



Creating and Controlling Private Land Use Restrictions in Scotland and Louisiana: A Comparative Mixed Jurisdiction Analysis

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Property law systems in many developed nations around the world today face two common dilemmas. First, should property owners be permitted to establish by contractual agreement land use restrictions and affirmative obligations that bind future owners of the affected land? If the answer to this question is “yes,” then legal systems must decide what limits, if any, should be imposed on these powerful property arrangements. In recent years, scholars from across Europe have begun to address how Europe’s legal systems confront these fundamental property problems in the hope of discerning whether there is a basis for possible harmonization of their property law regimes.¹ Scholars in the United States have been debating these same issues since the early 1980’s when preliminary work began on the preparation of the *Restatement (Third) of Property: Servitudes*.²

This essay attempts to trace how two classically mixed jurisdictions, Scotland and Louisiana, have responded to this essential property law conundrum over the span of the last three centuries. By recounting the journeys these two legal systems have undertaken and by reflecting on both their similar points of origin and on the different paths and solutions they have pursued, this essay aims to illuminate some of the fundamental values of each jurisdiction’s property law regime. Before we begin to evaluate these two legal systems’ journeys, though, let us imagine for a moment the prototypical problem that these mixed jurisdictions faced.

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¹ SJEFF VAN ERP & BRAM AKKERMANS, EDS., TOWARDS A UNIFIED SYSTEM OF LAND BURDENS? (2006). See also STEVEN BARTELS & MICHAEL MILO, EDS., CONTENTS OF REAL RIGHTS (2004).

² RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000). The debate was launched in earnest with a symposium issue of the *Southern California Law Review*. See Uriel Reichman, *Toward a United Concept of Servitudes*, 55 S. CAL. L. REV. 1177 (1982); Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982). It continued with another symposium in the *Cornell Law Review*. See Gregory S. Alexander, *Freedom, Coercion and the Law of Servitudes*, 73 CORNELL L. REV. 883 (1988); Richard Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906 (1988).

1. Mr. Smith's Dilemma

Assume Mr. Smith³ owns a large parcel of land outside of Edinburgh, close enough that increasing demand for housing is causing the value of the property to rise, but still not yet subject to any effective public land use planning regulation either because such a system does not yet exist or the land is simply outside the jurisdiction of a public planning authority. Assume further that Mr. Smith wants to subdivide his land. He would like to retain a particularly nice lot for himself where he will construct his dream house. He would like to save one lot, adjacent to his own, to convey to his good friend Mr. Stone,⁴ who in turn will build a house. And he would also like to sell the remaining lots to individuals and families who will construct their own homes. In the end, Mr. Smith envisions a tasteful and cohesive community of similarly scaled and appointed residences.

But what can Mr. Smith do to assure the residential character of the entire neighborhood, to prevent the appearance of annoying commercial activities such as noisy public houses where malt or spirituous liquors might be sold and “victualling” might occur?⁵ How can he prevent even more bothersome operations, such as tanneries or slaughterhouses, from moving into the neighborhood? How can he be assured that the residential houses will actually be constructed? How can he guarantee that the houses will have a uniform appearance, be made of high quality, local stone and be adorned with tidy gardens and fences? In short, what can Mr. Smith do to make his cozy neighborhood dream come true?

In the late eighteenth century in Scotland, it was not exactly clear how Mr. Smith might proceed. Perhaps he might act like a real estate developer today and simply borrow money and build houses or apartment buildings himself and then lease them out, with each lease containing covenants detailing permitted activities, prohibiting others and setting forth the lessees' affirmative obligations. But this would entail substantial risk that the rental market for the dwellings might decline at some point in the future, thus jeopardizing Mr. Smith's ability to repay his loan. More importantly, even assuming funds were available to finance such a project, Mr. Smith would have to spend too much time and resources managing and maintaining all of this rental property and collecting rents.

Alternatively, Mr. Smith could always sell off each lot individually. In each document of conveyance (or some separate instrument) he could contractually obligate the purchaser to (a) build according to his plans and specifications within a date certain, (b) contribute to maintenance of common areas and facilities, and (c) not engage in any undesirable activities. The problem with this plan, of course, is that unless the contractual agreement with the original purchaser is understood “to run with the land”—to have “third party effect”—then Mr. Smith or any other land owners who were intended to have enforcement rights could not count on the original contractual commitments enduring very long. To the contrary, Mr. Smith, other intended beneficiaries, and their successors would have no choice but to attempt to reach a new set of contractual agreements with every new round of property owners—a prospect that would be difficult to achieve. Not only would the transaction costs for all this bargaining be enormous over time, but some property owners would undoubtedly resist even the most reasonable of Mr.

³ My hypothetical protagonist bears no family relation to Professor T.B. Smith, the real instigator, according to many observers, of the modern “mixed jurisdiction” movement. See Kenneth G.C. Reid, *The Idea of Mixed Legal Systems*, 78 TUL. L. REV. 5, 11-12 (2003).

⁴ Again, any resemblance to the late Professor Ferdinand Stone of Tulane Law School, who visited Edinburgh University's law faculty in 1963, is merely accidental. *Id.* at 12.

⁵ See e.g., *Earl of Zetland v. Hislop*, 1882 S.C. (H.L.) 40.

Smith's offers to enter into mutually binding and beneficial agreements, thus effectively "holding out" and frustrating his plans for continued neighborly cohesion.⁶

As a last alternative, Mr. Smith could simply sell the lots without any contractual agreements about future land use and development at all, and, if disagreeable activity emerges later, either he or other dissatisfied neighbors could bring nuisance actions against offending property owners. But this would be a risky strategy, as the standards for determining what activity amounts to an actionable nuisance are notoriously mushy.⁷ In short, this plan will hardly provide the kind of certainty that Mr. Smith and his serenity seeking neighbors would prefer to safeguard their significant land based investments.

Are there any other property law institutions Mr. Smith could use to realize his vision? Servitudes would seem to provide the likely way forward because they cure the transaction cost problems created by the limitations of the doctrine of contractual privity by forging a binding relationship between different land owners in which both *the burden* and *the benefit* of the servitude "run with the land" and bind successive owners of both the *servient* and the *dominant* estate.⁸ But in Scotland, just as in Louisiana, there were limits to what servitudes could accomplish just at the time that the demand for this kind of development began to increase dramatically—in Scotland in the late eighteenth and early nineteenth centuries, and in Louisiana a little later, at the dawn of the twentieth century.

2. The Inadequacy of Servitude Law

a. Scotland

Why were servitudes inadequate in Scotland? As an initial matter, servitudes could not be used to require the owner of a servient estate to do any affirmative act, such as to build a house or to maintain a common area like the park or square Mr. Smith envisioned at the center of his neighborhood.⁹ Although a servitude might be used to prevent the owner of a servient tenement from erecting a building or from obstructing a view,¹⁰ the presence of the traditional *in faciendo* limitation on the content of servitudes would undermine Mr. Smith's plans to require his neighbors to actively *create* his ideal neighborhood.

⁶ For a similar transaction cost based account of the need for restrictive covenants whose burdens and benefits "run with the land," see JOSEPH W. SINGER, *ENTITLEMENT: THE PARADOXES OF PROPERTY* 50-51 (2000). For another lucid account of the notorious "hold out" and his ability to cause social or economic waste, particularly when "elements of bilateral monopoly coincide with a large number of parties," and for an explanation of the economic waste that can result from the absence of viable restrictive covenants, see RICHARD POSNER, *ECONOMIC ANALYSIS OF LAW* 62, 65-66 (7th ed. 2007).

⁷ See LA. CIV. CODE ANN. art. 667 (West, Supp. 2007) (providing the statutory basis for nuisance actions under Louisiana law); W.M. GORDON, *SCOTTISH LAND LAW* 810-11 (1999) (observing the difficulty inherent in predicting what operations will constitute a nuisance given the infinite variety of potentially intolerable activities and the circumstantial and contextual nature of the judicial inquiry in any nuisance suit).

⁸ POSNER, *supra* note 6, at 65-66.

⁹ Ken Reid, *Modernising Land Burdens: The New Law of Scotland* in VAN ERP & AKKERMANS, *supra* note 1 at 63, 64; KENNETH G.C. REID, *THE LAW OF PROPERTY IN SCOTLAND* § 381(1996).

