

Servitudes, Security, and Assent: Some Comments on Professors French and Reichman

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Easements and covenants are second only to the “fee tail” or perhaps to “springing uses” as a symbol of the mindless formalism of traditional property law. Aside from that, when we consider what easements and real covenants *do*—bind land owners to some previous owners’ agreements in which the current owners have had no say—the puzzle is that a free and rational nation permits these legal arrangements at all.¹ Even the name, “servitude,” which Professors Reichman and French prefer to use in their excellent articles,² has a slight ring of involuntarism.

As these two authors tell us, we tolerate these “dead hand” arrangements because they provide a long lasting security for land development and encourage property owners to invest in the long term improvements that are essential to the productive use of real estate. As Jeremy Bentham told us over a century ago, secure expectations of return are a *sine qua non* of enterprise;³ if the community wants to encourage my neighbor to invest time and effort in a solar heating panel, it had better let him agree with me that I *and my successors* will keep my trees from overshadowing his roof.

Professors French and Reichman agree that the old rules and limitations, clumsy though they are, do help to carry out this basic purpose of securing property for land development.⁴ Their argument is not that the old rules are senseless, but rather that their functions can be served

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1. See Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 12 (1978).

2. French, *Toward a Modern Law of Servitudes: Reweaving The Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982); Reichman, *Toward A Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982).

3. J. BENTHAM, *THE THEORY OF LEGISLATION* 109-22 (C. Ogden ed. 1931) (1st ed. 1840).

4. French, *supra* note 2, at 1263-64; Reichman, *supra* note 2, at 1183.

more easily.⁵ We should look to the functions that the old rules perform, they say, rather than to the rules themselves.⁶ If we do, not only will we be able to deal with all the different forms of servitudes in a unified fashion, but we will also be able to uphold useful servitudes while applying streamlined methods to rid ourselves of the outdated ones.⁷

This is a thoroughly sensible approach. But it is well to recall that we are devising new strategies in an old war among generations of land owners, and we should not be overly surprised if we wind up in some of the same old trenches. As the following sections will elaborate, a major function of the older doctrines has been rather political. Many of the courts' complex distinctions help us to infer whether a new taker has voluntarily accepted the obligations of a servitude—an inference especially important in a society that aspires to conduct its affairs on the basis of free choice.⁸ Indeed, as rhetoric, the inference of continuing or renewed assent to some degree defuses the intergenerational conflict inherent in these long-lasting obligations.

The quest for signs of continuing assent—the effort to find a reasonable inference that new parties voluntarily undertake the obligations of their predecessors—is likely to persist even in a reformed law of servitudes. In the following sections I will discuss at least two aspects of this persistence. First, even in a reformed law of servitudes, there could be at least a partial re-elaboration of the old distinctions that attempted to ascertain continuing voluntary assent to servitude obligations; any such new distinctions could be uncomfortably close to the old distinctions among “easements,” “equitable servitudes,” and “cove-

5. French, *supra* note 2, at 1265-66; Reichman, *supra* note 2, at 1182.

6. French, *supra* note 2, at 1266; Reichman, *supra* note 2, at 1182.

7. French, *supra* note 2, at 1304; Reichman, *supra* note 2, at 1258-59.

8. Professor French may have voluntary acceptance partly in mind when she asserts that the older doctrines served “fairness” functions. French, *supra* note 2, at 1282, 1284, 1295. Consent, whether real or constructive, may be a fundamental element in a concept of fairness, as it is in contractarian political theories. See generally J. RAWLS, A THEORY OF JUSTICE (1971) (discussing a version of social contract theory). But fairness may also include other elements. My own view is that the narrower issue of consent is more helpful than “fairness” in understanding servitude law because the parties' continuing acceptance speaks more directly to the intuitive objections to the “dead hand” of ancient servitudes. Leaving aside inefficiency considerations, our chief worry about old servitudes is that they may be dictatorial, holding later landowners to obligations that they might prefer to negotiate for themselves. At the same time, we do not want to release owners from obligations that they have agreed to. See Browder, *supra* note 1, at 12-13.

If continuing voluntary consent is viewed as an underlying theme in servitude law, the later 19th century importation of contract theory into servitude law may be more easily explainable, even if, as Professor Reichman argues, contract theories were doctrinally unsatisfactory in the context of servitudes. Reichman, *supra* note 2, at 1211-30.

nants." Second, we might well be wary, as the older courts were, about a reform doctrine that too easily relaxes servitude obligations when we cannot infer assent of the beneficiaries.

