SERVITUDES DONE "PROPER"LY: PROPRIETY, NOT CONTRACT LAW

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I. INTRODUCTION

The law of servitudes has changed dramatically in the last hundred years. Legal scholars have been successful in documenting these changes in case law, but less successful in articulating a unified set of principles that guide the current law of servitudes. One explanation that received significant attention is the idea that efficient recording systems in the United States have liberated property owners from the constraints of traditional property laws disfavoring servitudes and have allowed these owners the broader freedoms of contract law. However, this explanation, and the sweeping common law reforms that flow from it, have not resonated with courts. Sometimes courts recognize a property owner's broader powers to bind their property via servitudes without concern for horizontal privity, the touch-and-concern doctrine, or whether the servitude is a restraint on alienation, but sometimes they apply the traditional, limiting, rules that have governed for centuries in common law. Why do courts sometimes strictly apply the traditional rules of servitudes and sometimes jettison them for more permissive, vaguer rules?

In this Article, I will offer an alternative framework for understanding contemporary servitudes premised not on a property regime as means of preference satisfaction guided by contract law, but rather, premised on a property regime as a means of proprietorial control guided by distribution of police powers to govern land between private owners, government actors, and quasi-government actors.[1] In this framework, servitudes are sorted into two main categories: "traditional" servitudes where the dominant estate or benefiting parcel is separate from the burdened parcel and "community" servitudes where the benefit and burden of a servitude apply to the same piece of land and the servitude is

1. Gregory S. Alexander et al., *A Statement of Progressive Property*, 94 CORNELL L. REV. 743, 743–744 (2009).

a tactic of community governance.[2] In traditional servitudes, the traditional rules still, by and large, apply to limit a land owner's power to bind future owners of a burdened parcel. On the other hand, courts tend to validate community servitudes even though these servitudes do not neatly fall within the traditional servitude rules so long as they further a clear public purpose, they are created voluntarily by the original grantor, and subsequent owners take the burdened land with notice. To illustrate this framework, I will examine the most significant uses of servitudes in the last hundred years, what they do, why they are valid, and what they tell us about the police power to regulate land.

Before we begin, it may be useful to define servitudes. One general and pithy definition of servitudes, a term encompassing easements, real covenants and equitable servitudes, is that they are tools to allocate non-possessory rights in someone else's land.[3] For example, one neighbor might give another neighbor an easement to drive over their land or one neighbor might burden their land with an equitable servitude promising that their neighbors can use part of their land as a private park, or a land owner might lease their property but require that the tenant covenant to maintain the landscaping.[4] The purpose of servitudes is that they "run with the land," or become a part of the land, meaning that the burden or benefit of the servitude passes to subsequent owners via operation of property law rather than via privity of contract.[5] These various kinds of traditional servitudes have developed over time based on historical circumstance, not internal logic, so they have somewhat arbitrary and redundant rules and purposes.[6]

Historically, the common law disfavored servitudes as creating clouds on title or otherwise hindering marketability of title.[7]

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2. "Community" servitudes are a tactic for managing land as a resource in a proprietorial property regime, as this Article will explain.

3. GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS 1 (1990).

4. Tulk v. Moxhay, 2 Phillips 774 (1848).

5. JESSE DUKEMINIER ET AL., PROPERTY 761 (9th ed. 2018); *see* Hughes v. New Life Dev. Corp., 387 S.W.3d 453, 475 (Tenn. 2012) (Once recorded, restrictive covenants become "property interests that run with the land," binding on all subsequent purchasers).

6. *Id.* at 762; *see also* Ralph A. Newman & Frank R. Losey, *Covenants Running with Land, and Equitable Servitudes: Two Concepts or One?*, 21 HASTINGS L. J. 1319, 1321 (1970); *see also* Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 SO. CAL. L. REV. 1177, 1185–1186 (1982); *see also* Susan French, *Design Proposal for the New Restatement of the Law of Property Servitudes*, 21 U. CAL. DAVIS L. REV. 1213, 1222–1223 (1988).

7. WILLIAM B. STOEBUCK & DALE A, WHITMAN, THE LAW OF PROPERTY 470 (3rd ed. 2000).

However, since the early twentieth century, several new uses of servitudes have exploded into common use.[8] These are covenants used by homeowners' associations in common interest communities, by non-profit organizations, and local governments. Their purpose is not to create a usage right for the beneficiary of the covenant or to secure a promise between a landlord and a tenant or two neighbors, but to alienate a portion of the burdened estate owner's private police power in the land to an external governor[9] who considers the burdened estate part of the domain that they govern. For example, a house in a common interest community is governed by the homeowner, as a part of his or her domain, and also by the homeowners' association, as a part of the common-interest-community domain. These popular contemporary servitudes, including covenants binding houses in common interest communities, preservation easements, affordability covenants, and covenants in development agreements, often do not satisfy the traditional requirements for servitudes–such as horizontal privity, the touch-and-concern doctrine, the non-assignability of servitudes-in-gross, and prohibitions on new forms of negative easements–as explained in Part III. Nevertheless, they are overwhelmingly enforced, as explained in Part IV.

The illogical muddle of the traditional common law of servitudes, combined with new and overwhelmingly popular servitudes that don't neatly fall into the traditional categories for easements, real covenants, and equitable servitudes, have led some notable property law scholars to the conclusion that the old common law rules of property that once governed servitudes have rightly given way to principles of contract law.[10] For example, Richard Epstein has argued that robust American recording systems ensure notice for subsequent owners of land burdened or benefited by servitudes, therefore all of the traditional requirements that limit the ability for a servitude to run with the land are unnecessary and should give way to contract law.[11]

Epstein's argument influenced the reporters of the Restatement of Property (Third): Servitudes, who aimed to streamline and modernize the traditional rules of easements, real

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8. *Id.* at 471.

9. By "governor" I am referring broadly to one who governs, in other words, to a person or entity who exercises executive power over the people and objects of a domain.

10. Richard Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358 (1982); RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §3.1, note a (Am. L. Inst. 2000) ("This section applies the modern principle of freedom of contract to the creation of servitudes.").

11. *Id.*

covenants, and equitable servitudes under unified rules based in contract law.[12] However, the Restatement of Property (Third): Servitudes has not been embraced by courts.[13] The Restatement of Property (Fourth) is currently being drafted, including a new section on servitudes that will attempt, once again, to articulate and explain the current rules governing servitudes in the U.S.[14]

In this Article, I demonstrate that the current state of servitude law can be better understood when viewed through the lens of property as a proprietorial regime where the power to police is a proprietor's right and duty that can be alienated to external governors of overlapping domains. This view draws on a history of scholarship articulating the idea of "propriety" as a justification for a private property regime and a guiding force in property law, most notably the scholarship of Carol Rose and Gregory Alexander.[15] In this proprietorial regime, police powers are one of several tools or tactics for promoting security and prosperity for the people and things that comprise a governor's domain. These powers can be wielded by the state, the federal government, a private owner, or any number of third-party designees to the extent that public law does not prohibit them.[16] However, any governor must have those rights and powers necessary for "proper" governance of their domain.[17]

When servitudes shift police powers between governors who each view the burdened parcel as part of their domain–as is the case with servitudes in common interest community, development, preservation, and public safety contexts–they can impose restrictions and obligations beyond those imposed by public law, but according to many of its essential rules.[18] A proprietorial framework starts with the premise that a governor has the right and duty to promote order and well-being for the people, land, and things they govern.[19] The governor's executive power to pursue

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12. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES ch. 2, intro. note (Am. L. Inst. 2000).

13. Andre Russell, *The Tenth Anniversary of the Restatement (Third) of Property, Servitudes: A Progress Report*, 42 U. TOLEDO L. REV. 753, 755 (2011).

14. American Law Institute, https://www.ali.org/publications/show/property/ (last visited July 7, 2021).

15. *See* Carol Rose, *Property as Wealth, Property as Propriety*, in COMPENSATORY JUSTICE: NOMOS XXXIII 223, 241 (John W. Chapman ed., 1991); GREGORY ALEXANDER, COMMODITY & PROPRIETY, 1 (1997).

16. Rose, *supra* note 15, at 233; MARKUS DIRK DUBBER, THE POLICE POWER, 73 (2005).

17. Rose, *supra* note 15, at 235.

18. *See* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, §8.5, note a (Am. L. Inst. 2000).

19. Rose, *supra* note 15, at 237.

this right and fulfill this duty is police power.[20] Analyzing servitudes as the voluntary redistribution or allocation of police powers over land between overlapping layers of governors offers a rational explanation for why courts sometimes treat servitudes as some hybrid between public and private land use controls rather than applying the traditional, narrow servitude rules. From a proprietorial lens, the choice of rules ensures that a domain's governors have those resources (or powers) that are necessary for proper governance. Applying this proprietorial framework to the current state of servitudes law in the U.S. allows us to look beyond the imprecise and inaccurate claim that contract law, as a tool of a private owner's preference satisfaction, has replaced the traditional property rules of servitudes.[21] In analyzing servitudes as alienation of governance powers necessary to "properly" govern a domain, this article attempts to help fill the gap between scholarship about the values of Progressive Property and housing rights advocates' on-the-ground strategies.[22] The law of servitudes is still property law, not contract law, and is therefore fundamentally concerned with an owner and their control over their domain, distinct from private agreements between autonomous individuals.[23]

Part II begins with an exposition on the police power, the jurisprudence that leads to our current understanding of it as a general power exclusive to the states, and its broader meaning in social history and political science, where the power to police is defined as a ruler's heteronomous power to impose order. Applying twentieth century philosopher Michel Foucault's concept of "governmentality" to the work of contemporary legal scholars who have explored the concepts of proprietorialism and police in property law, this section lays a framework for envisioning multiple, simultaneous, overlapping governors over objects that each governor claims as part of their domain. Part I concludes by testing this framework with two hypotheses about how the law of servitudes should be intelligible through such a framework.

Part III is a taxonomical project, describing the five most prevalent uses of servitudes in the US today: traditional servitudes

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20. DUBBER, *supra* note 16, at 82.

21. In 2000, the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES adopted a contractarian view of modern servitudes, but most courts have ignored or declined to adopt the view. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES ch. 2, intro. note (Am. L. Inst. 2000). Russell, *supra* note 13.