¹⁰ RODERICK PAISLEY, *LAND LAW* § 8.10, at 235 (2000)

Second, servitudes in Scotland were subject to a fairly rigid *numerus clausus*, a closed list, derived largely from Roman law.¹¹ To be sure, property owners could establish positive servitudes that gave the dominant owner some right of access over a servient tenement or a right to do something on it and obligated the servient owner to tolerate this access or activity—for example, servitudes of way, of passage, of pasturage, of aqueduct, and servitudes allowing the bleaching linen, or to obtain peat or turf for fuel.¹² But it was difficult, if not impossible, to establish innovative servitudes that were largely negative in character and that prevented an owner from making some use of his property if they deviated too much from the recognized list.¹³ Servitudes that were considered too dissimilar from the traditional Scottish brands might unduly surprise purchasers if there were no obvious visible signs of their existence.¹⁴ Furthermore, as property theorists have since pointed out, uncertainty about the permissible range of real rights and the possibility that new and previously unrecognized rights might emerge can increase information and measuring costs for potential purchasers and other market participants who will be affected by these rights, all of which can inhibit the development of a healthy real estate market.¹⁵

The final limitation on the usefulness of servitudes was the traditional contiguity or proximity rule that a servitude could only be imposed in favor of a neighboring or at least nearby parcel of land that would serve as the dominant tenement.¹⁶ This could present a problem if a developer like Mr. Smith wanted to dispose of all the individual parcels by use of grants in *feu* in which the grantor-disponer only retained a superiority interest for himself and his successors as proprietors of the *dominium utile*.¹⁷ In other words, Mr. Smith might prefer to retain only a non-appurtenant property interest in the land obligation he was creating. In this situation Mr. Smith's interest would not qualify as a dominant tenement in the sense required by the traditional law of servitudes.

For all of these reasons, then, the traditional law of servitudes in Scotland could not accomplish all that Mr. Smith needed. It demonstrated the end that he sought to achieve—land obligations binding on future owners. But its narrow parameters would not permit the detailed and far reaching set of negative restrictions and affirmative obligations that would be needed for a modern system of private land use planning.

b. Louisiana

In Louisiana the law of servitudes was not much friendlier to the project of expanding the scope of permissible land obligations. There were the traditional *rural* servitudes—of passage, way, taking water, aqueduct, watering, pasturage, burning brick or lime or taking earth or sand from

¹¹ Reid, *Modernising*, *supra* note 7, at 64; REID, *supra* note 9 at § 381. For an extended discussion of the reasons why Scottish courts tended to restrict the development of new brands of servitudes, see DOUGLAS J. CUISINE & RODERICK R.M. PAISLEY, *SERVITUDES AND RIGHTS OF WAY* §1.30, at 36-39 (1998).

¹² PAISLEY, *supra* note 10, § 8.9, at 232-235.

¹³ See Reid, *Modernising*, *supra* note 9, at 64 (discussing *Nicolson v. Melvill* (1708) Mor.14516, as an example of Scottish court's reluctance to open the "floodgates" to a wide array of new real rights).

¹⁴ CUISINE & PAISLEY, *supra* note 11, at 38.

¹⁵ Manfred Wolf, *Marketability Contra Freedom of Parties in the Law of Land Burdens*, in ERP & AKKERMANS, *supra* note 1, 11,13; Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L. J. 1 (2000).

¹⁶ REID, *supra* note 9, § 381.

¹⁷ *Id.*

the servient estate.¹⁸ An *urban* servitude could prohibit the owner of a servient estate owner from obstructing a dominant estate owner's view or light,¹⁹ or from erecting a building on the servient estate above a certain height.²⁰ In addition, an *urban* servitude could obligate a servient owner to provide lateral support for a wall or building,²¹ to raise a wall to a certain height,²² to allow passage through a house or lot,²³ to allow water to pass through pipes or canals, or to allow water to drip onto the servient estate from the dominant estate owner's roof.²⁴ But it was not clear that predial servitudes could impose new kinds of negative use restrictions, such as prohibiting the owner of a servient estate from engaging in commercial or industrial activities, other than by deploying crude outright bans on constructing any building at all or prohibitions on building above a certain height.²⁵ Moreover, it was clear that traditional predial servitudes could not easily be used to prescribe the type and value of buildings that could be constructed on immovable property.²⁶

Indeed, in the early 1900's, the Louisiana Supreme Court had sent strong signals that there were rigorous limits to what the law of servitudes could accomplish. In one 1907 decision, *Female Orphan Society v. Young Men's Christian Association*,²⁷ it held that perpetual restraints on the alienation of land were absolutely prohibited and void, even if the restraints were made as conditions to a donation intended to benefit a sympathetic and worthy charitable organization.²⁸ The decision's author, Justice Oliver Provosty, remarked:

Parties are not free to invent and create such tenures as they please, but are required to hold their property in the modes thus prescribed. All other modes are impliedly forbidden. It is clear then, that under our law, an ownership, without the *potestas alienandi* being vested in someone, is an impossibility—finds no place in our Code's scheme of the tenure of property—and is therefore impliedly forbidden.²⁹

In other words, Louisiana law would only permit a limited number of ways to dismember ownership, and absolute restraints on alienation would clearly fall outside these bounds.

¹⁸ LA. CIV. CODE art. 721 (1870)

¹⁹ LA. CIV. CODE art. 711 (1870)

²⁰ LA. CIV. CODE art. 718 (1870)

²¹ LA. CIV. CODE art. 712 (1870).

²² LA. CIV. CODE art. 718 (1870).

²³ LA. CIV. CODE art. 719 (1870).

²⁴ LA. CIV. CODE art. 713 (1870).

²⁵ See LA. CIV. CODE art. 728(3) (1870) (listing height and building restrictions as non-apparent servitudes); A.N. YIANNPOULOS, PREDIAL SERVITUDES, 4 LOUISIANA CIVIL LAW TREATISE § 111 (3d ed. 2004) (noting the limited category of permissible use restrictions in Louisiana before the advent of building restrictions).

²⁶ See e.g., *Cambias v. Douglas*, 120 So. 369, 371 (La. 1929) (holding that a deed covenant requiring a lot purchaser to construct a single residence was not a real obligation binding on subsequent transferees but merely a personal obligation binding on the original transferee and thus permitting a subsequent transferee to erect a triplex apartment building).

²⁷ 44 So. 15 (La. 1907).

²⁸ Id. at 16-19.

²⁹ Id. at 16.

In another famous opinion just five years later in *Louisiana & Arkansas Railroad Co. v. Winn Parish Lumber Company*,³⁰ Justice Provosty warned that allowing a purported “covenant running with the land” to bind land owners to transport all timber cut and produced on their land on a railroad built and owned by the company that had previously owned and conveyed the burdened timber land would not only impose an impermissible servitude *in faciendo* (an obligation on the owner of the land to do some affirmative act), but risked unleashing an “unregulated brood” of real rights on Louisiana soil that might revive feudal services (and feudalism itself) and thus violate one of the core principles of both the French and Louisiana Civil Codes.³¹ In other words, the purity of a Romanized conception of servitudes, which had been restored by Article 686 of the French Civil Code and passed to Louisiana by the drafters of its Civil Code, would be lost.³²

Louisiana’s law of servitudes at the dawn of the twentieth century then, just as in Scotland, seemed to be a rather inflexible tool for creating new real rights that would serve the needs of Mr. Smith and Mr. Stone if they had transplanted their ambitious building plans to Louisiana’s fertile soil. So how did both Scotland and Louisiana overcome the limitations of the Roman law of servitudes?

3. Overcoming Rigidity

a. The Scottish Solution—Towards the Real Burden

In Scotland the tools for achieving a modern system of private land use restrictions were found, as Professor Kenneth Reid has so ably shown us, in two additional legal sources besides traditional servitudes. One source lay within another branch of property law—the still common practice at the turn of the eighteenth to the nineteenth century of transferring interests in land via feudal grants. The premise of a feudal land ownership system is that ultimate title to all land is held in the sovereign (the Crown in Scotland and England). Persons actually in possession of the land hold their interests as vassals. While a vassal can transfer his property interest by *substitution*—by selling his interest and allowing the buyer to replace the seller in the feudal chain—he can also transfer a property interest by creating a new feudal estate in favor of yet another vassal below him in the feudal order—by *subinfeudation*.³³

The allure of feudal subinfeudation for lawyers trying to lay the groundwork for rational land use development on the edges of Scotland’s burgeoning eighteenth century cities was that, although many of the standard implied feudal obligations were beginning to be discontinued by statutory reforms (*e.g.*, personal services in 1715, the military tenure of wardholding, heritable jurisdiction, and prohibitions on alienation in 1746), feudal conditions could be supplemented by additional obligations imposed on the vassal or feuar. A feudal grant thus might still impose some raw physical obligation on the vassal (to move his cattle out of the way so the feudal superior could hunt on the vassal’s land or to maintain a boat for the superior and supply it with rowers and steersman) or might impose some economic obligation on the vassal (to pay a small annual

³⁰ 59 So. 403, 411-428 (La. 1912) (on rehearing) (Provosty, J, separate concurring opinion).

³¹ *Id.* at 419.

³² *Id.* at 414.