I. OLD DISTINCTIONS IN NEW BOTTLES

The traditional rules about servitudes took three rather different directions, depending on the form of the original agreements. From the point of view of the "burdened" property owner, these forms were roughly as follows:

Situation 1. I agree for myself and my successors that you may use my land or some part of it for X (traditionally an "easement").

Situation 2. I agree for myself and my successors not to do Y on my land (traditionally an "equitable servitude").⁹

Situation 3. I agree for myself and my successors to do Z on my land (traditionally a "covenant").

Clever law students can easily collapse these three servitudes into one: your right to cross my lot equals my refraining from impeding your crossing which equals my use of my property in such a manner as to leave open your way. If it is all a matter of labels, why not treat all of these situations as a single form of property right, as our authors suggest? The older servitude doctrines did not do so, and the reasons for their divergent rules could persist in such a way as once again to split our authors' unified approach. One concern that loomed very large in the older distinctions had to do with considerations of notice, considerations about which I must digress for a moment.

From the point of view of aiding land development, a major purpose of notice is to provide security to buyers of property. If buyers risked unanticipated obligations from unexpected beneficiaries, they might be reluctant to invest in land development, and ultimately land would be less than fully utilized. Just as importantly, however, notice permits an inference of the continued voluntary character of servitude obligations. If future takers purchase a piece of property with notice of a restriction made by a predecessor, then, in the absence of duress or fraud, they may ordinarily be thought to have bargained for the property with the restriction in mind, and to have shown themselves willing to abide by it.

Notice of servitudes may take at least two forms: notice in the documents or records of title, and notice that is signalled upon inspec-

9. This is the least distinct category. As Professor Reichman points out, Situation 2 could also be characterized as a "negative easement" or a "covenant." Reichman, *supra* note 2, at 1181.

tion of the land, by the duties and properties involved in the servitude itself. In a time of incomplete or nonexistent legal methods for recording servitudes, the courts focused on the latter type of notice. Indeed, as our authors tell us, a chief function of the old "touch and concern" doctrine was to assure that the physical character of the land obligation gave notice to future takers.¹⁰ But even aside from "touch and concern" matters, Situations 1, 2, and 3, as outlined above, differ sharply with respect to their inherent capacity to give notice. If in the past I agreed that you had permission to drive over my lot, one who buys from me should see your tracks and should ask about your rights before buying my property (Situation 1). However, if I agreed not to build on my lot so that you could enjoy the sunshine (Situation 2), or if I agreed to maintain a mill so that you could grind your corn (Situation 3), then one who buys from me may have no clear visual or other sensual signals upon which to base an inquiry about your possible servitude rights that would bind him as my successor. As our authors tell us, the older rules elaborately distinguished between these situations, and enforced only those servitudes that were likely to give notice of themselves.¹¹ But, our authors say, an adequate recording system obviates many of these distinctions, since the recorded documents give notice even of nonobvious obligations.¹²

In this line of thinking the authors are in good company; indeed, as Professor Reichman's account of the American "horizontal privity" rule suggests, even the older courts apparently tried to expand the enforceability of servitudes to the limits of the recording system.¹³ If all types of servitudes can be recorded as property interests, then supposedly we can dispense with the divergent rules for Situations 1, 2, and 3, since we need not rely on physical features of the land to give notice. Away, then, with anomalies such as the ban on "negative" servitudes that are passively enjoyed or carried out, since the recording system will tell the buyer what he needs to know about the restriction, and with whom he must deal to extinguish it. When one buys property with a recorded restriction, one may be presumed to have known about and to have accepted the obligation.

But is the presumption valid? Perhaps, but only insofar as the recording system is adequate. Some of the comments in these articles

10. French, *supra* note 2, at 1290; Reichman, *supra* note 2, at 1233.

11. French, *supra* note 2, at 1286-87, 1290; Reichman, *supra* note 2, at 1190.

12. French, *supra* note 2, at 1284; Reichman, *supra* note 2, at 1190.

13. Reichman, *supra* note 2, at 1220-21.

suggest that, because of lapses in the recording system, we may not be finished with the older inquiries about types of properties and duties in the different servitudes, and about their different inherent abilities to give notice of themselves.¹⁴ Both of our authors have to deal with that horribly fascinating character in property law, the adverse possessor, who has no record notice of restrictions at all.¹⁵ And quite aside from the idiosyncratic adverse possessor, our authors suggest that the record documents might not completely inform even one who sees them.¹⁶

