helpful when the conflict's cause is due more to social antagonisms among neighbors than to a justiciable legal issue.

Moreover, many subdivision disputes are "polycentric," where

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104. *See* S. BARTON & C. SILVERMAN, *supra* note 75, at 20-22, 23-27.

105. *See RCA Characteristics and Issues*, in INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 10.

106. The association may often become involved in such a dispute by prosecuting the violating owner under an existing rule or by passing a new regulation of the behavior. *See* Justice Court Mut. Hous. Coop., Inc. v. Sandow, 50 Misc. 2d. 541, 270 N.Y.S.2d 829 (1966).

107. For a description of these choices, see S. GOLDBERG, E. GREEN, & F. SANDER, DISPUTE RESOLUTION 7-10 (1985); S. LEESON & B. JOHNSTON, ENDING IT: DISPUTE RESOLUTION IN AMERICA (1988); McMunigal, *The Costs of Settlement: The Impact of Scarcity of Adjudication on Litigating Lawyers*, 40 U.C.L.A. L. REV. 833 (1990); Ray, *Condominium Disputes: Fitting the Forum to the Fuss*, 3 PROB. & PROP. 20 (1989).

108. *See* S. GOLDBERG, E. GREEN, & F. SANDER, *supra* note 107, at 5.

109. *See id.* at 10-11; Sander, *Varieties of Dispute Processing*, 70 F.R.D. 111, 118-26 (1976).

110. *See* S. LEESON & B. JOHNSTON, *supra* note 107, at 149; McThenia & Shaffer, *For Reconciliation*, 94 YALE L.J. 1660, 1664, 1667 (1985); Shonholtz, *Neighborhood Justice Systems: Work Structure, and Guiding Principles*, 5 MEDIATION Q. 3, 13-16 (1984).

resolution of a dispute will affect many others and where there is no clear definition of rights.[111] Consider, for example, an owner challenging a private government's rejection of building plans under a covenant calling for architectural review. The issue's resolution will affect the rest of the community (by allowing or barring the alleged "eyesore"). Additionally, the legal rule is quite flexible, only requiring fair and reasonable application of the standard[112] and consistency with other houses.[113] Formal adjudication may not be most helpful in such situations.[114]

Professor Sally Engle Merry has argued that alternate dispute resolution devices cannot be imposed without considering the culture's view of how disputes should be resolved.[115] She maintains that many Americans resist alternate dispute resolution because of "Americans' widespread cultural conceptions of legal solutions to problems."[116] She notes that "when disputants are bound together by multi-stranded social relationships, they will seek to compromise their differences, but when they have only single-stranded social ties, they will seek victory in adversarial contests rather than attempt to reach compromise."[117] The special economie, social and physical interdependence of owners within private governments may create a subculture of multi-stranded relationships where alternate dispute resolution is a viable and valuable option.

On the other hand, alternate dispute resolution may not be appropriate in some private government disputes. Formal adjudication may be necessary where some issues are novel or important.[118] This may especially be true if there is an unequal power relationship between the disputants,[119] which may be the case when the community seeks enforcement against an individual. Consider, for example, an association trying to enforce a rule restricting occupancy to a "traditional" single family.[120] Such an important issue of personal autonomy requires clear judicial resolution, especially since a nonconformist standing

111. Fuller, *The Forms and Limits of Adjudication*, 92 HARV. L. REV. 353, 394-404 (1978).

112. *See, e.g.*, Amoco Realty Co. v. Montalbano, 133 Ill. App. 3d 327, 478 N.E.2d 860 (1985); Gosnay v. Big Sky Owners Ass'n, 205 Mont. 221, 666 P.2d 1247 (1983).

113. *See, e.g.*, Rhue v. Cheyenne Homes, Inc., 168 Colo. 6, 449 P.2d 361 (1969); Marose v. Deves, 697 S.W.2d 279 (Mo. Ct. App. 1985).

114. *See* Fuller, *supra* note 111, at 394-404.

115. Merry, *Disputing Without Culture* (Book Review), 100 HARV. L. REV. 2057, 2060, 2062 (1987).

116. *Id.* at 2062.

117. *Id.* at 2061.

118. *See* Fiss, *Out of Eden*, 94 YALE L.J. 1669 (1985); Fiss, *Against Settlement*, 93 YALE L.J. 1073 (1984).

119. *See* Fiss, *Out of Eden, supra* note 118.

120. *See supra* note 59 and accompanying text.

alone may be unable to reach satisfactory results through negotiation and mediation.

Alternate dispute resolution has been used to a limited extent in residential associations.[121] One study shows that a very large percentage of disputants within condominiums were willing to submit the controversy to arbitration or mediation.[122] We need to continue to study the types of conflicts and disputants within servitude regimes and develop appropriate dispute resolution schemes that can be required by the servitude documents or imposed by the courts.

IV. CONCLUSION

As we near the end of the twentieth century, servitude regimes and private residential governments can be employed to bring many benefits to homeowners. Less developable land is available, city and suburban sprawl tests our transportation resources, interdependence of landowners has increased with geographical proximity, and the environmental fallout of poorly planned development is magnified. Servitude regimes and private governments permit efficiencies, free choice, self-fulfillment and communal participation. However, there are costs to individuals and society. We need to address these problems and develop solutions in a way that preserves, not terminates, the benefits of servitudes.

121. *See* S. BARTON & C. SILVERMAN, *supra* note 75, at 23; INTERGOVERNMENTAL RELATIONS, *supra* note 3, at 5, 19; S. WILLIAMSON & R. ADAMS, DISPUTE RESOLUTION IN CONDOMINIUMS: AN EXPLORATORY STUDY OF CONDOMINIUM OWNERS IN THE STATE OF FLORIDA (Human Resources Management Center, College of Business Administration, University of North Florida 1987); *see generally* Ray, *supra* note 107.

122. S. WILLIAMSON & R. ADAMS, *supra* note 121, at 63 (87.7% of complainants were willing to accept arbitration and 86.4% were willing to accept mediation).