³³ See Kenneth G.C Reid, *Vassals No More: Feudalism and Post-Feudalism in Scotland* 11 EUR. REV. PRIV. L 283, 284-285 (2003).

sum—the *reddendo* or *feuduty*, to bring his malt to the superior’s brewery to be made into ale, to bring his ironwork to the superior’s smithy, or to have the superior’s agent prepare any subsequent dispositions of the land). To be sure, feudal conditions cannot entirely account for the development of modern land conditions in Scotland because (i) there were practical limitations on how they could be enforced, (ii) not all land conveyances were feudal in nature, and (iii) not all feudal conditions were necessarily tied to land. Nonetheless, it is easy to see how feudal conditions could widen the imagination of lawyers struggling with how to create a legal institution that would enable land owners to insure that the increasingly detailed land use conditions and obligations they were inserting in conveyancing instruments would be enforceable against grantees and their successors.³⁴

Another source of inspiration for Scottish lawyers lay in a peculiar security device, now almost totally forgotten, called the *pecuniary real burden*. In essence, this relatively primitive security device, which was in vogue in the 1820’s, allowed a grantor or a third party to obtain an interest in land of the grantee to secure a personal obligation of the grantee (usually in the form of an obligation to pay money). Although the underlying obligation was personal to the debtor and did not run with the land, and although the creditor’s interests were quite limited compared to a modern security device, the pecuniary real burden did continue to apply to the subject land even if it passed to successors of the debtor. Thus the idea of an individual creditor having rights to proceed against land regardless of its owner’s identity may again have influenced Scottish legal minds, at least to the degree that lawyers and judges began to borrow the name of this security device as they struggled to achieve another end.³⁵

By the middle of the 1810s all of these influences and sources began to coalesce as courts confronted more and more disputes between parties seeking to enforce what lawyers began to call *real burdens* on one hand and successors of the original grantees, whether they were feudal grantees or not, on the other hand. Initially, a number of Scottish courts enforced restrictions against successors merely because they had appeared in the *feuing* plans originally exhibited by feudal superiors to their feuars.³⁶ After 1818, when it appeared that the mere exhibition of a plan would not guarantee the enforceability of these kinds of obligations and restrictions against successors, landowners continued to include remarkably detailed conditions in their grants and dispositions, whether they were feudal in nature or not.³⁷

Finally, in a seminal 1840 case, *Corp. of Tailors of Aberdeen v. Coutts*,³⁸ the House of Lords formally recognized a *real burden* as a new and distinct type of title condition in Scottish land law, a condition which could “run with the land” like a servitude, but which could also impose a much wider range of land use restrictions and obligations on the burdened property owner than a traditional servitude could. Generally, five rules of constitution had to be satisfied for the real burden to be enforceable: (1) there was both a dominant and servient estate; (2) the burden was stated in a written conveyance or in a deed of conditions (meaning primarily that it could not be created by prescription); (3) the burden was properly registered in the public records; (4) the writing precisely stated the obligation and clearly indicated the parties’ intent that

³⁴ REID, *supra* note 9, §§ 379 & 382; KENNETH G.C. REID, THE ABOLITION OF FEUDAL TENURE IN SCOTLAND § 1.5 (2003).

³⁵ REID, *supra* note 9, § 383.

³⁶ See *Young v. Dewar*, 17 Nov. 1814 FC, discussed in REID, *supra* note 9, § 378. Curiously, as Reid notes, the enforcement of restrictions in these cases was not sought by feudal superiors but by other feuars. *Id.*

³⁷ REID, *supra* note 9, ¶ 379

³⁸ (1840) 1 Robin 296.

the condition run with the land; and (5) the burden did not violate any supplemental rules about the content of the actual conditions imposed.³⁹ Further, as later decisions clarified, a real burden could be enforced, not only by the feudal superior (if one existed), but also by each affected property owner against every other affected property owner, creating in effect an efficient system of self-regulation and deterrence based on fear of litigation.⁴⁰

Although another set of limitations based on the character of real burdens was stated from the outset in *Tailors of Aberdeen v. Coutts*,⁴¹ and was repeatedly referenced in later cases,⁴² this set of restrictions was not particularly restrictive in practice. First, a condition imposed in a real burden was still required to relate in some way to the servient estate itself and thus could not impose an entirely personal obligation on the burdened land owner.⁴³ Similarly, the condition had to create some "palpable benefit" for a dominant estate and not merely for the individual or entity that happened to be the owner of the dominant estate.⁴⁴ In addition, beginning with *Tailors of Aberdeen v. Coutts*, it was often said that the conditions of a real burden (1) could not be contrary to law or inconsistent with the nature of this species of property, (2) could not be useless or vexatious, (3) could not be contrary to public policy—by which it was usually meant that they could not, for example, impede commerce or create a monopoly, and (4) if the condition involved the payment of a sum of money, the amount had to be distinctly specified.⁴⁵ Although subsequent Scottish decisions clarified and narrowed some of these limitations (a prime example being Scottish courts' gradual acceptance of the principle that a real burden could impose some restraints on competition if the burdened and benefited properties were in close enough proximity to each other),⁴⁶ the basic structure of the law of real burdens remained largely unchanged for the next 150 years until the Scottish Law Commission proposed and the new Scottish parliament enacted comprehensive reforms of the law of real burdens in conjunction with efforts to abolish the last vestiges of Scottish feudal tenure.⁴⁷

b. The Louisiana Solution—Towards Building Restrictions

In Louisiana the key breakthrough came in a 1915 Louisiana Supreme Court decision, *Queensborough Land Co. v. Cazeaux*,⁴⁸ authored once again by Justice Oliver Provosty. The dispute here centered on the then all too common practice throughout the United States of using deed covenants to prohibit residential property owners from selling or leasing their property to

³⁹ REID, *supra* note 9, ¶¶ 386-391.

⁴⁰ See *Hislop v. MacRitchie's Trustees* (1881) 8 R (HL) 95. The story of how parties other than the original grantor could obtain enforcement rights is a complex one. For details see Scott Wortley, *Love Thy Neighbor: The Development of the Scottish Law of Implied Third Party Rights of Enforcement of Real Burdens*, 2005 JUR. REV. 345.

⁴¹ (1840) 1 Rob 296, 306-307, 311.

⁴² See *e.g.*, *Aberdeen Varieties Ltd v. James F. Donald (Aberdeen Cinemas) Ltd.*, 1940 S.L.T. 58, 63.

⁴³ REID, *supra* note 9, ¶ 391.

⁴⁴ *Id.*

⁴⁵ (1840) 1 Rob 296, 306-307 and 311. These content based restrictions are discussed in REID, *supra* note 9, ¶¶ 391 and PAISLEY, *supra* note 10, § 9.11.

⁴⁶ Compare *Aberdeen Varieties Ltd v. James F. Donald (Aberdeen Cinemas) Ltd.*, 1940 S.L.T. 58, 63, and *Phillips v. Lavery*, 1962 S.L.T. 57 (Sh. Ct), with *Co-operative Wholesale Society v. Ushers Brewery*, 1975 S.L.T. 9.

⁴⁷ See TITLE CONDITIONS (SCOTLAND) ACT 2003 and THE ABOLITION OF FEUDAL TENURE ETC. (SCOTLAND) ACT 2000.

⁴⁸ 67 So.2d 641 (La. 1915).

racial, ethnic or religious minorities.⁴⁹ In this case, the covenant expressly provided that it “run with the land” and sought to bar the sale or lease of the affected land to “a negro” for a period of twenty five years.⁵⁰ After the defendant Cazeaux purchased a lot subject to the covenant in 1907 and sold it to a “negro” one year later, the plaintiff land company sued to rescind the sale. Cazeaux defended, claiming that the covenant could not be an obligation running with the land because it was contrary to public policy as a restraint of commerce and because it represented a “tenure of property unknown to our laws.”⁵¹ One might have hoped that Justice Provosty would have agreed and characterized this “covenant” as either an impermissible restraint on alienation as he had done with the much more socially benign charitable donation in *Female Orphan Society v. Young Men’s Christian Association*,⁵² or as an attempt to supplement the “unregulated brood” of real rights he feared were emerging in *Louisiana & Arkansas Railroad & Co. v. Winn Parish Lumber Co.*⁵³ But alas, fears of restraints on alienation and of expanding the scope of traditional real rights seemed to melt away in this case.

After refusing to apply the Fourteenth Amendment of the U.S. Constitution to the private agreement,⁵⁴ Provosty held that the covenant was enforceable as a real right running with the land against both the first homeowner and his black purchaser because it did not run afoul of any limitations on real rights under Louisiana law.⁵⁵ The covenant did not violate the prohibition on restraints against alienation established in *Female Orphan Society*, Provosty explained, because here the covenant only created a “partial and temporary inalienability,” not a complete and perpetual one.⁵⁶ It did not violate the prohibition against servitudes *in faciendo* as in *Louisiana & Arkansas Railroad* because it did not require the landowners to do anything; it only prevented them from selling and leasing the property to a certain class of individuals.⁵⁷ Finally, in the strangest and most strained part of the opinion, Provosty turned to Article 491 of the 1870 Louisiana Civil Code, which, in direct recapitulation of French Civil Code Article 544, declares that “perfect ownership gives the right to use, to enjoy and to dispose of one’s property in the most unlimited manner.”⁵⁸ Quoting at length from a host of French commentators and ignoring his own passionate articulation of the *numerus clausus* principle just three years earlier in the

⁴⁹ See Carol Rose, *Property Stories: Shelley v. Kraemer*, in GERALD KORNGOLD & ANDREW P. MORRIS, EDS., PROPERTY STORIES, 169, 172-177 (2004).