For a servitude to burden or benefit successors in interest, these authors agree, the original arrangers must have so intended;¹⁷ presumably we respect their intentions so as to encourage others to make arrangements that enhance the use of land. But how do we know whether they intended a servitude to run? They may have said so in the recorded documents, but mere boilerplate statements of intent will not suffice.¹⁸ Conversely, our authors say, even if the parties said nothing in the recorded documents, we may think that some servitudes were intended by implication.¹⁹ Where, then, may we turn to discover whether the parties might have intended that their arrangements would bind future takers?

In this task it is clear that we must resort once again to the character of the properties and to the duties involved in the purported servitude. Suppose that my neighbor and I agreed that I would restrict my use of my property. If we had intended that my obligations extend to my purchaser, we—and especially my neighbor—surely would have wanted to make sure that my purchaser was aware of them. Hence, the issue of our original “intent” overlaps with the notice that my successor receives: the less obvious the obligations, the more likely we would be to state and record them explicitly. Thus, even without our explicitly saying so, my neighbor and I probably thought that my purchaser should have to allow my neighbor to drive over the right-of-way, since, as anyone can see, the neighboring lot needs access. However, it is not so clear that we expected my purchaser to refrain from putting up a TV antenna, and it is even less clear that our expectation was that my purchaser should keep the house painted blue. The real issue is, of course, what a buyer could tell about the obligation by inspection of the prop-

14. French, *supra* note 2, at 1309; Reichman, *supra* note 2, at 1251.

15. French, *supra* note 2, at 1299-1300; Reichman, *supra* note 2, at 1251-52.

16. French, *supra* note 2, at 1309; Reichman, *supra* note 2, at 1251.

17. French, *supra* note 2, at 1284-86; Reichman, *supra* note 2, at 1244.

18. French, *supra* note 2, at 1290, 1306.

19. French, *supra* note 2, at 1289; Reichman, *supra* note 2, at 1244.

erty, and these different situations would convey different information. Even with a unified doctrine of servitudes, then, it might not be too surprising if the courts, in implying intent, once again use distinctions reminiscent of the older distinctions among "easements," "equitable servitudes," and "covenants."²⁰

Perhaps even more importantly, in the modern use of servitudes vestiges of the older distinctions can be expected to reappear in the interpretation of covenants for the governance of planned communities. My condominium deed tells me that I am a member of the Homeowners' Association and that I must abide by its rules, even new rules that are not now in force. *All* the new rules? Certainly not, for they must be, as the courts say, "reasonable."²¹ And what is a "reasonable" Association rule? On the whole, it is one that I should have expected.²² Often, though not always, reasonable rules are associated with the physical maintenance of the community²³—a matter that might once have fallen under the doctrine of "touch and concern."

Condominium units' proximity and shared space require considerable accommodation, of course, and as a unit purchaser I should expect that other owners' needs will affect in various ways my property and my uses of it. Those needs predictably give rise to Association rules. But once again the older distinctions may reemerge because they relate to the kinds of rules of which I was "on notice" that my Association might pass. Thus, I might be charged with anticipating a rule that allows community custodians to come into my unit to repair the electrical

20. The courts might be aided in their analysis by using Hohfeldian labels in these various situations, and might describe the different categories as "privilege," "immunity," or "right/duty" servitudes. However, given the capacity of labels to take on a life of their own, I am not so sure that Hohfeld's labels, in the long run, would be much less confusing than "easement," "equitable servitude," and "covenant." For Hohfeld's categories, see Hohfeld, *Faulty Analysis in Easement and License Cases*, 27 YALE L.J. 66, 69 n.8 (1917); Hohfeld, *Some Fundamental Conceptions as Applied in Judicial Reasoning*, 23 YALE L.J. 16, 128-58 (1913). For an application of these categories to homeowners' association rules, see Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 268-73 (1976).

21. *Hidden Harbour Estates v. Norman*, 309 So. 2d 180, 182 (Fla. Dist. Ct. App. 1975); *Amoruso v. Board of Managers of Westchester Hills Condominium*, 38 A.D.2d 845, 846, 330 N.Y.S.2d 107, 109 (1972); *Justice Court Mut. Hous. Coop., Inc. v. Sandow*, 50 Misc. 2d 541, 544, 270 N.Y.S.2d 829, 832 (1966).