22. Brandon M. Weiss, *Progressive Property Theory and Housing Justice Campaigns*, 10 U.C. IRVINE L. REV. 251, 285 (2019).

23. Rose, *supra* note 15, at 241.

where the servient estate or burdened parcel is not part of the grantee-governor's domain, and four common examples of community servitudes where the servient estate or burdened parcel is part of the grantee-governor's domain: common interest community covenants, conservation easements, affordability covenants, and development agreement covenants.

Part IV analyzes the enforceability of the five kinds of contemporary servitudes presented in Part III. While some servitudes are statutorily authorized via enabling acts, many others have been enforced by courts without the benefit of express enabling statutes and even though these servitudes often lack the traditional requirements for covenants that run with land.

In Part V, I will apply the principles of police, propriety, and governmentality articulated in Part II to the kinds of servitudes described in Part III. This application will justify and explain the enforceability of contemporary servitudes as analyzed in Part IV.

Until the twentieth century, the primary purpose of servitudes in America was to burden one piece of land for the benefit of an appurtenant piece of land.[24] Today, the primary purpose of servitudes is a means of private landowners submitting their land to the regulatory domain of a governmental or quasi-governmental entity in furtherance of the governmental goals of order and well-being.[25] The common law requirements for deciding whether a servitude is valid have been in a state of flux for decades as even the base assumptions about whether servitudes should be favored or disfavored has been shifting.[26] Arguments that arbitrary property rules are no longer relevant and have given way to logical contract rules based in preference satisfaction, while certainly provocative, have not been borne out in case law. A proprietorial framework that incorporates both police power and preference satisfaction as "strategies" of the state[27] in securing the order and prosperity of a population[28] offers a coherent rationale for the old rules of servitudes and why courts stubbornly continue to apply

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24. *See* Reichman, *supra* note 6, at 1183–1184. *See also* Susan French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1262–1263 (1982) (discussing simple ancient uses and innovative uses since late nineteenth century).

25. STOEBUCK & WHITMAN, *supra* note 7, at 471.

26. STOEBUCK & WHITMAN, *supra* note 7, at 470.

27. Carol M. Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 8–9 (1991).

28. FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÉGE DE FRANCE 1977-1978 353 (Michel Senellart et al. eds., Graham Burchell trans., Picador Press 2007)) (2004).

them in certain circumstances,[29] as well as the seemingly incompatible rules that courts apply to community servitudes.[30]

II. POLICE POWER, PROPRIETORIALISM, & GOVERNMENTALITY

The current taxonomical structure of U.S. land use law begins with drawing a bright line between public and private powers to police land.[31] According to this dichotomy, the public power has always been held severally by the states, may be deployed rationally for the purpose of protecting the public health, safety, welfare, and morals, and is limited only by the constitutionally enumerated rights of individuals, enumerated powers of the federal government, and limitations contained in each state's constitution.[32] In contrast, private rights to regulate land arise from an individual property owner's inherent authority as an owner as articulated by the courts via common law and by the legislature, for the purposes of pursuing the owner's best interests however the owner conceives them—a purpose known as "preference satisfaction."[33] These powers include the rights to put

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29. *See* In re Extraction Oil & Gas, Inc. v. Platte River Midstream, LLC, 622 B.R. 581, 605 (D. Del. Bkrtcy. Ct. 2020) (Colorado continues to apply "touch and concern" and horizontal privity requirements for real covenants that run with the land); Garland v. Rosenshein, 649 N.E.2d 756,758 (Mass. 1995) ("Touch and concern requirement required in Massachusetts for servitude to run with the land); In re Energytec, Inc. 739 F.3d 215, 222, 223 (5th Cir. 2013) (Applying tests for horizontal and vertical privity in determining whether a covenant runs with the land); Wykeman Rise, LLC v. Federer, 52 A.3d 702, 714, 715 (Conn. 2012) (Applying tests for horizontal and vertical privity in determining whether a covenant runs with the land).

30. *See* Wellesly Conservation Council, Inc. v. Pereira, 153 N.E.3d 413, 420 (Mass. App. Ct. 2020) (Quoting the RESTATEMENT (3RD) OF PROPERTY: SERVITUDES in support of conclusion that monetary damages may be awarded for conservation servitude violation); Wisniewski v. Kelly, 437, N.W.2d 25 (Mich. 1989) (Subdivider's reservation of police power over subdivision, including two common element lots, found to run to resident's association as a covenant despite developer's failure to transfer powers.); Weatherby Lake Improvement Co. v. Sherman, 611 S.W.2d 326 (Mo. Ct. App. 1980) (Validity of affirmative covenant to pay for maintenance and upkeep of lake as neighborhood amenity implied in equity where no express servitude was ever created).

31. *See eg.* RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.1 cmt. a & f (Am. L. Inst. 2000) ("'Servitude' is the generic term that describes legal devices private parties can use to created rights and obligations that run with land. . . Zoning, subdivision controls, and other public-land-use regulations are not servitudes covered by this Restatement.").

32. Randy Barnett, *The Proper Scope of the Police Power*, 79 NOTRE DAME L. REV. 429, 430 (2004).

33. Stephen R. Munzer, Compensation and Government Takings of Private Property, in COMPENSATORY JUSTICE: NOMOS XXXIII 195, 200 (John W. Chapman ed., 1991). The economic term "preference satisfaction" connotes an individual's decisions about how to best invest and manage resources at their disposal as informed by the manager's moral and ethical tableau, not a manager's capricious desire or amoral calculation.

the land to specific uses, to exclude others, to do nothing with the land, and the ability to alienate all or some of the land or rights incidental to ownership of the land as exemplified in the law of defeasible estates and servitudes.[34]

This public/private divide has led to one set of rules for the states' valid exercise of public police powers and a different set of rules for a private owner's valid exercise of their private land use controls.[35] Since the twentieth century, a bevy of innovative land use tools have made this bright line between public and private land use controls quite blurry. For example, zoning and planning tools like Planned Unit Developments, Floating Zones, and transferred development rights have made public land use planning far more customizable than the Supreme Court majority in the landmark zoning case, *Village of Euclid v. Ambler Realty*, probably could have ever imagined.[36] Similarly, a central tool for private land use controls, servitudes, have taken on characteristics remarkably similar to zoning laws and other governmental regulations in common interest communities, conservation easements, and affordable housing. The blurring line between public and private land use controls has troubled courts and scholars for several decades. How to decide which set of rules to apply? How to determine the proper standard of review?

Robert Ellickson has argued that the essential difference between public land use controls and covenants, conditions, and restrictions in common interest communities is an individual's "perfectly voluntary" participation in the regulatory regime of a common interest community, which Ellickson claims justifies stricter judicial scrutiny for rulemaking in common interest communities.[37] This public/private dichotomy has been attacked from many directions. Andrea Boyack has questioned how "perfectly voluntary" common interest community covenants are in

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34. Wesley Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L. J. 710, 746 (1917).

35. DUKEMINIER ET AL., *supra* note 5, at 729.

36. Planned Unit Developments, Floating Zones, and Transferrable Development Rights zoning tools have all been attacked as illegitimate exercises of state police power and upheld as valid by courts. *See* Giger v. City of Omaha, 442 N.W.2d 182, 189 (Neb. 1989) (challenge to PUD as *ultra vires*, spot zoning, and illegal contract zoning); Rodgers v. Village of Tarrytown, 96 N.E.2d 731(N.Y. 1951) (challenging the validity of a floating zone ordinance); Suitum v. Tahoe Regional Planning Agency, 520 U.S. 725 (1997) (Supreme Court decides ripeness question in Plaintiff's challenge of a transferrable development right ordinance as an unconstitutional taking without just compensation).

37. Robert Ellickson, *Cities and Homeowners Associations*, 130 U. PENN. L. REV. 1519, 1580 (1982).

reality.[38] Randy Barnett's view of the police power undermines Ellickson's "perfectly voluntary" differentiation by locating the state police power in a Natural Rights framework premised on the voluntary participation of every individual subject.[39] I will add my own skepticism of Ellickson's distinction by observing that zoning is becoming more and more "perfectly voluntary" all the time, as we see in floating zones, cluster zones, Planned United Development, and many legislatively enabled contemporary servitudes. Conversely, to echo Boyack's point, a decision to move into some common interest communities is no more "perfectly voluntary" than a decision to move into a specific town.[40]

Focusing on whether an actor is public or private misses the substantive point of identifying the strategies or methods of managing resources.[41] Carol Rose persuasively argues that the strategy or method of managing resources yields more insight than quibbling over labels like "public" or "private."[42] Rose puts aside the public/private dichotomy to focus on a set of techniques, including regulation and recognizing (or abolishing) private property rights, as two out of at least four methods of assuring society's overarching goal in securing the proper order of resources.[43] Central to my thesis in this Article is that defining "police" and then tracing the technique of policing in land use regulation, regardless of whether the wielder is public or private, yields valuable information about the current state of the law of servitudes. Nonetheless, the difference between public and private actors in land use regulation does matter. As Ellickson points out, the significance is evident, for example, in differing judicial standards of review applied to public and private bodies in land use decisions and in differing standards for whether land use controls are valid in the first place.[44] Therefore, to proceed, we must first define the police power, then acknowledge its role in US

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38. Andrea Boyack powerfully calls into question the legal fiction of freedom of contract in neighborhood association servitudes in her article, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL'Y 767 (2014).

39. Barnett, *supra* note 32, at 451–452.

40. Indeed, some common interest communities like Weston, FL and Rancho Santa Margarita, CA began as master-planned common interest communities and later incorporated as cities. Weston, FL, https://en.wikipedia.org/wiki/Weston,_Florida (last visited June 11, 2021); Rancho Santa Margarita, https://en.wikipedia.org/wiki/Rancho_Santa_Margarita,_California (last visited June 11, 2021).

41. Carol Rose, *Rethinking Environmental Controls: Management Strategies for Common Resources*, 1991 DUKE L.J. 1, 8–9 (1991).

42. Rose, *supra* note 27, at 8.

43. *Id.*; GREGORY S. ALEXANDER, COMMODITY & PROPRIETY (1997).