⁵⁰ *Queensborough Land*, 67 So. at 642.

⁵¹ *Id.* at 642.

⁵² 44 So. 15, 16 (La. 1907).

⁵³ 59 So.403, 419 (La. 1912).

⁵⁴ *Queensborough Land*, 67 So. at 643. Despite the racial atmosphere in the United States at the time of the decision, this holding was not completely foreordained as at least one federal district court had held two decades earlier that a racially restrictive occupancy covenant could be invalidated under the Fourteenth Amendment. See *Gandolpho v. Hartman*, 49 F. 181, 182 (S.D. Cal. 1892). But Provosty did not even acknowledge this decision and instead cited the *Civil Rights Cases*, 109 U.S. 62 (1883), and *Ex Parte Plessy*, 11 So. 948 (La. 1892), for the proposition that the federal constitution’s equal protection clause did not have any bearing on racial discrimination created by private contracting.

⁵⁵ *Queensborough Land*, 67 So. at 642-646.

⁵⁶ *Id.* at 643. In this portion of the opinion, he also suggested that partial and temporary restraints would be upheld as long as they were based on “substantial reason” and not “caprice.” *Id.* Always eager to impress, Provosty here cited a French case permitting a perpetual and total restraint on alienation imposed pursuant to a donation of land for use as a graveyard. *Id.* (citing *Carpentier et Du Saint Rep. De Droit Francais, Vo. Condition 347*). Provosty was apparently tone deaf to the irony of analogizing the racially restricted neighborhood he was endorsing to a French graveyard.

⁵⁷ *Id.* at 644

⁵⁸ La. Civ. Code art. 491 (1870).

timber-railroad tying case, Provosty celebrated a property owner's right to dismember ownership in any manner he saw fit. He described the restrictive covenant here as just another useful dismemberment of one of the classic elements of the right of ownership—the right to alienate—in which one part of that right, the ability to alienate to white people, is given to future owners, while the right to alienate to black people is retained by the original developer and perhaps transferred to other owners of the lots as a kind of “stipulation pour autrui.”⁵⁹ All of this is quite dubious as legal doctrine, at least given the general policy at the time in both Louisiana and American property law of disfavoring restraints on alienation and of disfavoring idiosyncratic restrictions.⁶⁰ On the other hand, Provosty's near unanimous majority opinion displays a remarkable confidence in the ability of the legal system to recognize and enforce future disaggregations of ownership.⁶¹

Within just a few short decades, Louisiana courts latched on to Justice Provosty's decision in *Queensborough Land v. Cazeaux* and, supplementing it with occasional references to parallel developments in other American jurisdictions, developed a new system of real rights called *building restrictions* that allowed for a developer of land to impose a set of land use limitations and affirmative duties (such as to pay assessments for maintenance of common areas and facilities) on all property owners in an affected subdivision that would be mutually enforceable by all affected landowners through suits for injunctive relief and damages, as long as the developer imposed the covenants pursuant to a *feasible* and *general plan* for development.⁶² In 1977, Louisiana enacted a new section of its Civil Code entitled *Building Restrictions* that finally codified all of these jurisprudentially created rules,⁶³ even though the racially restricted covenants that gave rise to them had long since been declared unconstitutional by the United States Supreme Court.⁶⁴

4. The Problem of Control: Too Much of a Good Thing?

Although both Scotland and Louisiana found a way to create and recognize these new and undoubtedly useful real rights through a similar process of common law innovation and adaptation, each jurisdiction followed a different path in responding to the inevitable next question: How does a legal system rein in private land use restrictions and obligations that can run with the land indefinitely? In particular, each system has reacted quite differently to the possibility that land burdens can become economically wasteful or obsolete because of some

⁵⁹ Id. at 645-646.

⁶⁰ Rose, *supra* note 49, at 182-184 (discussing failure of American common law courts to apply the “touch and concern” doctrine to invalidate racially restrictive covenants in other states).

⁶¹ Curiously, Justice Charles A. O'Neil dissented from Provosty's opinion that the racially restrictive covenant ran with the land but did not publish reasons for his dissent. *Queensborough Land Co.*, 67 So. at 646.

⁶² The key judicial decisions in this sudden flowering of building restrictions in Louisiana include: *Hill v. Ross*, 117 So.725, 726 (La. 1928) (citing *Queensborough Land* to enforce covenants establishing set back requirements for residential development); *Rabouin v. Doutrey*, 160 So. 393, 395 (La. 1935); *Ouachita Home Site & Realty Co. v. Collie*, 179 So. 841, 842-843 (La. 1938) (enforcing covenant prohibiting any construction other than for residences and imposing minimum value on cost of residences); and *Alfortish v. Wagner*, 7 So.2d 708, 711 (La. 1942) (enforcing front yard set back restriction even though titles to several lots in affected area did not contain restriction since owners of those lots were actually in compliance with restrictions anyway).

⁶³ LA. CIV. CODE ANN. arts. 775-783 (West. 1980).

⁶⁴ *Shelley v. Kraemer*. 334 U.S. 1, 20-21 (1948).

fundamental change either in the surrounding neighborhood or in the specific area containing the burdened properties.

a. Policy Arguments: An American Property Theory Perspective

Given the more striking differences here between the two systems with respect to limitations on land burdens, it is worth considering momentarily the different policy arguments that tend to be offered both in support of and against robust statutory or judicial mechanisms for terminating obsolete land burdens. In the United States, these policy arguments were particularly well aired in the debate leading up to the preparation of the *Restatement (Third) of Property: Servitudes*. The arguments for creating strong judicial and statutory mechanisms to eliminate land burdens over time reduce to three general propositions.

First, scholars and law reformers alike have often pointed out that persons who acquire land and other real or immovable property encumbered by covenants and burdens often do not exercise any real *choice* about binding themselves to the contractual commitments made by previous owners of the property. They lack such choice because the properties available for purchase are either few in number or prohibitively expensive and, furthermore, many purchasers are completely uninformed (or ill informed at best) about the precise nature of the land burdens that will be affecting their property. If this is true, the scholars and law reformers argue, subsequent purchasers of properties that are affected by old and potentially obsolete land burdens are not exercising any *freedom* in binding themselves through their purchases but instead are largely involuntary conscripts.⁶⁵ In such circumstances, legislators and courts should be prepared to create rules and doctrines that will free people from the coercive restrictions that prior land owners imposed on the property. The tenor of the law then should then favor, or at least recognize, the need for terminating aging land burdens and freeing current owners from the shackles of the past.

Second, some academic critics have argued that covenanting parties are notoriously poor planners because they lack foresight about how changing conditions might make their land use arrangements inefficient over long periods of time.⁶⁶ They argue that judicial doctrines that provide at least the possibility for courts to terminate or vary land obligations when significant and unforeseen contingencies arise provide a useful safety valve to relieve subsequent land owners of the poor land use planning decisions of their predecessors in interest.⁶⁷

Finally, some academics argue that permanent land burdens create restraints on alienability of land and thus can produce significant inefficiency in real estate markets, especially when multiple parties enjoy enforcement rights. This inefficiency stems from the high transaction cost burden a prospective purchaser or current burdened land owner will face in identifying all the parties from whom waivers of restrictions must be obtained and in negotiating these waivers—especially when holdouts seek to grab all, or nearly all, of the potential surplus value or development value that can be gained from releasing the land from the old restrictions.⁶⁸

⁶⁵ See Alexander, *supra* note 2, at 886-892 & 898-900; SINGER, *supra* note 6, at 52-54; SCOTTISH LAW COMMISSION, REPORT ON REAL BURDENS (Scot. Law. Comm. No. 181) §§ 5.1-5.6 (2000).

⁶⁶ Stewart Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 958 (1988).

⁶⁷ Stewart Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 652-654 (1985).

⁶⁸ Sterk, *supra* note 67, at 643.