22. *See Rhue v. Cheyenne Homes, Inc.*, 168 Colo. 6, 8, 449 P.2d 361, 362 (1969) ("no secret" that architectural controls are used in planned communities).

23. *See Justice Court Mut. Hous. Coop., Inc. v. Sandow*, 50 Misc. 2d 541, 545, 270 N.Y.S.2d 829, 832 (1966) (distinguishing a "lifestyle" regulation from those "essentially pertaining to use of the land"). *See also Forest Park Coop., Inc. v. Hellman*, 2 Misc. 2d 183, 184, 152 N.Y.S.2d 685, 686 (1956) (washing machines prohibited from cooperative housing units because of adverse impacts of the machines on other residents).

system; I might have even reasonably expected a rule that prohibits me from adding a wading pool without the architecture committee's approval; but should I have anticipated a rule that requires me to keep a Doberman security dog? In interpreting the "reasonableness" of the Association's rules, even in a reformed law of servitudes, we may once again find the courts adumbrating familiar distinctions with respect to notice. They may well find differing levels of "reasonableness"—i.e., my ability to predict the need and to anticipate a rule—in situations where (1) I must let someone else do X in my unit; (2) I must refrain from doing Y in my unit; or (3) I must do Z in my unit. Thus, in the attenuated form of the "reasonableness" of community rules, we may once again find the ghosts of easements, equitable servitudes, and covenants—not to speak of "touch and concern."

II. TOUCHING AND CONCERNING CHANGED CIRCUMSTANCES

In the older interpretations of servitudes, the fabulously frustrating doctrine of "touch and concern" occupied a central place. The authors here sensibly perceive that the function of "touch and concern" is to require that servitudes enhance the use of a real estate resource.²⁴ If the servitude's net effect is to assist efficient real estate utilization, it serves the purpose for which we have servitudes; moreover it is likely to involve rights or duties that land owners might expect, and thus gives reasonable notice of its continuing nature to future buyers.²⁵ A reformed servitude law, then, might well substitute a phrase such as "land-development-related" for "touch and concern," if only to shed the baggage of those old touch and concern doctrines, with all their vagueness and circularity.²⁶ Professor French even suggests that, since "touch and concern" issues collapse with "usefulness," we can dispense with "touch and concern" altogether, if we can apply an expanded doc-

24. French, *supra* note 2, at 1289; Reichman, *supra* note 2, at 1232-33. See also Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 143-50 (1978) (socioeconomic purpose of the "touch and concern" rule) [hereinafter cited as *Judicial Supervision*].

25. *Judicial Supervision*, *supra* note 24, at 143-50.

26. As to circularity, see Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 210-11 (1970). Among other things, Berger discusses the famous "test" proposed by Bigelow: a covenant touches and concerns the land if it affects the legal interests of the parties as owners of the land, and particularly if it affects the value of those legal interests. The test is circular, however, since the court's determination regarding "touch and concern" determines whether the covenant affects the legal interests of the parties as landowners. Berger's own approach is based on ordinary language analysis, in which a covenant would be held to touch and concern the land if the normal expectations of society would so dictate. *Id.* at 211-12.

trine of "changed circumstance" to rid ourselves of useless servitudes.²⁷

This is a sensible approach, but there is a rub: to whose understanding of "usefulness" (or land-development-relatedness) are we to turn? In putting forth the doctrine of "changed circumstance" to quash or limit obsolete servitudes, our authors imply that our own current understanding of usefulness should prevail over the understanding of the original parties.²⁸

There is something to be said for this view. If the servitude no longer aids land development on the basis of today's evaluation of costs and benefits, then it seems inefficient to enforce it against current takers; what is more, today's buyer is less likely to expect an antiquated servitude (assuming that the record notice is insufficient).²⁹

It is well to recall, however, that the older doctrines were not always quite so free about the "changes of circumstance" that could release servitudes. For one thing, the courts' understanding of the relevant "changes," and their distinctions among different types of changes, indicated that obsolescence was not the only matter at issue. As with the older concern for notice, judicial treatment of "changed circumstance" demonstrates a special concern for the parties' acceptance of the situation—but here in the weaker form of their passive acceptance of the extinguishment of the servitude. If the neighbors in a residentially-restricted subdivision allow a change by failing to object when one of their fellow owners builds a warehouse, then that "change of circumstance" may be used as a way of saying that they acquiesced in the relaxation of the restriction. They could have objected and did not, and thus signalled that they did not care very much if the servitude was relaxed.³⁰ As some earlier judges realized, however, a quite differ-