44. Ellickson, *supra* note 37, at 1529–1530.

land use law as a power reserved to the states. From there, we will dive deeper into social theory to investigate the role of the police power in maintaining social order and security at both the level of *familia* and nation-state before concluding this Part I with some summary points about the police power as it relates to land use control, generally, and a hypothesis about the rules of servitudes reinterpreted as exercises of private police power.

A. Defining the Police Power in U.S. Law[45]

The English roots of the concept held the police power synonymous with a law of *overruling necessity*, by which the sovereign had the right to impinge on or even destroy private property for the defense of society or public peace.[46] Blackstone combined the concept of "police" with "oeconomy" to describe a state's regulatory power over its residents in circumstances other than emergency:

> By the public police and oeconomy I mean the due regulation and domestic order of the kingdom: whereby the individuals of the state, like members of a well-governed family, are bound to conform their general behavior to the rules of propriety, good neighbourhood, and good manners; and to be decent, industrious, and inoffensive in their respective stations.[47]

Blackstone's definition is reflected in nineteenth century U.S. Supreme Court jurisprudence defining states' police powers in a broad, nonemergency context as the power "to prescribe regulations to promote the health, peace, morals, education, and good order of the people, and to legislate so as to increase the industries of the state, develop its resources, and add to its wealth and prosperity."[48]

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45. For a succinct and helpful history of the police power, *see* Stephen R. Miller, *Community Rights and the Municipal Police Power*, 55 SANTA CLARA L. REV. 675, 685–688 (2015); for a much longer and thoroughly engaging genealogy of the police power, *see* MARKUS DIRK DUBBER, THE POLICE POWER: PATRIARCHY AND THE FOUNDATIONS OF AMERICAN GOVERNMENT, parts 1 & II (2005); *see also* WILLIAM PACKER PRENTICE, POLICE POWERS ARISING UNDER THE LAW OF OVERRULING NECESSITY 10 (1894).

46. PRENTICE, *supra* note 45, at 4.

47. 4 WILLIAM BLACKSTONE, COMMENTARIES *162 (1769).

48. Mugler v. Kansas, 123 U.S. 623, 663 (1887) (quoting Barbier v. Connolly, 113 U.S. 27, 31 (1884).

The current range of states' police power is extensive.[49] In the 1964 opinion *Berman v. Parker*, Justice Douglas described the state police power as so all-encompassing as to be virtually meaningless:

> The concept of the public welfare is broad and inclusive. The values it represents are spiritual as well as physical, aesthetic as well as monetary. It is within the power of the legislature to determine that the community should be beautiful as well as healthy, spacious as well as clean, well-balanced as well as carefully patrolled.[50]

It has consistently grown in scope along with the nation's industrial and technological development, and we can expect that it will continue to grow so long as civilization "advances."[51] Zoning, labor, education, public health and safety, building codes, traffic, and more are all regulated based on states' police power.[52]

However, even in *Berman,* Justice Douglas alludes to some limitations on the state police power. [53] First and foremost, the state police power is an unenumerated power possessed by the *states*, not the federal government.[54] Second, states can delegate their police powers, but only to lesser branches of state government.[55] A state or locality cannot delegate the public police power to a private entity for private gain or benefit.[56] In wielding the police power, the governmental body must pursue the security and welfare of the public, not the government itself or any particular individual.[57] Finally, a state's police powers are limited to the extent that they are preempted by enumerated federal powers, the state's constitution, and individual rights enumerated in federal or state constitutions.[58]

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49. *See* Berman v. Parker, 348 U.S. 26, 33 (1954); PRENTICE, *supra* note 45 at 1.

50. *Berman*, 348 U.S. at 33.

51. PRENTICE, *supra* note 45, at 9.

52. PRENTICE, *supra* note 45, at 4; Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

53. *Berman*, 348 U.S. at 32 ("Subject to specific constitutional limitations, when the legislature has spoken, the public interest has been declared in terms well-nigh conclusive.").

54. *Berman*, 348 U.S. at 31–32.

55. STOEBUCK & WHITMAN, *supra* note 7, at 519.

56. JOHN R. NOLON ET AL., LAND USE AND SUSTAINABLE DEVELOPMENT 144 (9th ed. 2017).

57. PRENTICE, *supra* note 45, at 7.

58. U.S. CONST. amend X.

B. Police Power as Exclusive to States

The Supreme Court has defined the police power as the power of the *states* to govern.[59] Professor Stephen R. Miller offers three different definitions of the state police power based on Supreme Court jurisprudence.[60] The first is James Madison's concept that the police power is the states' "residual sovereignty"—that is, all sovereignty not explicitly granted to the federal government in the Constitution.[61] The second and third definitions are based on enumerations of the police power as the power to protect the public health, safety, morals, and welfare broadly or narrowly construed. The *Lochner* Era version of the definition narrowly construes the public health, safely, morals, and welfare while the New Deal Era version embraces an expansive and broad construction.[62] In each of these definitions, the police power is recognized as a power of the state, not of the federal government or the individual. In *U.S. v. Lopez*, the Supreme Court employed the "residual sovereignty" concept of state police power in finding that it marks a limit to congressional Commerce Clause power to make gun control legislation.[63] In Justice Souter's dissent in *Lopez*, he argued that the Commerce Clause gives the U.S. Congress a form of general police power and that the judiciary should be as deferential to Congress's exercise of its *enumerated* police power under the Commerce Clause as it is of the states' reserved police powers.[64] He alluded to Holmes's dissent in *Lochner* by suggesting that judicial intervention to second-guess Congress's power to regulate based on the Commerce Clause supplants the people's democratic will.[65] "For Souter, 'police power' was indicative of a type of power that might be exercised, perhaps even in overlapping spheres, by federal and state agents."[66] However, Justice Souter's description of the federal power to regulate pursuant to the Commerce Clause as a form of police power has been pointedly rejected by the Supreme Court in subsequent decisions related to the police power.[67] As Chief Justice Roberts explained in *National Federation*

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59. *Berman*, 348 U.S. at 31–32.

60. Miller, *supra* note 45, at 702.

61. *Id.* (begging the question of defining sovereignty).

62. *Id.*

63. United States v. Lopez, 514 U.S. 549, 552 (1995).

64. *Lopez*, 514 U.S. at 606.

65. *Lopez*, 514 U.S. at 604.

66. Miller, *supra* note 45, at 698.

67. In U.S. v. Morrison, Justice Rehnquist wrote for the majority, "The Constitution requires a distinction between what is truly national and what is truly local, and there is no

of Independent Businesses v. Sebelius, our federalist system does not recognize a general, unenumerated police power in the federal government.[68] Clearly, the majority of Supreme Court justices currently view the police power as the unenumerated power reserved exclusively to the states and are wary of describing enumerated federal powers as "police" powers.[69]

Locating the generalized police power as exclusive to the states not only prevents the federal government from extending its centralized sovereign power beyond constitutionally enumerated limits,[70]but it also prevents the states from invalidly delegating this power to individuals or groups.[71] For example, in land use law, third parties unhappy with a locality's decision to enter into development agreements frequently challenge such development agreements as invalid delegations of the state's police power to private developers, or "contract zoning."[72] The prohibition on contract zoning is grounded in the duties, or obligations, of a state to govern and regulate in the best interest of the state's population or public.[73] An improper delegation of state police power to a private party is an abuse of power and dereliction of duty. This concept of the state police power as an obligation or duty to regulate a state's domain in the best interest of the inhabitants and resources within the state was influential on the Founders. As such, it predates the United States and the Constitution.[74] Legal scholars have explored the idea that private property is a means of allocating power and obligation over things in order to promote

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better example of the police power, which the Founders undeniably left reposed in the States and denied the central Government, than the suppression of violent crime and vindication of its victims." 529 U.S. 598, 599 (2000); In National Federation of Independent Business v. Sebelius, Justice Roberts wrote for the majority:

> The Federal Government . . . must show that a constitutional grant of power authorizes each of its actions. The same does not apply to the States, because the Constitution is not the source of their power . . . Our cases refer to this general power of governing, possessed by the States but not by the Federal Government, as the "police power." . . . This case concerns two powers that the Constitution does grant the Federal Government, but which must be read carefully to avoid creating a general federal authority akin to the police power.

567 U.S. 519, 535–36 (2012).

68. *Nat'l Fed'n of Indep. Bus.*, 567 U.S. at 536.

69. *Id.*

70. *Id.*

71. William A. Fischel, *The Evolution of Homeownership*, 77 U. CHI. L. REV. 1503, 1520 (2010).

72. *See* NOLON ET AL., *supra* note 56, at 296; *see also* CALLIES ET AL., BARGAINING FOR DEVELOPMENT: A HANDBOOK ON DEVELOPMENT AGREEMENTS, ANNEXATION AGREEMENTS, LAND DEVELOPMENT CONDITIONS, VESTED RIGHTS, AND THE PROVISION OF PUBLIC FACILITIES, 91-96 (2003).

73. *See, e.g.,* McNeil v. City of South Pasadena, 166 Cal. 153, 155–156 (1913).

74. DUBBER, *supra* note 16, at 82.

societal police and economy.[75] As feudal land tenure and caste regimes gave way to Civic Republican ideals in the Anglo-American legal system, planting the seeds of democratic autonomy and equality, the extent of and justification for a private property owner's powers to "police" or regulate their domain began to shift. Some scholars describe this shift as "governmentality";[76] others describe it as the pursuit of "human flourishing".[77]

C. "Property as Propriety," Police as Private Power

In her ridiculously good article, *Property as Wealth, Property as Propriety*, Carol Rose posits that there are two irreducible justifications for recognizing private property rights.[78] The dominant justification today is preference satisfaction, or the liberal economic idea that a self-interested private owner will most efficiently manage resources to "increase the bag of goods" or "the size of the pie."[79] According to this rationale, the powers of a private land owner to control their property should be robust because a self-interested owner will maximizes efficiency and utility of their privately-owned resources.[80] According to Rose, the older, overshadowed, but still lingering justification for allocating powers to a private property owner is as a means of maintaining "propriety" or social order, by allocating that which is "proper" to each member of society based on each member's station so as to "keep good order in the commonwealth or body politic."[81] There are strains of Blackstone's definition of police and oeconomy in Rose's definition of propriety.[82] This is no coincidence; as Rose explains, "[p]roperty-as-propriety entailed governing authority in some domain; but because of that authority, property was a kind of trust as well".[83] The power to police was the power to impose proper order over the people and things in one's domain.[84] In Rose's proprietorialism, private property rights are a tactic for maintaining good social order. In the next subpart, I will examine

75. Rose, *supra* note 15, at 236–237.
76. FOUCAULT, *supra* note 28, at 352–353.
77. Eduardo M. Peñalever, Land Virtues, 94 CORNELL L. REV. 821, 876 (2009).
78. Rose, *supra* note 15, at 247.
79. Rose, *supra* note 15, at 239.
80. Munzer, *supra* note 33, at 200.
81. Rose, *supra* note 15, reprinted in PROPERTY AND PERSUASION 49, 58 (1994).
82. *See supra* Part II.A. 11.
83. Rose, *supra* note 15, at 237.
84. DUBBER, *supra* note 16, at 44.

the roots of private police power as a means of securing "good social order" in U.S. history to show that despite current Supreme Court jurisprudence, the concept of the police power is not exclusive to the states and has, in fact, always been a part of our private property system, as well.