Of course, many commentators and courts discount all of these concerns by pointing out that any purchaser of land affected by a properly recorded restrictive covenant or land burden will have at least constructive *notice* of the impact of the restriction and therefore will only have itself to blame for the covenant's discomfort or impracticality.⁶⁹ For these critics of judicial interference with land burdens, the presence of effective notice means that current buyers of burdened property are exercising market choice and thus self-selecting to join neighborhoods or acquire property regulated by private land restrictions and obligations. Further, many courts and commentators complement their nearly religious faith in the efficacy of notice by pointing out that relieving a burdened property owner of a land burden through judicial fiat will produce a windfall gain for the burdened owner if the price of the burdened property was reduced at the time of purchase to reflect the diminished value produced by the land burden.⁷⁰

Other critics of judicial attempts to limit or terminate land burdens, covenants and servitudes also warn of the potential destabilizing effect on property rights generally that might result from allowing "the domain of contingency" to slip into this area of property law.⁷¹ For such critics there is no principled difference between a fee simple ownership interest in land and an interest in the right to enforce a restrictive covenant or land burden when it is coupled with ownership of a benefited parcel of land, especially since so many land purchasers today conceive of their acquisitions as forming a package of interrelated possessory and non-possessory property rights. If we are prepared to protect the possessory fee simple ownership interest robustly by preventing courts from sanctioning private eminent domain actions in the name of increased overall economic utility, then, they argue, we should also be prepared to protect enforcement of non-possessory restrictive covenants or land burdens with equal vigor.

Finally, some academic critics argue that judicial termination or variation of land burdens might well be tantamount to an exercise of private eminent domain, especially if courts are prepared to relieve burdened land owners of what might still be considered useful, amenity protecting restrictions by simply allowing the burdened land owners to pay damage awards to the benefited land owners who resist termination or change. For such critics, the fear is that courts will use "liability rules" in these contexts to justify stripping a benefited land owner of an *objectively* low value land condition even when that property owner might place high *subjective* value on his or her ability to enforce that condition. In such situations, today's annoying "hold out" might surprise us by becoming "tomorrow's culture hero."⁷²

Despite the dominance of these views in American property law, American law reformers and most American courts today at least recognize the principle that a covenant or servitude might be judicially altered or terminated if a burdened owner can prove that circumstances have

⁶⁹ The most well known academic exponent of the importance of notice is Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 SO. CAL. L. REV. 1369 (1982); Epstein, *supra* note 2. American courts employ the notice trope so regularly it has become commonplace. See e.g., *River Heights Associates L.P., v. Batten*, 591 S.E.2d 683, 689 (Va. 2004); *Tippecanoe Associates II, v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 449 (Ind. Ct. App. 2004).

⁷⁰ See John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 21-22 (2005) (discussing windfall profit fears in the context of easement relocation).

⁷¹ Glen O. Robinson, *Explaining Contingent Rights: The Puzzle of "Obsolete" Covenants*, 91 COLUM. L. REV. 546, 572-579 (1991).

⁷² Carol Rose, *Servitudes, Security and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. R. REV., 1403, 1411-1413 (1982); Sterk, *supra* note 67, at 628-631.

changed so radically that the original purpose of the covenant is no longer being served.⁷³ Yet burdened land owners usually fail to convince courts to use the principle to terminate land restrictions or obligations, even when dramatic external changes in circumstances have lessened the amenity value of the covenants to the benefited property owners.⁷⁴ It is only when there is an exceptional set of facts involving radical changes both outside of the burdened area and within its zone of influence that a typical American court will be willing to declare a land burden unenforceable.⁷⁵ For many American property law observers, the limited reach of the changed conditions is undoubtedly reassuring,⁷⁶ but to the European lawyer, and particularly to a Scottish one, it probably seems quite strange.

b. The Scottish Solutions: Modest, *Ex Ante* Content Limits and Ambitious, Innovative *Ex Post* Controls

Scotland's response to the fundamental problem of potentially indefinite land burdens is particularly instructive as its law reformers have presented us with one of the most recent and comprehensive revisions of this area of law anywhere in the world. An American observer might find the Scottish approach to be radical. But in Scotland, where much of the developable land became encrusted with highly detailed real burdens more than 150 years ago—burdens that now often seem out of date or even pointless—its recent solutions seem much less extreme. Indeed, a Scottish solution to the core policy problem, which one of its leading property experts calls an eternal conflict “between party autonomy and the protection of future owners[,] between the right to agree to a restriction with the current owner and the rights of future owners who were not party

⁷³ See RESTATEMENT (THIRD) OF PROPERTY: SERVICITUDES §7.10 (2002) (endorsing the changed conditions doctrine in general and courts' ability to award monetary damages in lieu of specific performance as an alternative method of terminating servitudes and covenants).

⁷⁴ For recent examples of American courts' refusals to use the changed conditions doctrine to invalidate arguably obsolete covenants, see *City of Bowie v. MIE Properties, Inc.*, 922 A.2d 509, 530 (Md. 2007) (enforcing covenant restricting certain kinds of commercial activities in planned university affiliated science and technology research park despite university's withdrawal from project and changes in surrounding neighborhood), *Miller v. Associated Gulf Land Corp.*, 941 So.2d 982, 984 & 988 (Ala. Ct. Civ. App. 2005) (enforcing covenants prohibiting commercial activity even though development company holding enforcing rights had released neighboring properties from covenants and in spite of commercialization of surrounding area); *River Heights Associates L.P., v. Batten*, 591 S.E.2d 683, 689 (Va. 2004) (enforcing covenant prohibiting commercial development despite adoption of zoning ordinance prohibiting residential development on affected property, intensive commercialization of nearby property and expansion of adjacent two lane road into eight to ten lane highway); *Tippecanoe Associates II, v. Kimco Lafayette 671, Inc.*, 811 N.E.2d 438, 447-448 (Ind. Ct. App. 2004) (enforcing anti-competition covenant in commercial lease prohibiting use of part of shopping center for grocery store even though benefited lessee no longer operated a grocery store in the shopping center); *Country Club District Homes Ass'n v. Country Club Christian Church*, 118 S.W.2d 185, 194-195 (Mo. Ct. App. 2003) (enforcing 90 year old covenants restricting anything but use of land for residential purposes to block church from building a parking lot despite introduction of zoning regulations into area, transformation of street in front of church from dirt road into six-lane major thoroughfare, church members' increased reliance on cars, and prospect that construction of parking lot would alleviate hazardous and annoying traffic patterns).

⁷⁵ *Chesterfield Meadows Shopping Center Associates, L.P. v. Smith*, 568 S.E.2d 676, 680 (Va. 2002) (invalidating covenant restricting use of one piece of property to protect historic home located on other property across the road when historic home was moved to another location and surrounding area had become thriving commercial district); *Medaris v. Trustees of Meyers Park Baptist Church*, 558 S.E.2d 199 (N.C. Ct. App. 2001) (complete transformation of affected area destroyed uniformity of plan imposing residential use restriction and possibility of equal enforcement).

⁷⁶ *Robinson*, *supra* note 71; *Epstein*, *supra* note 2; *Epstein*, *supra* note 69.

to the original agreement and did not receive payment for it,”⁷⁷ required a much more robust set of statutory and judicial mechanisms designed to limit or eventually terminate problematic real burdens.

In its recently enacted *Title Conditions (Scotland) Act 2003*, Scotland initially sets relatively elastic *ex ante* limits on the content of real burdens, essentially repeating the same broadly defined *ex ante* content limits that existed under its common law of real burdens. These limits include a straightforward praedial requirement at both ends of the burden. In other words, a real burden must first “relate in some way to the burdened property.”⁷⁸ In the case of use restrictions (prohibitions on building or certain commercial or industrial activities for instance), this test is easy enough to satisfy. In the case of affirmative obligations, application of the test can be more difficult. But the basic idea is still that a real burden cannot impose any strictly personal obligation on the burdened property owner—an obligation to pay an annuity or to perform a dance—that is unrelated to the use or maintenance of the burdened property or some construction or facility that serves the burdened property.⁷⁹ At the other end, except in some special cases (such as *personal* real burdens implemented for conservation, housing promotion, maritime, health care or economic development purposes,), a real burden must also provide a *benefit* to some property or community of properties that is in relative proximity to the burdened property.⁸⁰ In the language of the common law, the benefit of a real burden must generally be appurtenant, not in gross, except in the statutorily permitted categories of personal real burdens.⁸¹

The rationale of the Scottish law reformers in insisting that a real burden provide an actual benefit to actual tangible properties and their owners in their capacity as property owners (albeit even indirectly by preventing the burdened property owner from engaging in activity that will injure the benefited property) may well originate in the long Scottish experience with the proliferation of feudally originated real burdens in the late eighteenth and nineteenth centuries. If the law is going to permit a person to enforce negative restrictions on the use of another person’s property in the absence of direct contractual relationship, the Scots reasoned, the enforcer should generally be a “close neighbor” of the burdened property who will obtain some real land use planning related benefit. This insistence on proximity and actual neighborly interest is thus modern Scottish law’s way of insuring that negative burdens in particular do not become a means once more for geographically remote quasi-feudal superiors to obtain “ransom payments” from burdened property owners without providing any ostensible land use planning benefit.⁸²

The parallels between these rules and the Anglo-American common law “touch and concern” requirement cannot be missed. Both sets of rules serve to minimize extraneous, unpredictable obligations from running with land when such obligations would provide minimal

⁷⁷ Reid, *Modernising*, *supra* note 9, at 68.