27. French, *supra* note 2, at 1300-01.

28. French, *supra* note 2, at 1301; Reichman, *supra* note 2, at 1259.

29. Professors French and Reichman also mention an argument derived from an interpretation of the original parties' intent: presumably the original parties did not intend the covenant to last beyond the point of obsolescence. French, *supra* note 2, at 1310; Reichman, *supra* note 2, at 1259. See also Browder, *supra* note 1259, at 38 (changed conditions doctrine). This argument could be too facile; it is certainly conceivable that the original parties entered into a covenant precisely because they feared that some desired use, which they wished to preserve, might come to be viewed as obsolete in the future.

30. See, e.g., *Margolis v. Wilson Oil Co.*, 342 Mich. 600, 602-03, 70 N.W.2d 811, 812 (1955) (failure to object to previous violations of regulation constitutes abandonment). Where "changed circumstance" applies to changes within the neighborhood, the doctrine resembles estoppel, laches, or abandonment defenses to servitudes, and interior changes are often denominated by those other names. All may be viewed as doctrines by which the beneficiaries of a servitude are inferred to accept passively the loss of the restriction. *Id.* See also *Burton v. East Point Motors, Inc.*, 209 Ga. 872, 874, 76 S.E.2d 700, 702 (1953) (plaintiffs, who waited until building was almost

ent situation is presented when the change occurs outside the covenanted area. Let us suppose that a would-be warehouse operator buys a restricted lot in the hopes of building his warehouse, and then argues that the encroachment of manufacturing uses, outside of the restricted area, is a "change of circumstance," rendering the servitude obsolete and hence unenforceable because the costs of maintaining the servitude exceed the benefits. The courts have been slower to grant relief on this basis, since the neighbors never had a claim against the outside changes, and their inaction cannot be construed as acquiescence to a change within the restricted area.³¹ Moreover, the warehouse operator took the restriction into account when he purchased with knowledge of it.³² In any event, if the restriction is as useless as he says, and the property so much more valuable without it, then he should be able to buy the neighbors' permission relatively cheaply.

At this point, of course, the infamous holdout appears: the neighbor who insists on his rights under an obsolete servitude to which no

completed to object, abandoned their right to do so). *But see* *Thodos v. Shirk*, 248 Iowa 172, 182-86, 79 N.W.2d 733, 739-41 (1956) (violation must be so general as to frustrate the object of the regulation if failure to object is to constitute abandonment); *East Parker Properties v. Pelican Realty Co.*, 335 So. 2d 466, 471 (La. Ct. App.), *reh'g denied*, 338 So. 2d 699 (La. 1976) (must be "frequent and substantial" violations of the restrictions without objection to constitute abandonment).

Even if the change occurs within the restricted area, the courts will not deny enforcement of a servitude unless the change was one to which the plaintiff might have been expected to object, again implying that the theory behind nonenforcement is one of acquiescence: we cannot infer acquiescence unless the change in question might have been expected to matter to the plaintiff. *See* *Whitaker v. Holmes*, 74 Ariz. 30, 33, 243 P.2d 462, 464 (1952); *Thodos v. Shirk*, 248 Iowa at 183, 79 N.W.2d at 739.

Passive consent under any of these doctrines ought not be lightly inferred in large projects, where the beneficiaries of the servitudes might face substantial transaction costs or free rider problems in enforcing the servitude. For some methods to deal with this problem, see Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 717 (1973).

A concept of acquiescence may underlie marketable title statutes, which bar assertion of property interests unless they have been asserted through a process of recording within a given statutory period of time. *See* P. BASYE, *CLEARING LAND TITLES* 368-71 (2d ed. 1970).