D. Police and Economy

Historians and legal scholars interested in property and power in the U.S. legal system are often drawn to studying the Enlightenment of the eighteenth century. In a few short decades, the fundamental premises of European civilization–what it means to be a person, the role of government, the idea of society as population, what constitutes knowledge–were fundamentally altered, culminating in the American and French revolutions in the final quarter of the eighteenth century.[85] The legacy of the Enlightenment continues to figure prominently in contemporary debate about such central questions as the nature of human rights, the proper scope of government, and the rationale for private property.[86]

One of the central questions that has fascinated scholars about this period is how Western nations evolved from states primarily focused on maintaining a monarch's sovereignty into contemporary liberal democracies.[87] At apparent odds are two forms of social order, one grounded in police, or a householder's heteronomous power to control the people and things that comprise his household or by a monarch as macro-householder, the other grounded in law, or the voluntary participation of free, autonomous citizens in democratic politics.[88]

In his compelling book, *The Police Power: Patriarchy and the Foundations of American Government*, Markus Dirk Dubber differentiates the Athenian idea of politics (defined as self-government by agreement between autonomous individuals), from economy (defined as heteronomous power of the householder over the household) and traces the origin of the police power to economy.[89] He explains that these two notions can be traced into

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85. LYNN HUNT, INVENTING HUMAN RIGHTS, 23–26 (2008); Michel Foucault, Governmentality, in THE FOUCAULT EFFECT: STUDIES IN GOVERNMENTALITY 87, 91 (Graham Burchell et al eds., 1991).

86. Alexander, *supra* note 1, at 743–744.

87. Foucault, *supra* note 85, at 91.

88. DUBBER, *supra* note 16, at 81–82.

89. DUBBER, *supra* note 16, at xii & n 15.

two different modes of government: *law*, by which "the state is the institutional manifestation of a political community of free and equal persons", and *police*, by which "the state is the institutional manifestation of a household" with the governmental authority as *paterfamilias* and the state as *familia*.[90]

Dubber and others have illustrated how the concepts of government as patriarchy and police as economy were woven into the fabric of the American republic. Dubber explains that prior to the American Revolution, the Founders had already been actively engaged in layered, hierarchical, policing. The Founders were accustomed to exercising a householder's heteronomous power over his household in, "their corporations, their camps, their towns, their churches, their families, and on their plantations," long before, and long after, the American Revolution.[91] The Founders often quoted Blackstone in defining the police power.[92] Dubber describes the American Revolution as removing a higher layer of household governance so that American white, male, property owners could "go about policing their respective households without interference from the macro householder, the king."[93] Instead of installing that macro police power in a new monarch or federal government, the Tenth Amendment made clear that the macro police power was installed in white, male, property-owners (or householders) united together as a republic of autonomous householders to make laws regulating the internal police of the state.[94]

Many other scholars have explored this dichotomy between politics and economy and their respective tools, law and police, in American history.[95] Rose ties the proprietorial justification for

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90. DUBBER, *supra* note 16, at 3.

91. DUBBER, *supra* note 16, at 192.

92. DUBBER, *supra* note 16, at 82.

93. DUBBER, *supra* note 16, at 83.

94. DUBBER, *supra* note 16, at 86.

95. *See* Christopher Tomlins, The Supreme Sovereignty of the State: A Genealogy of Police in American Constitutional Law, from the Founding Era to Lochner, in POLICE AND THE LIBERAL STATE, 33 (Markus Dirk Dubber & Mariana Valverde eds. 2008); William J. Novak, Police Power and the Hidden Transformations of the American State, in POLICE AND THE LIBERAL STATE, 54 (Markus Dirk Dubber & Mariana Valverde eds. 2008); Mark E. Kahn, Limited Liberty, Durable Patriarchy, in POLICE AND THE LIBERAL STATE, 74, (Markus Dirk Dubber & Mariana Valverde eds. 2008); Markus Dirk Dubber, Criminal Police and Criminal Law in the *Rechtsstaat*, in POLICE AND THE LIBERAL STATE, 92, (Markus Dirk Dubber & Mariana Valverde eds. 2008); David Alan Sklansky, Work and Authority in Policing, in POLICE AND THE LIBERAL STATE, 110, (Markus Dirk Dubber & Mariana Valverde eds. 2008); and Ron Levi, Loitering in the City That Works: On Circulation, Activity, and Police in Governing Urban Space, in POLICE AND THE LIBERAL STATE, 178, (Markus Dirk Dubber & Mariana Valverde eds. 2008).

property ownership to the governmental project envisioned by the Founders, explaining that in Jeffersonian civic republicanism, agricultural property ownership was the prerequisite and ideal for participation in the political and commercial spheres because agrarian property ownership ensured a subject's autonomy and independence as a subject in the political sphere.[96] This political independence was vital in a property regime not oriented toward maximizing profit, but toward maintaining social order, because it created a community of independent householders, or governors, able to engage in democratic law-making between themselves, but each wielding heteronomous power and charged with the responsibility of maintaining order and discipline within their respective homesteads necessary for the flourishing of the people and objects that comprised the homestead.[97] Through a proprietorial lens, a property regime vests a limited heteronomous power in a governing subject over the objects within their domain, but it also establishes a sort of trust, or duty of that governor to the objects within their domain.[98]

In his book, *Commodity & Propriety*, Gregory Alexander also attempts to reconcile heteronomous police power and autonomous political power in property law throughout American history.[99] He explains how the assiduous separation of the domestic and commercial spheres throughout the nineteenth century reified white male property owners' heteronomous control over the people and things in their households while allowing them to participate in commercial life and politics as autonomous individuals.[100] However, with the rise of industrialization, the decline of farming, and the entry of women and children into the commercial sphere, this neat compartmentalization that relegated women and children to the status of objects governed by a householder was less tenable.[101]

Political philosopher Mark Neocleous delineated how the American Founders introduced political practice into economy or resolved tensions between law and police as two competing concepts of social order.[102] He describes how the Constitutional

96. ROSE, *supra* note 81, at 61.

97. *Id.*

98. ROSE, *supra* note 81, at 63.

99. ALEXANDER, *supra* note 43.

100. ALEXANDER, *supra* note 43, at 297.

101. ALEXANDER, *supra* note 43, at 298.

102. MARK NEOCLEOUS, THE FABRICATION OF SOCIAL ORDER: A CRITICAL THEORY OF POLICE POWER, 31 (2000).

liberalism in vogue in the late eighteenth century led to the declaration of rule of *law* and the restriction of the notion of *police* to the body tasked with enforcing the law while [being] simultaneously limited by it.[103] Indeed, today, in common parlance "police" is synonymous with "law enforcement."[104]

The common theme in the explanations of police and law or economy and politics in U.S. history as described above is the emergence of politics as a replacement for monarchical police power by divine right at the highest level of social hierarchy.[105] The secession from British rule effectively freed white, male, property owners from a monarch's dominion, replacing it with a democratic political community of white, male property, owners who continued to wield their own police powers over their agrarian households until the agrarian model gave way to industrialization and urbanization.[106] Focusing on the highest level of social hierarchy and the police powers voluntarily vested in the state by white, land-owning, male citizens explains U.S. jurisprudence that has come to view the police power as unique to the states. However, the heteronomous power to police was, since before the founding of the U.S. and to this day, a power wielded by multiple different governors over various, overlapping domains. For example, a head-of-household has power over and responsibility for the well-being of the people and objects of their household as members of the household, clergy might have power over and responsibility for the spiritual or pastoral care of the same people in the household as members of their parish, teachers might have power over and responsibility for the educational growth and development of the students in the household as members of their class, doctors and veterinarians might have power over and responsibility for the people and animals of the household as members of a public health community, and so on.

The relationship between law and police/politics and economy has also been examined from the other direction. That is, how economy, or the management of the household, became a part of the management of the state. Michel Foucault, the late twentieth century continental philosopher who influenced Dubber's genealogy of the police power, examined how Western

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103. *Id.* at 31–32.

104. Merriam-Webster.com/thesaurus/police (last visited Nov. 30, 2021).

105. DUBBER, *supra* note 16, at 81; Rose, *supra* note 15, at 236; ALEXANDER, *supra* note 15, at 29-31.

106. DUBBER, *supra* note 16, at 81; Rose, *supra* note 15, at 236; ALEXANDER, *supra* note 15, at 29–31.

nations evolved from states primarily focused on maintaining a monarch's sovereignty into contemporary liberal democracies.[107] Like Rose's analysis of the roots of proprietorialism, Foucault concentrated his analysis heavily on French theories of government since the fifteenth century.[108] In Foucault's view, the art of governing is fundamentally concerned with the question of how to introduce economy (i.e. a head-of-household's correct management of the people and things within the household) into management of the state.[109] Like Dubber, Foucault roots police in the power of a patriarch to monitor, order, and control the people, goods, and wealth that comprise his household "correctly" so that the household is secure and prosperous.[110] Foucault observed that governors, or wielders of the police power, are "multifarious" and "immanent to the state", as for example, the head of a family, a superior of a convent, or a teacher.[111] Each is imbued with a degree of heteronomous power to regulate the peace and well-being of the people and things over which they have authority.[112] Status as an object of one governor's police power by no means precludes a person from being the object of another governor's simultaneous police power or of being a governor, oneself, over other people or things. In describing the hierarchies undergirding proprietorial property regimes, Rose similarly conveys the nesting or concentric characteristics of the governors and the governed:

> Property in this world 'properly' consisted in whatever resources one needed to do one's part in keeping good order; and the normal understanding of order was indeed hierarchy–in the family, in the immediate community, in the larger society and commonwealth, in the natural world, and in the relation between the natural and spiritual worlds.[113]

American history, specifically the overthrow of monarchical power and replacement with liberal democratic state power during the American Revolution, is the root of our Supreme Court jurisprudence identifying the police power as exclusive to states.[114] However, the aim of police–social order, security, and prosperity–

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107. Foucault, *supra* note 85, at 91.