⁷⁸ THE TITLE CONDITIONS (SCOTLAND) ACT 2003 § 3(1)-(2).

⁷⁹ REPORT ON REAL BURDENS, *supra* note 65, §§ 2.9-2.12.

⁸⁰ THE TITLE CONDITIONS (SCOTLAND) ACT 2003 §§ 1 and 3(3), and 38-48. *See also* REPORT ON REAL BURDENS, *supra* note 65, §§ 2.13-2.15.

⁸¹ For a detailed discussion of the latter, see Roderick Paisley, *Personal Real Burdens*, 2005 JUR. REV. 377.

⁸² Reid, *Modernising*, *supra* note 9, at 73-74; REPORT ON REAL BURDENS, *supra* note 65, §§ 9.6-9.8. The hostility of Scottish courts to claims of feudal superiors and other parties benefited by title conditions to extract ransom payments in exchange for granting waivers of such conditions is manifested in recent decisions denying monetary compensation for loss of such rights. *See* *Srathclyde Joint Police Board v. The Elderslie Estates* (2001) S.L.T. (Lands Tr.) 2; *George Wimpey East Scotland Ltd. v. Fleming* (2006) S.L.T. (Lands Tr.) 59.

uniquely land use related planning benefit.⁸³ In this sense, these rules perform a potential cost-minimization function that is not altogether dissimilar from what the *numerus clausus* principle did for the Romanized law of servitudes.

Another set of limits evoke those established in 1840 in *Aberdeen Tailors v. Coutts*,⁸⁴ though perhaps in a slightly more relaxed form. The *Title Conditions (Scotland) Act* now provides that a real burden “must not be contrary to public policy as for example an *unreasonable* restraint of trade and must not be repugnant with ownership (nor must it be illegal)” and generally “must not have the effect of creating a monopoly.”⁸⁵ With these provisions Scotland adopts an approach remarkably similar to that proposed in the *Restatement (Third) of Property: Servitudes*, whose drafters sought to free the American law of covenants and servitudes from traditional English common law’s *ex ante* restraints on creation—the touch and concern requirement, horizontal privity—which American courts sometimes employ *ex post* to declare a restrictive covenant void *ab initio*.⁸⁶

More important than these *ex ante* limits on the content or character of real burdens are three additional *ex post* means of controlling or restraining otherwise validly constituted real burdens. The first method, which builds on language often repeated in earlier cases but rarely deployed, is that a benefited owner or person seeking to enforce a real burden must now, according to the *Title Conditions (Scotland) Act*, have “an interest to enforce.”⁸⁷ In some ways this requirement merely extends the idea that a real burden can only exist if it confers a benefit on some benefited property—the praedial requirement. But the Act seeks to give a more precise meaning to this notion by defining what an “interest” or “right to enforce” means in the case of a typical negative use restriction:

A person has such interest if—

(a) in the circumstances of any case, failure to comply with the real burden is resulting in, or will result in, material detriment to the value or enjoyment of the person’s ownership of, or right in, the benefited property.⁸⁸

⁸³ Rose, *supra* note 72, 1409. See also Sterk, *supra* note 67, at 646-647 (theorizing that the touch and concern doctrine serves a useful purpose in allowing courts to avoid specific performance of “non-unique promises,” *i.e.*, “those for which the potential promisee can obtain a similar benefit by means other than imposition of a real covenant”).

⁸⁴ (1840) 1 Rob 296, 306-307, 311.

⁸⁵ THE TITLE CONDITIONS (SCOTLAND) ACT 2003 § 3(6)-(7).

⁸⁶ The *Restatement (Third) of Property: Servitudes* proposes replacing the touch and concern test with a nakedly instrumental analysis which presumes that a servitude otherwise properly created is valid unless it is “illegal or unconstitutional or violates public policy.” RESTATEMENT, *supra* note 2, § 3.1. It then enumerates in quite general terms the possible grounds for declaring a servitude to be in violation of this broad public policy standard. Those grounds include finding that the servitude (1) “is arbitrary, spiteful or capricious,” (2) “unreasonably burdens a fundamental constitutional right,” (3) “imposes an unreasonable restraint on alienation under § 3.4 or § 3.5,” (4) “imposes an unreasonable restraint on trade or competition under § 3.6,” or (5) “is unconscionable under § 3.7.” *Id.* It is still too early to tell whether American courts will ultimately embrace the *Restatement* approach and discard the “touch and concern” rule. Recent decisions suggest that American courts are not yet ready to jettison this well worn rule. See *e.g.*, *Miller v. Associated Gulf Club Corp.*, 941 So.2d 982, 987 (Ala. Ct. Civ. App. 2005) (applying “touch and concern” test and holding that covenant in gross satisfies test because it benefited other land owned by benefited party).

⁸⁷ TITLE CONDITIONS (SCOTLAND) ACT 2003 § 8(1).

⁸⁸ TITLE CONDITIONS (SCOTLAND) ACT 2003 § 8(3)(a).

This is a potentially valuable limitation tool because if it is deployed adroitly by courts it might discourage owners of property in a typical residential development, for instance, from bringing trivial lawsuits to punish or enjoin violations of relatively trivial restrictions.⁸⁹

Unfortunately, though, the first major reported decision interpreting this provision of the *Title Conditions (Scotland) Act* does not provide much confidence that courts will use it carefully to weed out trivial burdens. Instead, it raises the possibility that courts might use “the interest to enforce” requirement as a means of depriving property owners of the ability to enforce real burdens designed to protect substantial amenity and investment interests. In *Barker v. Lewis*,⁹⁰ a group of neighbors in a six lot luxury housing development sought to enjoin the owners of one of the burdened lots from operating a bed and breakfast out of their home in the face of a deed condition restricting the use of each house to a “domestic dwellinghouse.” Although the sheriff’s court acknowledged that the complaining owners had “title to enforce” and that the operation of the bed and breakfast breached the condition, it nevertheless held that pursuers lacked an “interest to enforce.” In particular, the court held that the “*material* detriment” requirement for an interest to enforce was equivalent to “*substantial* detriment” and that to determine whether there has been a “substantial inconvenience or annoyance,” as opposed to “just sentimental, speculative, trivial discomfort or personal annoyance,” a court must resort to an “objective standard of what would affect a proprietor of ordinary sensibility and susceptibility” and consider “the existing character of the locality affected” and the proximity of the benefited and burdened properties to each other.⁹¹ According to Kenneth Reid, this is nothing more than a recitation of a classic nuisance standard under Scot’s law,⁹² an ironic fact given that one of the reasons someone like our Mr. Smith might have sought to use real burdens in the first place was to avoid the unpredictability of nuisance law.⁹³ Eventually the court in *Barker* concluded that the inconvenience and annoyance resulting from the visits of approximately 250 paying guests a year simply did not rise to this level of “material detriment.”⁹⁴ Although this is only the first reported decision to apply the new “interest to enforce” limitation on the enforcement of real burdens, the danger, if other courts follow its interpretation, will be that real burdens might seem hardly worth the effort if they import nothing more than traditional nuisance principles.

A second and more important tool for reigning in real burdens is found in the ability of burdened property owners to seek a variation or discharge of a burden by applying to a specialized court called the Lands Tribunal.⁹⁵ This resort to the Lands Tribunal has existed in Scots law since 1970,⁹⁶ but the new *Title Conditions (Scotland) Act* clarifies the standards for appeal to the Lands Tribunal. The Lands Tribunal can exercise its power to discharge or vary any

⁸⁹ The policy rationale underlying the interest to enforce requirement is best expressed by Professor Kenneth Reid, a member of the Scottish Law Commission and a key drafter of the Commission’s REPORT ON REAL BURDENS (2000), which paved the way for the Title Conditions (Scotland) Act 2003. According to Professor Reid, the proliferation of negative burdens seeking to exert control over minute details of the lives of residents in modern housing estates had become “absurd” and counterproductive. In his view, “trivial burdens lead to trivial benefits.” Reid, *Modernising*, *supra* note 9, at 72.

⁹⁰ 2007 S.L.T. (Sh. Ct.) 48.

⁹¹ *Id.* at 55.

⁹² Kenneth Reid, *Interest to Enforce Real Burdens: How Material is “Material”?*, 11 EDIN. L. REV. 440, 442 (2007).

⁹³ *Supra* note 7 and accompanying text.

⁹⁴ *Barker v. Lewis* (2007) S.L.T. 48, 55-57.

⁹⁵ TITLE CONDITIONS (SCOTLAND) ACT 2003 §§ 90(1)(a) & 98.