31. *See, e.g.,* *Welshire, Inc. v. Harbison*, 33 Del. Ch. 199, 206, 91 A.2d 404, 408 (Del. 1952); *Toues, Inc. v. La Salle Nat'l Bank*, 34 Ill. App. 3d 236, 242, 339 N.E.2d 3, 7 (1975); *Eilers v. Alewel*, 393 S.W.2d 584, 589 (Mo. 1965); *Fox v. Miner*, 467 P.2d 595, 599 (Wyo. 1970). Looser interpretations of changed circumstance doctrine can draw stinging dissents. *See, e.g.,* *Wolff v. Fallon*, 44 Cal. 2d 695, 698, 284 P.2d 802, 804 (1955) (Spence, J. & Traynor, J., dissenting); *Downs v. Kroeger*, 200 Cal. 743, 750, 254 P. 1101, 1103 (1927) (Waite, C.J., Richards, J. & Curtis, J., dissenting); *Hecht v. Stephens*, 204 Kan. 559, 565, 464 P.2d 258, 264 (1970) (Fontron, J., dissenting).

32. *See* *Tones, Inc. v. La Salle Nat'l Bank*, 34 Ill. App. 3d 236, 243, 339 N.E.2d 3, 8 (1975); *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 168-69, 172 N.E. 455, 457-58 (1930); *Fox v. Miner*, 467 P.2d 595, 599 (Wyo. 1970).

one now would agree because its costs outweigh its benefits. To overcome this mean or greedy holdout, our authors would apparently apply a "changed circumstance" doctrine, either to ignore the holdout's claims altogether, or to compensate them only at the "reasonable" price of damages.³³ There are several grounds for objection to this use of changed circumstance doctrine in pursuit of efficiency. First of all, it is rather surprising that use of the doctrine is suggested by authors who otherwise urge that servitudes be viewed as property interests. While it is true that the neighbors may "hold out" against the rational warehouse operator, they would be equally capable of "holding out" if the warehouse firm needed their land in fee.³⁴ The right to "hold out," for whatever idiotic reasons, is an aspect of the right to hold property.³⁵ 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. The mere fact that some other private individual might put my property to a higher market-value use than I do does not mean that he is serving a public purpose, so that I have to "sell" to him at the "price" of market damages. If we are to take servitudes seriously as property rights, then the neighbors' holdout is perfectly legitimate.

Second, the holdout has too often been treated as a rascal. Sometimes the purported holdout has a genuine interest in his property right, however irrationally inflated that interest may seem to the world at large.³⁶ To protect such an owner, we have to protect the opportunist as well, except insofar as doctrines such as duress or unconscionability enable us to distinguish between the two.³⁷ And sometimes the holdout

33. French, *supra* note 2, at 1301; Reichman, *supra* note 2, at 1258-59. Of the two authors here, Professor Reichman appears to take a somewhat more cautious view of the use of "changed circumstance" and notes the doctrine's likeness to a private eminent domain. See *Judicial Supervision*, *supra* note 24, at 157.

34. In any event, a clever buyer may be able to use neighborhood pressure to overcome the holdout. He may, for example, offer a sum of money to each member of the entire neighborhood, on the condition that they all consent to the extinguishment of the servitude. See R. ELLICKSON & A. TARLOCK, *LAND USE CONTROLS* 1023 (1981).

35. Calabresi and Melamed, in *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1092 (1972) argue that the whole point of protecting an entitlement by a property rule (as opposed to a liability rule) is to assure that the entitlement passes only by voluntary agreement, giving the owner a "veto" over transfer.

36. See Cardozo's comments in *Evangelical Lutheran Church of the Ascension v. Sahlem*, 254 N.Y. 161, 168, 172 N.E. 455, 457 (1930) ("Rightly or wrongly, [the objecting landowner] believes that the comfort of his dwelling will be imperiled by the change, and so he chooses to abide by the covenant as framed.")

37. These doctrines may be available only to one with whom the "holdout" ultimately does strike a deal; the holdout's refusal to deal does not give rise to a wealth transfer. Cf. Gordley,

may confer a long term benefit, even though the benefit is not obvious at the time. One has only to read Professor Dunham's charming story about the crotchety Montgomery Ward, who thwarted construction in Chicago's downtown lakeshore park by insisting on his servitude right to an unobstructed vista to the lake, to realize that today's "holdout" may be tomorrow's culture hero.³⁸ Third, as I shall discuss shortly, holdout problems can be substantially diminished by limiting servitudes to a fixed duration which is understood by the parties at the outset and renegotiated periodically.