108. ROSE, *supra* note 81, at 58–59; Foucault, *supra* note 85, at 87–104.

109. Foucault, *supra* note 85, at 92.

110. Foucault, *supra* note 85, at 92.

111. Foucault, *supra* note 85, at 91.

112. Foucault, *supra* note 85, at 91.

113. ROSE, *supra* note 81, at 59.

114. *See* Gregory v. Ashcroft, 501 U.S. 452, 457–458 (1991).

does not preclude, but tends toward, overlapping, layered, hierarchical social structures, or spheres-within-spheres, where a person may be governor or object in any number of bodies politic within their nation-state; each subject to its own police. The same antipathy in American law toward monarchical power and feudal land regimes that leads away from identifying a Federal "police power" obscures the police powers of a private landowner.[115] Instead, we frame private police powers as a property owner's "property rights" or "liberty", focusing on the landowner's freedom from oversight or governance rather than exploring the powers of the landowner in relationship to their domain.[116]

E. Governing Populations

For Dubber, the nature of police, or allocating to each person that which is "proper to their station," is fundamentally rooted in patriarchal models of the family or household.[117] Before the Enlightenment, propriety and good order meant maintaining one's place in the social hierarchy.[118] However, according to Foucault, modern Western liberal democracies developed precisely because the model of household economy as described by Rousseau, Locke, and Blackstone was replaced by something new.[119] This innovation was the concept of "population" as the object to be governed, defined, and measured by statistics. The development of the concept of "the population," separate from individual constituent members, and intelligible through statistics and the study of economics as a social science, provides a new justification for governing in the interests of "the public."[120] After "the population" became the object of government in the eighteenth century, the work of government, according to Foucault, becomes "a right

115. *See* Jacques v. Steenberg Homes, 563 N.W.2d 154, 159–160 (Wis. 1997) (landowner's power to police entry onto land described as landowner's right to exclude). Thomas Merrill, *The Property* Strategy, 160 U. PENN. L. REV. 2061, 2067–2068 (2012) (identifying private police powers held by a landowner as "residual managerial authority".)

116. *See* State v. Shack, 277 A.2d 369, 374 (N.J. 1971) (a notable exception where the landowner's private police powers were found not to extend to policing interactions between migrant farm workers who lived and worked on the property and members of the outside world).

117. DUBBER, *supra* note 16, at 3.

118. ROSE, *supra* note 81, at 59.

119. Interestingly, both Rose and Foucault identified seventeenth and eighteenth century France, culminating with the American and French Revolutions, as the locus of this shift from what Foucault calls raison d'Etat or sovereignty to governmentality in the art and science of government and what Rose describes as the dominance of a property as propriety regime to a property as preference satisfaction regime.

120. Foucault, *supra* note 85, at 99–100.

manner of disposing of things so as to lead . . . to an end which is 'convenient' for each of the things that are to be governed" (by which he infers "a plurality of specific aims" such as maximizing wealth, ensuring minimum subsistence, population growth, and other aims).[121] Foucault invented a neologism to describe this new project of the state: governmentality.[122] In his articulation of governmentality, Foucault explains that "the target of governmental power is population, its principle form of knowledge is political economy, and its essential technical means are apparatuses of security."[123] In other words, Western liberal democracies have reinterpreted the project of government to be the use of security tools, including law, police, and private property, to dispose of things "properly." In this context, "proper" disposition of things is no longer limited to the end of maintaining hierarchy, but can include any end that promotes the security and well-being of the body politic.[124] A government can discern the proper ends and its efficacy in reaching them by using the mode of scientific rationality that used to be called political economy, or what today we would simply call "economics."[125]

The study of economics provides information to a governor to analyze the efficacy of various management tactics, including recognizing private property for the end of individual preference satisfaction, in reaching the specific aims of security and prosperity for the population. Economics as a social science of population provides a governor with the means of discerning the "natural processes" not in the sense of divine law, but in the sense of scientifically observable and calculable rules of nature.[126] The objective of government after the advent of economics as a social science is "state intervention with the essential function of ensuring the security of the natural phenomena of economic processes or processes intrinsic to population."[127] Because of the so-called "naturalness" of economic processes, that is their ability to

121. Foucault, *supra* note 85, at 95.

122. Foucault, *supra* note 85, at 102.

123. Foucault, *supra* note 85, at 102.

124. Foucault, *supra* note 85, at 99.

125. Jean Jacques Rousseau defined political economy this way: "The word Economy or OEconomy, is derived from oikos, a house, and nomos, law, and meant originally only the wise and legitimate government of the house for the common good of the whole family. The meaning of the term was then extended to the government of that great family, the State." JEAN JACQUES ROUSSEAU, DISCOURSE ON POLITICAL ECONOMY (1755).

126. MICHEL FOUCAULT, SECURITY, TERRITORY, POPULATION: LECTURES AT THE COLLÉGE DE FRANCE 1977–1978, 352–353 (Michel Senellart et al. eds., Graham Burchell trans., Picador Press 2007) (2004).

127. *Id.*

be explained by scientific rationality, Foucault identifies a split in the use of the police power with incentive-regulation tactics employed to ensure the "natural" tendencies of the economy and population and more traditional "negative" functions of police in the modern sense–closely associated with "law enforcement"–as the implement of preventing disorder.[128]

Rose posits that preference satisfaction and propriety are alternative, irreducible rationales for recognizing private property rights because one aims at promoting individual prosperity and the other at collective security.[129] In her view, a property regime based on propriety is an ancient view of property that has largely given way to an understanding of property as a means of maximizing individual wealth.[130] However, preference satisfaction can be subsumed by a proprietorial framework whose aim is to "arrange or dispose of things to achieve the various objectives for the population."[131] In other words, a private property regime based on preference satisfaction may be viewed as one tactic for disposing of things so as to lead to the end most convenient for each of the things to be governed: the aim of proprietorialism in a Western liberal democracy.[132]

As an illustration of how a modern state deploys "apparatuses of security" to properly dispose of resources most convenient for the ends of the population, we can consider Rose's four categories for managing common resources. In her clear and jargon-free style, Rose explains that in managing a common resource, a manager can (1) do nothing to manage the resource, (2) exclude access, a management style she labels "Keep Out," (3) manage the way that the resource can be used, which she describes as "Right Way" management, or (4) convert the commons into private property, which Rose calls the "Property" approach, but which I will call the Russian Doll approach, for reasons explained below.[133] Rose

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128. *Id.* at 354.

129. Rose, *supra* note 15, at 232.

130. ROSE, *supra* note 81, at 64.

131. Foucault, *supra* note 85, at 95.

132. Lynda Butler and Larissa Katz are both doing interest work in developing this idea. Butler has explored property as a system of management to support the claim that managerial goals should be construed as broader than those cognizable through an individual owner's right to exclude. Lynda L. Butler, *Property as a Management Institution*, 82 BROOKLYN L. REV. 1215, 1245–1247 (2017). Larissa Katz has explored the ways in which landowners, as both objects governed by the state and governors of their private domains, are used by the state as agents for accomplishing police. Larissa Katz, *Governing Through Owners: How and Why Formal Private Property Rights Enhance State Power*, 160 U. PA. L. REV. 2029 (2012).

133. Rose, *supra* note 41, at 8–9. *See* Katz, *supra* note 132, at 2031 (articulating a

powerfully illustrates these four categories in the management of resources as diverse as fisheries and clean air, but her framework can be broadened even further to encompass land or any object of proprietorial control.[134] I suggest that Rose's fourth category of resource management, "Property," can alternatively be thought of as the "Russian Doll" approach because Rose's understanding of Property means commodification, but also the police powers of a proprietor.[135] From a proprietorial lens, a resource manager may divide a commons into private property, by, for example divvying up pieces of Rose's proverbial berry patch, so that each berry patch owner/manager is vested not only with a commodity that can be bought and sold, but also with the police powers necessary to regulate the land, all nested within other regulatory powers which the original resource manager retained, such as the power to zone the berry patch (Rose's "Right Way" management technique) or the power to condemn the berry patch (Rose's "Keep Out" technique). The new property owner now has its own power to manage their piece of the berry patch by (1) doing nothing, (2) excluding others, (3) regulating the "right way" to use the resource or (4) creating new property interests. In carving out and alienating a property interest, like a servitude, a private landowner is both increasing the objects governed by the beneficiary of the servitude and imparting, or nesting, a portion of their police power in the new governor.

To summarize the concepts in the paragraph above, contrary to Rose's assertion, preference satisfaction and proprietorialism are not irreducible rationales for private property rights.[136] If proprietorialism is understood as disposing of things in the ways most convenient to the ends of the objects governed, disposition of things to a private owner for the purpose of preference satisfaction can be interpreted as a "proper" disposition of things, to be verified by the tools of economics as a social science.[137] Vesting powers over land in private owners with the assumption that those owners will dispose of the land in ways that conform to "natural" rules of utility and efficiencies is one tactic that a state can employ to "properly" dispose of things for the benefit of the population.[138]

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concept similar to Rose's "Property" management strategy under the name "governing through owners").