⁹⁶ CONVEYANCING AND FEUDAL REFORM (SCOTLAND) ACT 1970.

title condition (including a real burden, a servitude or a condition in a long lease) upon application by a burdened owner after considering a laundry list of relevant factors, including the purpose of the condition, whether circumstances have changed since the condition's creation (including changes in the character of the benefited or burdened property or of the surrounding neighborhood), whether the condition unreasonably impedes enjoyment of the burdened property, and whether the benefited property owner is willing to pay compensation for the variation or discharge.⁹⁷

It is difficult to overstate, at least from an American observer's perspective, just how significant this statutorily sanctioned changed conditions doctrine appears. The evidence suggests that it has become a powerful engine for discharging obsolete and cumbersome real burdens, especially when burdened owners bring applications for discharge and, as recent experience has shown will often be the case, the benefited property owners do not even bother to oppose the application.⁹⁸ Furthermore, even when there is opposition to a discharge or variation application, recent empirical reviews reveal that the Land Tribunal's power to discharge land conditions has been applied quite liberally.⁹⁹ In fact, if these current trends continue, property owners might eventually lose confidence in the ability of real burdens to impose reliable land use restrictions that will endure beyond the ownership of the original contractual parties unless the burdens protect the most easily discernible amenity values.¹⁰⁰

Finally, and perhaps most innovatively, Scotland has also established a presumptive 100 year temporal limit on the life of real burdens.¹⁰¹ Because its law reformers recognized, just as some American academics did, that an automatic sunset provision could be over-inclusive in that it might invalidate real burdens that are still perfectly useful to the benefited property owners without being unduly restrictive to the burdened owners,¹⁰² Scotland chose to adopt a more nuanced, triggered sunset rule. Under the *Title Conditions (Scotland) Act*, a burden that has lasted more than 100 years is, with some special exceptions for conservation, maritime, facility, and service burdens, presumptively, but not automatically, discharged. To claim that a discharge has become effective and to be able to register a notice to that effect in the public records, the burdened property owner must first provide "intimation" (notice) to the benefited property owner or owners, who are then given an opportunity to apply to the Lands Tribunal and convince it to revive the real burden on the same grounds that are used to make variation and discharge decisions.¹⁰³ In effect what Scotland has done is shift the burden of proof for determining whether conditions have changed substantially enough to terminate a real burden. Prior to 100

⁹⁷ Title Conditions (Scotland) Act 2003 § 100.

⁹⁸ See GEORGE GRETTON, KENNETH REID, ALAN BARR, EDINBURGH LAW SCHOOL TRICENTENARY SEMINAR: SOME CURRENT ISSUES IN PROPERTY LAW 19 (2007) (reporting that in anywhere between 50% to 75% of variation and discharge cases resolved by the Lands Tribunal applications are unopposed or an initial opposition is withdrawn).

⁹⁹ According to a 1997 survey, survey applications in opposed cases achieved a 70% success rate. This success rate rose to 89% under the Title Conditions Act. *Id.* at 20

¹⁰⁰ In one of the few recent decisions in which the Lands Tribunal denied a discharge application, benefited neighbors were threatened with losing a scenic view of the Firth of Clyde had the burdened property owner been able to void the real burden and build a new house. *Faeley v. Clark*, 2006 GWD 28-626, discussed in GRETTON, *supra* note 98 at 20-29. Coincidentally, the purpose of the burden in this case was very close to a traditional Louisiana urban servitude.

¹⁰¹ TITLE CONDITIONS (SCOTLAND) ACT 2003 § 20.

¹⁰² Reid, *Modernising*, *supra* note 9, at 78; Sterk, *supra* note 67, at 655

¹⁰³ TITLE CONDITIONS (SCOTLAND) ACT 2003 §§ 21, 90(1),(b)(i), 98, 100.

years, the burdened property owner must prove why variation or discharge is merited. After 100 years, the benefited land owner must prove why variation or discharge should *not* occur.

This temporal innovation in Scottish law has precedent in other jurisdictions, notably Massachusetts, which enacted a 30 year limit on the life of new covenants¹⁰⁴ and Ontario, which adopted a 40 year sunset rule.¹⁰⁵ This strategy might provide an intriguing starting point for reform proposals in both Louisiana and the rest of the United States where there is greater distrust of judicial power to overturn private contractual arrangements but where restrictive covenants created throughout the twentieth century may in time increasingly present more troubling problems of obsolescence.

c. Louisiana's Solutions: *Ex Ante* Limits and Weak *Ex Post* Controls

The most significant difference today between Louisiana and Scottish law in the area of private land use restrictions is the much more limited assortment of statutory and judicial tools for limiting the content, extent and perpetuity of predial and personal servitudes and building restrictions in Louisiana. Current Louisiana law, like Scottish law today, establishes a number of *ex ante* limits on the creation of both predial and personal servitudes, but these limits generally have not provided much actual control over the content of private land use restrictions and obligations. To establish a predial servitude there must, of course, be both a dominant and a servient estate.¹⁰⁶ Moreover, a predial servitude must provide some actual *utility* or convenience for the dominant estate, either at the time of creation or in the future. As Article 647 of the Civil Code puts it: "There can be no predial servitude if the charge imposed cannot be reasonably expected to benefit the dominant estate."¹⁰⁷

The current Civil Code also recognizes the need for *limited personal servitudes* granted in favor of a natural or juridical person, but significantly limits their content by providing that such "rights of use" can only grant benefited persons "an advantage" over the servient estate.¹⁰⁸ Thus, the clear implication is that these limited personal servitudes cannot impose negative restrictions, such as restraints on alienation or land use restrictions.¹⁰⁹

Finally, a scheme of interlocking building restrictions can only come into being if they are established by an ancestor in title pursuant to a "general plan governing building standards, specified uses and improvements" which is "feasible and capable of being preserved."¹¹⁰ Similarly, associations of property owners in a neighborhood affected by a building restriction scheme can also create new rules and regulations restricting each other's enjoyment and use of their property.¹¹¹ Courts will, in turn, generally defer to an association's enforcement decisions respecting these rules and restrictions, even when the rules establish broad discretionary standards governing issues such as whether new construction is harmonious with the architectural

¹⁰⁴ MASS. GEN. LAWS, ANN. ch. 184, §§ 27, 28. Massachusetts allows a benefited property owner to renew restrictions automatically for twenty year intervals by filing a new notice of restriction in the public records. *Id.* § 27(b)(1)-(2). When it enacted its 30 year time limit, Massachusetts also enacted a 50 year time limit for restrictions that were created before the effective date of the new legislation. *Id.* § 28.

¹⁰⁵ Land Titles Act c. 230 § 118(9); Registry Act c. 445 §§104, 106.

¹⁰⁶ LA. CIV. CODE ANN. arts. 646, 697-698 (West 1980)

¹⁰⁷ LA. CIV. CODE ANN. art. 647 (West 1980).

¹⁰⁸ LA. CIV. CODE ANN. art. 640 (West 1980).

¹⁰⁹ A.N. YIANNPOULOS, PERSONAL SERVITUDES, 3 LOUISIANA CIVIL LAW TREATISE § 224 (4th ed. 2000).

¹¹⁰ LA. CIV. CODE ANN. art. 775 (West 1980).

¹¹¹ LA. CIV. CODE ANN. art. 780 (West 1980).

style of existing buildings, as long as the association can demonstrate that it is exercising its authority reasonably and in good faith.¹¹² The Louisiana Civil Code and Louisiana statutes do little else *ex ante* to control private land use restrictions. In light of the relatively limited nature of these *ex ante* restraints, Louisiana courts have over time grown more receptive to new, and even previously disfavored, forms of private land use restrictions. For example, even though earlier decisions seemed to reject the possibility that predial servitudes could be created for the express purpose of limiting economic competition,¹¹³ recent decisions seem quite comfortable enforcing these kind of anti-competitive servitudes, regardless of whether of they are limited in time or potentially indefinite in duration.¹¹⁴

In the absence of any sunset provision or a statutorily based changed conditions doctrine expressly allowing courts to vary or discharge land conditions as in Scotland, burdened property owners and courts sympathetic to their plight in Louisiana have occasionally looked elsewhere for tools to control obsolete or problematic servitudes or building restrictions. The only way to terminate building restrictions, for example, except by voluntary agreement of specified percentages of the affected property owners,¹¹⁵ or by establishing two-year liberative prescription (*i.e.*, that a violation occurred and those with enforcement power failed to act),¹¹⁶ is for a burdened property owner to prove that a particular restriction or an entire building restriction scheme has been *abandoned* throughout the affected neighborhood of properties.¹¹⁷ Unfortunately for disgruntled property owners, Louisiana judges have generally been unsympathetic to such arguments, insisting, just like their counterparts in other American courts, that a particular building restriction or an entire scheme will only be declared abandoned when there is overwhelming evidence of change both in the exterior and interior of the affected area and that this change completely impedes achievement of the restriction or scheme's purpose.¹¹⁸

¹¹² See *Oakbrook Civic Ass'n v. Sonnier*, 481 So.2d 1008, 1012 (La. 1986) (establishing test); *Country Club of Louisiana Property Owner's Ass'n v. Dornier*, 691 So.2d 141, 145, 148 (La. Ct. App. 1 Cir. 1997) (holding that disparate application of yard signage restriction to prohibit residents, but not speculative builders, from placing "for sale" signs in front of their homes was unreasonable); *Cosby v. Holcomb Trucking Co.* 942 So.2d 471, 476-77 (La. 2006) (ability of developer or homeowner's association to waive commercial use restriction does not invalidate building restrictions as long as discretionary power is exercised reasonably and in good faith).