More fundamentally, when we test past restrictions by present-day conceptions of obsolescence, we are signalling to our contemporaries that their agreed upon servitudes may shift with the winds. Romantic philosophers might well regard such shifts as a breach of the social contract among generations.³⁹ But hard-nosed utilitarians also look to the effect on current enterprisers. The prospect of shifting legal interpretations of "usefulness" introduces an uncertainty into servitude transactions, such that the parties might be discouraged from the very land development that servitudes are intended to secure.⁴⁰ The social costs might well be considerable. Consider the developer who is willing to invest effort and expense on a handsome building if she knows that her work will last. She might attempt to preserve it through a covenant restricting alteration or demolition. But with a relaxed doctrine of "changed circumstance," can she be sure that her work will outlast a change in taste comparable to that separating the Victorian period from the 1950's? And might she not simply give up the idea altogether?

If we are seriously concerned about servitudes that outlast their usefulness for land development, there is a simpler and less unsettling way to limit inefficient servitudes. Although our present authors prefer servitudes of potentially infinite duration,⁴¹ other authors have urged that servitudes be limited to some fixed period.⁴² Indeed, with the pos-

Equality in Exchange, 69 CALIF. L. REV. 1587, 1613-16 (1981) (an exchange must occur to enable a party to challenge the validity of the deal).

38. Dunham, *The Chicago Lake Front and A. Montgomery Ward*, 25 U. CHI. L. SCH. REC. 11 (Winter 1979) (originally published as an appendix in WELFARE COUNCIL OF METROPOLITAN CHICAGO, OPEN SPACE AREAS (1966)).

39. E. BURKE, REFLECTIONS ON THE REVOLUTION IN FRANCE 108-11 (Arlington House ed. 1966).

40. J. BENTHAM, *supra* note 3, at 115-16. See also Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundation of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-18 (1967) ("demoralization costs," "efficiency gains," and "settlement costs").

41. French, *supra* note 2, at 1315 n.254; Reichman, *supra* note 2, at 1232.

42. URBAN LAND INSTITUTE, THE HOMES ASSOCIATION HANDBOOK 212 (Tech. Bull. No. 50, October 1964) [hereinafter cited as HOMES ASSOCIATION HANDBOOK]; Ellickson, *supra* note

sible exception of servitudes designed to assure permanently the continued duration of our natural or historic heritage, no servitude should be expected to last in perpetuity.⁴³ Servitudes rather should be geared to the expected life of the development they serve—land development, after all, is the chief reason why we put up with servitudes in the first place. The parties should state a limited length of time that they think the servitude will enhance the development; the legislatures too can state at least a presumptive life span of servitudes for different development purposes. Only thereafter should the courts tell us what a reasonable life expectancy might have been at the time the servitude was created—not what we *now* think its appropriate life is. Beyond that period, let the servitude be open for renegotiation.⁴⁴

French's and Reichman's papers suggest that a principle reason for nonnegotiated extinguishments of servitudes is that some changes may render negotiation impossible, so that the beneficiaries of a servitude cannot be assembled to agree upon its extinguishment even if they might be amenable.⁴⁵ Taken seriously, this suggestion argues that the changed circumstance doctrine should be confined to situations in which the claimants' rights have become too complex for extinguishment through ordinary negotiation.

One approach to this problem is to limit and specify the claimants to servitude rights, so that future negotiation for extinguishment remains possible. This function, Professor French points out,⁴⁶ was once

30, at 717; Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 182-83 (1978). For a statute imposing such a limitation, see MASS. GEN. LAWS ANN. ch. 184, § 27 (West 1977).

43. Servitudes for the preservation of natural (and arguably historical) resources might be perpetual because they are designed to assure no development, a situation that could last indefinitely. See *infra* note 47.

44. Limiting the duration of servitudes should lessen the difficulties of interpreting the original intent of the parties as to whether and how long the servitude should endure. If the parties set their own duration, the outside duration might be established by the reasonable life of the property development that is served by the restriction. Cf. HOMES ASSOCIATION HANDBOOK, *supra* note 42, at 212 (advocating periodic review of covenants). At the expiration of the agreed upon duration, the servitude may be viewed either as terminated (and renegotiable), or as presumptively renewed unless objected to by some specified percentage of affected property owners. *Id.* at 212, 336. The presumptive-renewal method is undoubtedly preferable where the parties limit the servitude to a period shorter than the expected life of the land development, e.g., condominium upkeep requirements that are set at a mortgage period, or at the first expected complete ownership turnover.

45. French, *supra* note 2, at 1316; Reichman, *supra* note 2, at 1256. See also *Judicial Supervision*, *supra* note 24, at 156 (prolonged negotiations and holdouts to raise compensation makes consensual extinguishment difficult to achieve at times).