134. Rose, *supra* note 41, at 8–10.

135. Rose, *supra* note 15, at 232.

136. Rose, *supra* note 15, at 225.

137. Foucault, *supra* note 85, at 94; FOUCAULT, *supra* note 127, at 353.

138. Rose, *supra* note 41, at 9–10.

F. Law and Police as Tactics of Security

If we recognize that preference satisfaction as a justification of private property can be subsumed within a proprietorial property framework once the definition of social economy is broadened beyond maintenance of hierarchical order to encompass all ends related to the security and well-being of the population, or body politic, then we can similarly diffuse the tension between law and police by recognizing that both are tactics of security. The dichotomies between preference satisfaction and proprietorialism and between law and police aren't really dichotomies at all. "Law is one of the tactics used to arrange or dispose of things to achieve the various objectives for the population."[139] "This explains, finally, the insertion of freedom within governmentality, not only as the right of individuals legitimately opposed to the power, usurpations, and abuses of the sovereign or the government, but as an element that has become indispensable to governmentality itself. Henceforth, a condition of governing well is that freedom, or certain forms of freedom are really respected. Failing to respect freedom is not only an abuse of rights with regard to the law, it is above all ignorance of how to govern properly."[140] In other words, law, or the consent of the governed, is a strategy in maintaining social order by, for example, allocating and respecting private property rights. This strategy is legitimated by the assumption that a free individual will make rational decisions intended to promote their own wellbeing by maximizing the utility and efficiency of the resources within their domain.[141] Since both the individual owner and their private property are objects within the state's domain, this recognition of private property rights, or Rose's "Property" management category, is legitimate proprietorial action for the State.[142]

Rose persuasively argues that strains of proprietorialism as a justification for private property rights can still be found throughout property law.[143] She identifies one strain in takings jurisprudence, which permits the state (as governor) to

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139. Foucault, *supra* note 85, at 95.

140. FOUCAULT, *supra* note 127, at 353.

141. Harold Demsetz, *Toward a Theory of Property Rights*, 57 AMERICAN ECONOMIC R. 347, 350 (1967).

142. Rose, *supra* note 41, at 9–10. *See also*, Larissa Katz, *It's Not Personal: Social Obligations in the Office of Ownership*, 29 CORNELL J. OF L. AND PUB. POLICY 587, 597–600 (2020).

143. ROSE, *supra* note 81, at 64.

unilaterally commandeer property from an individual (here, a governed object), but only for public use and only upon payment of just compensation.[144] She detects other echoes of this proprietorial view in the welfare law and policy work of scholars like Charles Reich and Cass Sunstein.[145] The law of contemporary servitudes provides another example of proprietorialism, one which depends on law and individual freedom as tactics for properly ordering things for the ends of the population. The following parts of this Article will show how and why contemporary servitudes depend on the voluntary consent of free individuals and the presumption of their self-interested actions in governing their individual domains to achieve land use ends "convenient" to the broader body politic, ends that would not be reachable by the state via its police power.

G. Summary and Hypotheses

In the subchapters above, I've attempted to articulate a basic and simple definition of police power as related to economics, or as Dubber summarizes Blackstone, a governor's heteronomous power to order the people and things over which it has control for the benefit of the collection of objects, or resources, governed.[146] I've examined how the American Revolution and founding of the United States focused on stripping the highest levels of social hierarchy, the monarch and lords, of police power by divine right while retaining lord-like police power "under law" or by the consent of free and autonomous white, male, landowners over homesteads and plantations, and the people who lived and worked on them.[147] This historical focus explains the Supreme Court's positioning the unenumerated police power exclusively in the states. Nevertheless, the concept of police as it arises in social theory is but one tactic of governmental power that can be readily split, subdivided, and wielded among any number of governors over any number of sub-populations within a nation-state. Finally, I've shown that the dichotomies between preference satisfaction and proprietorialism as rationales for recognizing private property rights and between law and police in theories of state power are not really irreducible dichotomies at all. Both sets of dichotomies

144. ROSE, *supra* note 81, at 64.

145. ROSE, *supra* note 81, at 63.

146. DUBBER, *supra* note 16, at 58.

147. DUBBER, *supra* note 16, at 83; GREGORY ALEXANDER, COMMODITY & PROPRIETY, 4–5 (1997).

can be captured within Foucault's notion of "governmentality,"[148] which is fundamentally proprietorial in that it is concerned with the state's disposing of the people and things it governs in a way most convenient to promote security, welfare, and prosperity.

Within governmentality, law (a subject's autonomous and voluntary participation in governance), and the heteronomous police power to monitor, regulate, and administer are *both* tactics of security to be recognized and employed by the state for the safety and prosperity of the broader population. Economic analysis not only informs a governor about the status of the populations' security and welfare, but it also provides the "natural rules" that indicate what "proper" or "convenient" ends for the people and things in a body politic should be so that government can incentivize free individuals to act in accordance with those natural rules.[149] With these preliminary points established, it is possible to make a couple of hypotheses about the nesting police powers intrinsic to a proprietorial understanding of contemporary servitudes.

First, if nesting police power in multiple micro-governors is a tactic immanent to the state as Foucault suggests, then we should see examples of other governors, besides the states, using police powers to manage and regulate land.[150] I argue below that there are many instances of police powers vested in both the federal government and private parties. Servitudes are one example of private governors exercising police powers over land.

Second, if law and police powers are tactics of security employed by the state to govern its population, we should be able to find examples of states recognizing micro-governors' police powers over their micro-domains where the micro-governor and the micro-domain are nested within the state's domain and police powers. More specifically, Foucault suggests that we should find states using soft policing tactics, like economic incentive-regulation, to ensure that micro-governors wield their police powers according to "natural" rules of economics that will increase the security and prosperity of the micro-governor's domain, and by extension the state's domain.[151] In the next two parts of this Article, I argue that this hypothesis holds true in determining whether contemporary servitudes are valid.

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148. Foucault, *supra* note 85, at 102–103.

149. FOUCAULT, *supra* note 126, at 349–350 & 353.

150. Foucault, *supra* note 85, at 91.

151. FOUCAULT, *supra* note 126, at 353–354.

H. Police Powers by Other Names

The first hypothesis, above, is that if, as Foucault suggests, multiple, nesting, or concentric, police powers are immanent to the state, then we should be able to find police powers being wielded by governors other than the states.[152] Indeed, we do. In addition to examples offered by Dubber and Rose in the text above, and the valid delegation of state police powers to localities pursuant to state constitutions or statutory law,[153] we can also find traces of the police power in both federal powers and the powers of private property owners, just under different names.[154] While identifying police powers wielded by the federal government under different names is not critical to understanding servitudes as proprietorial tactics, it does show that police powers in a proprietorial property regime are not exclusive to states as governors. As discussed above, some scholars (and Supreme Court Justices) consider the federal government's constitutionally enumerated powers to regulate, *inter alia*, commerce, immigration, and international and Indian affairs, to be a form of police powers.[155] Additionally, Dubber identifies federal social safety laws, or public welfare offenses,[156] as a form of federal police power:[157]

> These [public welfare] cases do not fit neatly into any of such accepted classifications of common law offenses, such as those against the state, the person, property, or public morals. Many of these offenses are not in the nature of positive aggressions or invasions, with which the common law so often dealt, but are in the nature of neglect where the law requires care, or inaction where it imposes a duty. Many violations of such regulations result in no direct or immediate injury to person or property, but merely create the danger or probability of it which the law seeks to

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152. Foucault, *supra* note 85, at 91.

153. Hunter v. Pittsburgh, 207 U.S. 161, 178–179 (1907).

154. DUBBER, *supra* note 45, at 147.

155. *See supra* Part II.B.

156. Federal social safety and public welfare offenses are strict liability criminal offenses requiring no mens rea. For example, allowing adulterated drugs to enter interstate commerce:

"The prosecution to which Dotterweich was subjected is based on a now familiar type of legislation whereby penalties serve as effective means of regulation. Such legislation dispenses with the conventional requirement for criminal conduct -awareness of some wrongdoing. In the interest of the larger good, it puts the burden of acting at hazard upon a person otherwise innocent but standing in responsible relation to a public danger."

U.S. v. Dotterweich, 320 U.S. 277, 280–281 (1943).

157. DUBBER, *supra* note 45, at 147.

> minimize. While such offenses do not threaten the security of the state in the manner of treason, they may be regarded as offenses against its authority, for their occurrence impairs the efficiency of controls deemed essential to the social order as presently constituted.[158]

In describing federal public welfare offenses as a form of police power, Dubber mirrors Foucault's syntax in defining government:

> That 'public welfare offenses' is but a convenient synonym for 'police offenses' is plain enough—convenient because it avoids recognition of a federal police power . . . They have the same object: threats. They are measured by the same standard: efficiency. They take the same form: regulations. And they produce the same cluster of interests: public welfare (or 'social betterment') and social order, and the authority of the state necessary to maintain them.[159]

As discussed at the beginning of Part I, the concept of police originates in the heteronomous power of a householder, or patriarch, over the people and things in his household. Therefore, it is not difficult to find traces of police inherent in the regime of private property rights. Rose and Dubber supply examples of proprietorialism that imply a private police power by delimiting the public police power. Rose does this in her discussion of takings, explaining the state's obligation to pay just compensation for the affront of depriving the individual that which is "proper" to them based on their station.[160] Dubber implies a private police power over one's body by delimiting the state's police power in the "privacy cases" related to reproductive freedom and sodomy, though those cases never discuss the police power or substantive due process explicitly.[161]

In addition to inferring private police power as existing beyond the limits of the state police power, we can locate instances of courts and legislatures acknowledging that private governors wield police powers over the objects they control, as the police power incidental to economy is described in this section. If we recognize that the rights incidental to private property ownership, such as the right to exclude, the right to use and enjoy, the right to alienate, the right to destroy, may all be tactics of police (order)

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158. DUBBER, *supra* note 45, at 151 (quoting Justice Frankfurter in Morissette v. United States, 342 U.S. 246 (1952)).