¹¹³ *Hebert v. Dupaty*, 7 So. 580, 581 (La. 1890); *Simmons v. Johnson*, 11 So.2d 710, 711-12 (La. App. 2 Cir. 1942); *Leonard v. Lavigne*, 162 So.2d 341, 343 (La. 1964). In each of these cases, the court held that the covenant restricting competition was only enforceable against the original promisor as a personal obligation, not against successors. This is the approach favored by Professor Yiannopoulos. YIANNOPOULOS, *supra* note 25, § 108.

¹¹⁴ See *Meadowcrest Center v. Tenant Health System Hospitals, Inc.*, 902 So.2d 512, 514 (La. Ct. App. 5 Cir. 2005) (recognizing enforceability of temporally unlimited negative predial servitude prohibiting use of servient estate as outpatient surgical or diagnostic center for benefit of hospital/dominant estate); *RRC Properties v. Wenstar Properties*, 930 So.2d 1234, 1237-38 (La. Ct. App. 2 Cir. 2006) (upholding 20 year negative predial servitude prohibiting use of servient estate for fast food restaurant competing with a Wendy's on dominant estate); *R&K Bluebonnet, Inc. v. Patout's of Baton Rouge*, 521 So.2d 634, 635-36 (La. App. 1 Cir. 1988) (implicitly recognizing enforceability of five year anti-competition servitude prohibiting use of servient estate as seafood restaurant to benefit seafood restaurant on adjacent dominant estate).

¹¹⁵ See LA. CIV. CODE ANN. art. 780 (West. 1980), and LA. REV. STAT. ANN. § 9:1141.6(B)(3).

¹¹⁶ LA. CIV. CODE ANN. art. 781 (West. 1980).

¹¹⁷ LA. CIV. CODE ANN. art. 782 (West. 1980).

¹¹⁸ Compare *Chamblis v. Parker*, 867 So.2d 974 (La. Ct. App. 2 Cir. 2004) (rejecting abandonment claim); *Belle Terre Lakes Home Owners Ass'n v. McGovern*, 805 So.2d 1286 (La. Ct. App. 5 Cir. 2002) (same); *Gwatney v. Miller*, 371 So.2d 1355 (La. Ct. App. 3 Cir. 1979) (same); *Robinson v. Donnell*, 374 So.2d 691 (La. App. 1 Cir. 1979) (finding abandonment of building restrictions with respect to large tract that could not be subdivided further,

As these arguments are typically unavailing, courts sympathetic to parties seeking to avoid bothersome servitudes and building restrictions have frequently resorted to other judicial doctrines. In one noteworthy case, a Louisiana court invalidated a set of building restrictions that sought to prevent the sale of homes in a subdivision to individuals financing their purchases with federally subsidized loan programs designed for families with low and moderate incomes.¹¹⁹ By holding that court enforcement and the parish clerk's recordation of the covenants amounted to state action, the court here held that the covenants violated the equal protection clause of the Fourteenth Amendment of the U.S. Constitution as impermissible discrimination based on economic status.¹²⁰ In another case, the Louisiana Supreme Court refused to enforce a prohibition against yard signage when property owners posted signs displaying a charged political message about a local environmental dispute.¹²¹ To read the signage requirement as a ban on this form of political speech, the court held, was analogous to reading a contract so literally that it produced absurd consequences.¹²² Whether Louisiana courts can be counted on to find similar constitutional or contract based solutions to problematic building restrictions in the future remains to be seen. Ironically, although the Louisiana legislature has recently attempted to provide additional flexibility to property owners' associations that manage building restriction regimes to adapt to new circumstances, this flexibility in fact is frequently used to make restrictions more, not less, burdensome.¹²³

5. Fundamental Values On Display

In the end, a broad view of Scotland and Louisiana's legal regimes regulating private land use restrictions reveals several significant differences in their fundamental underlying values. Scotland, it seems, has chosen to privilege the protection of *current* and *future* property owners' ability to use their property free from restraints imposed by *prior* owners. In so doing, it seems intent on maximizing the adaptability of its relatively scarce land as a community resource. Scottish jurists apparently view the use and enjoyment rights of current and future burdened property owners as more significant, more legitimate in a way, than the contractually generated and potential reliance interests of currently benefited property owners or persons holding enforcement rights. In short, the Scottish law of real burdens and title conditions, it might be said, exhibits a kind of social, maybe even communitarian, understanding of property itself.

could not receive municipal water supply and a large portion of which had been converted to a lake used for motor boat testing).

¹¹⁹ Roy v. Ducote, 399 So.2d 737 (La. Ct. App. 3 Cir. 1981).

¹²⁰ Id. at 740-741.

¹²¹ Cashio v. Shoriak, 481 So.2d 1013 (La. 1986).

¹²² Id. at 1015.

¹²³ After a 1998 Louisiana Supreme Court decision froze the ability of homeowners' associations to make building restrictions more burdensome without the unanimous consent of all affected property owners, Brier Lake v. Jones, 710 So.2d 1054 (La. 1998), the legislature responded by enacting the LOUISIANA HOMEOWNER'S ASSOCIATION ACT, LA. REV. STAT. ANN. § 9:1141.1 et seq., which, unless the governing rules of the community provide otherwise, allows *new* restrictions to be enacted by three-fourths of the lot owners, allows existing restrictions to be made *more onerous* by agreement of two-thirds of lot owners, and allows restrictions to be rendered *less onerous, reduced or terminated* by agreement of just a bare majority of lot owners. Id. § 1141.6(B)(1)-(3).

Indeed, it is as if the words of a famous commentator on Scottish property law from the turn of the last century, John Rankine, have been resurrected as the new motto for the modern Scottish law of real burdens.¹²⁴ As Rankine put it, all limitations or restrictions imposed on land ownership for the benefit of other individuals ultimately “resolve themselves into the law of neighborhood.”¹²⁵ It is this principle of “neighborhood” that permits certain kinds of obligations to ascend—almost poetically—above contract, “rising into a different sphere—that of real rights.”¹²⁶ By “neighborhood,” Rankine and modern Scots jurists seem to mean that property rights, especially non-possessory real rights such as real burdens, are only protected to the extent they serve some neighborly purpose—that is, if they actually contribute to the quality of community life, not just if they provide a means of personal enrichment to the holder of those rights.

Louisiana, acting more like its American neighbors than its jurists might realize, has over time increasingly emphasized *former* owners’ freedom to disaggregate property and impose restrictions on *future* owners’ use and powers of disposition. Likewise, it has increasingly treated incorporeal property rights as a commodity, confident that the notice provided in the public records will be sufficient to warn future owners of the limitations previous owners have imposed on the use and disposition of their property. In this sense, predial servitudes, personal servitudes and building restrictions are increasingly viewed in Louisiana more like any other investment vehicle and are thus zealously protected by courts just like any other incorporeal property right capable of generating reliance interests, even if that interest is in nothing more than the right to extract a waiver.

Thus despite their similar evolutionary paths, and despite some similarities in the overall structure of their basic substantive rules, Scotland and Louisiana have ended up with private land use restriction regimes that are different both in tone and sometimes in result as well. Mr. Smith and Mr. Stone’s heirs and successors may still live side by side each other in their respectable cottages, townhouses or suburban ranch homes (whether outside of Edinburgh or Baton Rouge), but much of their property owning lives are now governed by complex, detailed real burdens and building restrictions. Yet because of Scotland’s longer history with real burdens and its stronger desire for judicial limitations on the life of those burdens, their chances for relief from these aging and potentially obsolete restrictions and obligations are brighter today in Scotland than in Louisiana. As Louisiana’s building restrictions age in the twenty first century, however, its jurists and law reformers might one day find themselves looking to Scotland for ideas on how to limit their twentieth century creations.

Cite as: John Lovett, *Creating and Controlling Private Land Use Restrictions in Scotland and Louisiana: A Comparative Mixed Jurisdiction Analysis*, vol. 12.1 ELECTRONIC JOURNAL OF COMPARATIVE LAW (May 2008), <<http://www.ejcl.org/121/art121-13.pdf>>.

¹²⁴ A recent Scottish Lands Tribunal decision, which discharged a 60 year old real burden, cited Rankine on the very same theme. *Strathclyde Joint Police Board v. The Elderslie Estates* (2001) S.L.T. 2, 11.

¹²⁵ JOHN RANKINE, *THE LAW OF LAND OWNERSHIP IN SCOTLAND* 367 (4th ed. 1909).

¹²⁶ *Id.* at 369.