46. French, *supra* note 2, at 1287.

served by restraints on easements in gross and by the requirement that servitudes benefit some ascertainable land. No doubt some old doctrines can be improved or expanded, while still limiting the numbers of potential claimants with whom future extinguishment must be negotiated.⁴⁷

No doubt too, given the complexity of modern real estate development, we should expect some matters to become too complex for negotiation. Here, the "changed circumstance" rule might be applied to limit one's remedies to damages, even where there is no inference of acquiescence to the change. But where negotiations are possible, it is hardly compatible with a property conception of servitudes to use "changed circumstance" as a general defense to servitude obligations, so as effectively to rearrange property rights through a kind of private eminent domain.⁴⁸

A general use of changed circumstance doctrine is not important if servitudes are limited in duration; if they are so limited, then the origi-

47. See, e.g., CONN. GEN. STAT. § 47-42a to -42c (1978) (allowing governmental bodies and charitable corporations to enforce servitudes for natural and historic preservation, even though they may own no benefitted land). See generally Breneman, *Historic Preservation Restrictions: A Sampling of State Statutes*, 8 CONN. L. REV. 231 (1976) (reviewing state historic preservation statutes); Note, *Conservation Restrictions: A Survey*, 8 CONN. L. REV. 383 (1976) (reviewing the development of state historic preservation statutes).

48. It is of course true that some current law does just this. See *Blakeley v. Gorin*, 365 Mass. 590, 313 N.E.2d 903 (1974), interpreting MASS. GEN. LAWS ANN. ch. 184, § 30 (West 1979). In *Blakeley*, the beneficiary of a covenant for light and air was confined to a damage remedy for a violation of the covenant, on the basis of a statute prohibiting an injunctive remedy where such a remedy was not "in the public interest." The court's discussion of the "public interest" dwelt largely on the point that the restricted hotel property would have much greater market value (and hence taxable value) if the restriction were removed. The decision suggests that servitudes might have little effect as property rights in the face of changing market forces; simply because the market would sufficiently enhance the hotel's value without the restriction, the hotel owners could extinguish the restriction by paying market-value damages to the owner of the benefitted property, rather than that owner's asking price.

As the authors here point out, there are comparable solutions in nuisance law. See the much-discussed *Boomer v. Atlantic Cement Co., Inc.*, 26 N.Y.2d 219, 257 N.E.2d 870, 309 N.Y.S.2d 312 (1970), in which the court held that a cement plant was a nuisance to nearby residents, but confined their remedy to damages. *Id.* at 228, 257 N.E.2d at 875, 309 N.Y.S.2d at 319. The dissent viewed this solution as an unlawful exercise of eminent domain for a private purpose. *Id.* at 230-31; 257 N.E.2d at 876; 309 N.Y.S.2d at 321 (Jasen, J., dissenting). *Boomer*, however, involved multiple claimants, and could be viewed as a solution required by the difficulty of negotiating a voluntary transaction. Moreover, it is at least arguable that "private eminent domain" in the nuisance context is more justifiable than it is in the servitude context, since the parties in nuisance cases have never had any consensual dealings with each other to define their respective property rights, and the courts must settle those often uncertain rights willy-nilly. The parties to a covenant, on the other hand, are at least indirectly related through the consensual arrangements of their respective predecessors in interest—arrangements that defined the very property interests at issue and that presumably were known and accepted by the current parties.

nal parties can count on an appropriate duration that they set themselves, while the rest of us can be assured that the "dead hand" will be removed unless future parties overtly signal its continued usefulness.

For the sake of utilization of land, the parties to a servitude agreement should be able to rely on its duration over the period in which they regard it as land enhancing. But if, as I believe to be the case, we can tolerate lasting servitudes more easily because we can infer the continued voluntary acceptance of successors in interest, then there is no reason why we should not, from time to time, require the successors to make their acceptance explicit.

CONCLUSION

Professors French and Reichman propose worthwhile changes in the law of servitudes. However, we must remember that the confusing doctrines that they attempt to unify developed in response to actual circumstances relating to the use of property. Any attempt to unify the concept of servitudes must recognize that these circumstances still exist, so that the pressures for slightly different rules may reappear in a new context. Additionally, a "changed circumstance" doctrine may very well frustrate one of the underlying purposes of servitude law—to secure efficient land development. A better approach is to limit servitudes to a fixed duration that is chosen by the original parties.