159. DUBBER, *supra* note 45, at 151–152.

160. Rose, *supra* note 15, at 239–240.

161. DUBBER, *supra* note 45, at 201–202.

economy (prosperity for the objects governed), the test for validity becomes whether an owner's chosen tactic promotes these ends, and the extent to which the private owner's governor (the state) defers to the private owner's exercise of powers.[162]

For example, the law of adverse possession and prescription can be understood as the cancelation of an owner's proprietorial power for failure to maintain the police of their land. A landowner's tendency toward good governance and valid exercise of police power over their land as a resource can be presumed based on the "natural" economic laws of utility and efficiency,[163] however this presumption can be rebutted, in which case the governor's attempt to exercise their private police power will be invalid. For example, an owner's ability to exclude others from their land may be overruled by the state if the owner's exercise of this managerial control is jeopardizing the health, safety, or wellbeing of people over whom the governor exercises heteronomous control, like a landowner over migrant workers residing on the land.[164] As another example, an owner's decision to destroy their property may be overruled by the state in the event the court concludes that the property owner is wielding their police power in a way that is detrimental to not only to the health, safety, welfare, prosperity, and security of the people and things governed by the landowner, but also of the population (including the landowner) governed by the local government.[165] For example, in *Eyerman v. Mercantile Trust*, the court declined to enforce a testatrix's wishes that her house be destroyed. The court explained that the testatrix might have been free to destroy her house during her own lifetime because the law presumes that she would not act against her own best interest (destroying her home, therefore, would presumably be in her best interest), but after her death when she can no longer suffer the consequences of her actions, this presumption no longer applies and the harm to the community in destroying her house is not outweighed by a presumed benefit to the testatrix.[166]

Finally, with the example of servitudes, we see that a servitude can be interpreted as a landowner freely and voluntarily alienating

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162. *See* Lynda L. Butler, *Property as a Management Institution*, 82 BROOKLYN L. REV. 1215, 1242–1243 (2017).

163. FOUCAULT, *supra* note 126, at 353; Rose, *supra* note 15, at 227.

164. State v. Shack, 277 A.2d 369, 374 (N.J. 1971) (right to exclude).

165. Eyerman v. Mercantile Trust Co, N.A., 524 S.W.2d 210, 217 (Mo. Ct of App. 1975) (right to destroy).

166. *Id.* at 214.

a portion of their private police power over their domain. To use Rose's four categories of resource management,[167] a landowner who grants a servitude gives away to another equal, autonomous governor, a portion of their managerial control over their land. In the sections that follow, I examine how legislative and judicial recognition of private parties to enter into new forms of servitudes is an instance of states deploying tactics of law (or rights of private individuals to pursue preference satisfaction according to natural laws of economics) to encourage private owners to voluntarily alienate their private police powers via servitudes for the benefit of populations of concern to the state.

III. CLASSIFYING CONTEMPORARY SERVITUDES

Environmental law scholars have described conservation easements as "hybrid servitudes," neither purely public nor private land use controls, but some combination of the two.[168] Boyack has described common interest communities as hybrid forms of government.[169] Land use scholar Judith Welch Wegner has characterized development agreements as hybrids of public regulatory power and private contract power.[170] In my prior work, I used the term "hybrid" to describe affordability covenants, which secure the vast majority of the U.S.'s privately-owned, publicly-subsidized affordable housing stock.[171] Conservation easements, developers' covenants found in development agreements, and affordability covenants are similar in that they are land use controls that take the form of a private servitude, but their purpose is to delegate police power from the property owner to a third-party regulator for the benefit of body politic or even an undefined public. Other kinds of preservation servitudes and restrictions that bind owners of properties held in common interest communities also follow this pattern. Traditional servitudes appurtenant or in gross, where the holder of the covenant is also the beneficiary of the covenant, do not follow this pattern. For example, a utility easement is a traditional servitude because the

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167. ROSE, *supra* note 27, at 8–9.

168. Jessica Owley, *Changing Property in a Changing World: A Call for the End of Perpetual Conservation Easements*, 30 STAN. ENVTL. L.J. 121, 136–37 (2011).

169. Boyack, *supra* note 38, at 771, 822.

170. Judith Welch Wegner, *Moving Toward the Bargaining Table: Contract Zoning, Development Agreements, and the Theoretical Foundations of Government Land Use Deals*, 65 N.C.L. REV. 957, 995–1003 (1987).

171. Elizabeth Elia, *Perpetual Affordability Covenants: Can These Land Use Tools Solve the Affordable Housing Crisis?*, 124 PENN STATE L.R. 57, 86 (2019).

enforcement power and the benefit of the covenant are both granted to the utility. A real covenant restricting a parcel to residential use for the benefit of its neighboring parcel is a traditional servitude because the beneficial interest and the right to enforce the covenant both attach to the benefited parcel.

The common feature among what I will label "community"[172] servitudes, and what distinguishes them from traditional servitudes, is that their primary purpose is not to allocate a non-possessory property interest in another person or appurtenant parcel of land; the instrument does not divvy sticks in the bundle between two or more equal, autonomous subjects presumed to engage in preference satisfaction.[173] Instead, these contemporary servitudes are primarily implementing governmentality.[174] Their aim is to merely announce that a certain bundle of sticks is subject to a certain governor's police power, a part of a certain domain.[175] They accomplish this goal by alienating some of the property owner's private police powers over the land to a third-party controller who acts in the best interests of a population or the public. To the extent the beneficiary of a community servitude is endowed with a right, it is usually simply the right to enforce the covenant against the property owner's *ultra vires* actions.[176] In practice, the benefit in community servitudes seems bifurcated, similarly to property held in trust, where the beneficial interest is held by a group, or even the general public, but management and enforcement authority is deposited in an agent or trustee.[177] To understand community servitudes in context, this section will provide a brief overview of traditional servitudes, servitudes in common interest communities, preservation servitudes, affordable housing covenants, and covenants found in development agreements.

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172. "Community" servitudes are tactics of governmentality–enabled as private decisions of free landowners, but for the purpose of promoting police of a population larger than the landowner's household or domain.

173. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §8.5 & §6 Intro Note (AM. L. INST. 2000).

174. *Id.*

175. *Id.*

176. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §6.8, §6.9 & §8.5 (AM. L. INST. 2000).

177. Neponsit Property Owners' Assn v. Emigrant Industrial Sav. Bank, 15 N.E.2d 793, 798 (N.Y. 1938); ELIZABETH BYERS & KARIN MARCHETTI PONTE, THE CONSERVATION EASEMENT HANDBOOK 116–117 (2nd ed. 2005).

A. Traditional Servitudes

The Restatement (Third) of Property: Servitudes defines a servitude as "a legal device that creates a right or an obligation that runs with land or an interest in land," including easements, profits, and covenants.[178] Traditionally, affirmative easements are nonpossessory rights to use someone else's land.[179] For example, Neighbor A might grant Neighbor B the right to cross Parcel A to reach Parcel B. A negative easement is a right to restrain a landowner from doing something on their own property.[180] While affirmative easements could be made for any number of reasons, there were only four kinds of negative easements traditionally recognized at common law.[181] These are easements for light, air, lateral support of land and the flow of artificial streams.[182] For example, if parcel A is burdened by an easement preventing the use of Parcel A in a way that prevents light from reaching Parcel B, the owner of Parcel A may not be able to build a second story addition to the house on Parcel A. Historically, the burden of an affirmative or negative easement passed automatically with the servient estate to subsequent owners of the servient estate.[183] However, the benefit of an easement only passed to subsequent owners when the easement was appurtenant, or attached to a dominant estate.[184] If an easement was in gross, or personal to a grantee, it could not be assigned.[185]

Covenants that run with land are promises about the use of land that run to subsequent owners of the land.[186] They have traditionally been divided into covenants at law, known as real covenants, and equitable servitudes.[187] For a covenant to transcend contract law and run to subsequent owners of the land who are not in privity of contract, a real covenant must meet certain requirements at traditional common law. First, the original parties must have intended that the covenant run to subsequent owners of

178. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.1 (AM. L. INST. 2000).

179. JULIAN JUERGENSMEYER & THOMAS ROBERTS, LAND USE PLANNING & DEVELOPMENT REGULATION §15.3 (3rd ed. 2012).

180. STOEBUCK & WHITMAN, *supra* note 7, at 439.

181. *Id.*

182. *Id.*

183. *Id.*

184. *Id.*

185. *Id.*

186. *Id.* at §15.4.

187. *Id.*

the burdened and benefitted parcels.[188] Second, there must be vertical and horizontal privity of estate.[189] In the United States, horizontal privity of estate has generally meant a landlord/tenant or grantor/grantee relationship.[190] Third, the benefit and the burden of the covenant must "touch or concern" the land.[191] Finally, as the covenant is the creation of an interest in real estate, it must be in a writing that satisfies the Statute of Frauds.[192] Finally, in the United States, all states have recording acts that create strong incentives to record interests in land, including servitudes, to protect against claims of subsequent purchasers and mortgagees.[193] Examples of traditional covenants include a tenant farmer's promise to mill all corn from the leased premises in the landlord's neighboring mill,[194] and neighbors' mutual agreement to maintain a party wall.[195] Equitable servitudes, which were traditionally enforceable in equity rather than at law, have similar but more relaxed common law requirements. For an equitable servitude to run with the land, the requirements that there be intent that the servitude run to subsequent owners and that the covenant touch or concern the burdened and benefited parcels are the same as for covenants that run at law.[196] Finally, a bona fide purchaser will be bound by an equitable servitude only if the purchaser had actual or constructive notice of the servitude at the time of purchase.[197] Examples of traditional equitable servitudes are duties to maintain a private park for neighboring benefitted properties[198] or servitudes restricting all lots in a neighborhood created by a common grantor to residential purposes[199]. Unlike real covenants, there is no need to show horizontal privity of estate or vertical privity of estate for an equitable servitude to run with a burdened parcel.[200] Covenants that do not meet the requirements to run with the land either at law or in equity may be binding as between the original parties pursuant to contract law, but they

188. STOEBUCK & WHITMAN, *supra* note 7, at §8.16.

189. *Id.* at §8.17 & §8.18.

190. *Id.* at §8.18.

191. *Id.* at §8.15.

192. *Id.* at §8.14.

193. *Id.* at §11.9.

194. Vyvyan v. Arthur, 1 B. & C. 410, 410–11 (K.B. 1823).

195. Savage v. Mason, 57 Mass. (3 Cush.) 500, 503 (1849).

196. JUERGENSMEYER & ROBERTS, *supra* note 179, at §15.7.

197. STOEBUCK& WHITMAN, *supra* note 7, at §8.28.

198. Tulk v. Moxhay, (1848) 41 E.R. 1143.

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

200. JUERGENSMEYER & ROBERTS, *supra* note 179, at §15.7.

will not be binding on subsequent owners of the burdened or benefited properties who have not assumed the contractual burden or benefit.[201] Affirmative easements fitting within the common law rule continue to be quite common today. Landowners and developers use them frequently to create means of access for neighbors, usage rights for utility infrastructure, and public sidewalks.[202] However, real covenants and equitable servitudes today are overwhelmingly tools that do not fit neatly within the traditional, common-law definitions.[203]

B. Servitudes in Common Interest Communities

Today, real covenants and equitable servitudes are predominately tools for regulating residential subdivisions.[204] Typically, they are created by a developer either expressly or via implication in the subdivision plat. The developer's entering into a development agreement with the local land use body, marketing of the new neighborhood as a specific kind of "community," or some combination of the two may spur the developer's creation of covenants and servitudes. Common interest community covenants typically burden each property in the subdivision for the benefit of all of the other properties in the subdivision.[205] Enforcement authority is typically vested in a homeowners' association (HOA), which may not own any land, itself, but acts as agent or trustee for the collective group of residential owners.[206] Membership in the HOA is often compulsory for all property owners in the common interest community.[207] The HOA is usually managed by a board and officers elected from among the HOA members.[208] An HOA's bylaws typically provide for specific procedures that a member is entitled to in any covenant enforcement action, such as notice, a right to a hearing, a right to representation, and a right to appeal Board decisions.[209] Subdivision covenants can impose an impressive array of affirmative duties and constraints on the property owners within a subdivision, from an affirmative duty to

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201. STOEBUCK& WHITMAN, *supra* note 7, at 472.

202. KORNGOLD, *supra* note 3, at 6–7.

203. STOEBUCK & WHITMAN, *supra* note 7, at 504–05.

204. STOEBUCK & WHITMAN, *supra* note 7, at 504.l.

205. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (AM. L. INST. 2000).

206. Ellickson, *supra* note 37, at 1522.

207. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a (AM. L. INST. 2000).

208. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.16 (AM. L. INST. 2000).

209. *See e.g.,* UNIF. COMMON INT. OWNERSHIP ACT §§ 3-115 & 3-116.

pay private taxes to maintain common amenities,[210] to restrictions or controls on virtually all external sensory information emanating from a property,[211] even to use and occupancy of enclosed spaces on a property.[212] It was not always clear that subdivision covenants would fall neatly into the definitions for traditional easements or covenants at common law. As easements, they are problematic because they often contain many more proscriptions other than the four negative easements traditionally recognized at common law. Their validity as running covenants was initially uncertain because obligations to pay fees or regulating who may use a property (such as a pet ban) may not be viewed as touching or concerning land.[213] Also, where an HOA owns no land, there was initial uncertainty over whether the horizontal privity requirement was satisfied.[214]

C. Preservation Servitudes

Preservation servitudes are negative easements and running covenants intended to protect or preserve land or resources.[215] The most common kind of preservation servitude is a conservation easement, with an estimated 191,476 conservation easements recorded in local land records across the United States today covering 32,701,848 acres of land.[216] Other notable preservation servitudes are historic preservation and agricultural preservation servitudes. Because there are only four kinds of negative easements allowed at traditional common law, some scholars have argued that conservation easements are more accurately described as equitable servitudes.[217] They are typically created by affirmative grant from a landowner to either a government or non-profit organization that acts as a trustee on behalf of an

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210. Wayne S. Hyatt & Jo Anne P. Stubblefield, *The Identity Crisis of Community Associations: In Search of the Appropriate Analogy*, 27 REAL PROP'Y, PROBATE & TRUST J. 589, 611–14 (1993).

211. *See* Boyack, *supra* note 38, at 785–87.

212. Nahrstedt v. Lakeside Village Condo. Ass'n, Inc., 878 P.2d 1275 (1994) (condo's "no pet" policy applies to all units even if pet never leaves condo unit).

213. Neponsit Property Owners' Ass'n v. Emigrant Industrial Sav. Bank, 15 N.E.2d 793, 795–798 (1938).

214. *Id.*

215. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES §1.6 cmt a (AM. L. INST. 2000).

216. National Conservation Easement Database, https://www.conservation easement.us/ (last visited Dec. 1, 2020).

217. Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEXAS L. REV. 433, 437 (1984).

unidentified public.[218] The federal tax code includes deductions for grantors of perpetual conservation easements, so many conservation easements are created with perpetual duration.[219] At traditional common law, a perpetual covenant or servitude is void as an unreasonable restraint on alienation.[220] The purpose of preservation servitudes are to prevent the current and future owners of the burdened land from intensifying uses or exploiting resources on the land for the benefit of a typically unidentified public.[221]

D. Affordability Covenants

Affordability covenants are the device used across the U.S. to require some privately owned real estate to be used as affordable housing.[222] These covenants are placed in the chain of title by developers of affordable housing in exchange for federal, state, and local development finance subsidies or in accordance with zoning requirements. The first affordability covenants were included in HUD mortgages in HUD's early, privately-owned housing development initiatives beginning in the 1960s.[223] However, the form of affordability covenant commonly used today was inspired by the free-standing covenants required by the federal HOME program beginning in the 1980s and the Low Income Housing Tax Credit program beginning in the 1990s and gained rapid popularity in state and local governments during the housing bubble (and affordability crisis) leading up to the Great Recession of 2008.[224] Affordability covenants typically require that the burdened parcel be rented or sold at formula prices to income-qualifying buyers or tenants.[225]

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218. *See e.g.,* UNIF. CONSERVATION EASEMENT ACT § 1(2) (UNIF. L. COMM'N 2007) (defining the holder of a conservation easement as either a governmental or non-profit entity).

219. I.R.C. § 1.170A-14(b)(2); *see also* UNIF. CONSERVATION EASEMENT ACT § 2(c) (UNIF. L. COMM'N 2007).

220. *See* RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.2(3)(a) (UNIF. L. COMM'N 1983).

221. *See* UNIF. CONSERVATION EASEMENT ACT § 1(1) (UNIF. L. COMM'N 2007).

222. Elia, *supra* note 171, at 61–62.

223. *See* Section 202 and Other HUD Rental Housing Programs for Low-Income Elderly Residents, Congressional Research Service, RL 33508, 3, 10, & 11 (2016), (https://crsreports.congress.gov/product/pdf/RL/RL33508/46) (explaining the history of HUD's Section 202, 221(d)(3), and 236 programs).

224. Elia, *supra* note 171, at 61–62.

225. Elia, *supra* note 171, at 60.

Sometimes the horizontal privity required at common law for a real covenant is satisfied by transfer of the real estate from a government to a developer or, or in some jurisdictions by creation of a deed of trust from the developer for the benefit of the local government, however, in many situations, these covenants lack horizontal privity. Typically, the benefit of affordability covenants is held in gross by a non-profit or government body.[226] It is questionable whether the benefit, or even the burden, of affordability covenants touch or concern land.[227] Finally, the longer the duration of affordability covenants, and the more restrictions on whom an eligible purchaser can be, the more likely that these covenants look like unreasonable restraints on alienation at traditional common law.[228]

E. Servitudes in Development Agreements

The last example of community servitudes considered in this Article, servitudes arising in development agreements between a local government and a developer ("Development Agreements"), cuts against the grain of the other examples of community servitudes described here. Development Agreements are most often associated with locking in specific zoning rights so that a developer can proceed with the long and slow work of a large development project without concern that the property's zoning classification will change before the developer's rights otherwise vest.[229] However, they are used for a variety of other reasons, as well. For example, they may be paired with a disposition agreement to arrange for the transfer and development of government-owned land for specific purposes.[230] Development Agreements might also be used as a means to skirt concurrency and exaction problems when a locality does not have the ability to demand exactions in exchange for development approvals but does have the power to deny approvals because of pre-existing

226. Elia, *supra* note 171, at 70–71.

227 Elia, *supra* note 171, at 70–71.

228 Elia, *supra* note 171, at 72–74.

229. CALLIES ET AL., *supra* note 72, at 3.

230. *See* Sample District of Columbia Disposition and Development Agreement for Sale and Development of Parcel 33 – Square 441, Lot 854, Washington, DC (2008) https://dmped.dc.gov/sites/default/files/dc/sites/config/publication/attachments/Broadcast%20Center%20One%20-%20Progression%20Place%20-%20Executed%20Land%20Disposition%20Agreement%20-%20Part%201%20of%202.pdf; Boise, Idaho Summary of Disposition and Development Agreement for 1715 W. Idaho Street, Boise, ID, https://ccdcboise.com/wp-content/uploads/2020/10/11_Summary-of-DDA.pdf; sample Disposition and Development Agreement for Garden Grove, CA, https://ggcity.org/internet/pdf/draft-2007july.pdf.

infrastructure insufficiencies.[231] A developer's covenants contained in development agreements contain many of the same shortcomings at traditional common law as described in the other hybrid servitudes, above. Namely, there may not be horizontal privity between the parties, the covenants may not touch or concern either the benefited or the burdened parcel, and the benefit of the covenant may be held in gross. However, development agreements are an example of community servitudes quite different from the other three considered in this article because the most hotly contested issue that they present is the legitimacy of the local government's action in entering into the agreement.[232]

The question of the local government's authority to enter into contracts that potentially bind future public bodies from exercising the public police power has been the overwhelming judicial and scholarly concern with development agreement validity.[233] In other words, the question is whether a legislative body has the ability to freeze its own police powers over specific land within its domain for the benefit of the private owner of that land. The majority of jurisdictions having considered the question adhere to a rule of propriety: where the legislative body is reasonably acting in furtherance of the public health, safety, and welfare, its decision to limit its police power is upheld, but where the legislative body is not reasonably acting in furtherance of the public health, safety, and welfare, its attempt to limit its own police powers are invalid instances of contract or spot zoning.[234]

Developers also make covenants that run with the land in Development Agreements.[235] For example, a developer may covenant to provide affordable housing, conform to specific design standards, or fund, build, or maintain specific on-site or off-site amenities, giving the locality the right to enforce these promises.[236]

Thus, Development Agreements entail promises between a locality and a private land owner, as co-governors of a property, coordinating their public and private police powers for an objective meant to promote the public welfare. In Part IV, I will analyze the validity and enforceability of these four examples of contemporary servitudes.

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231. CALLIES ET AL., *supra* note 72, at 3.

232. CALLIES ET AL., *supra* note 72, at 91.

233. For an excellent introduction to this topic, *see* CALLIES ET AL, *supra* note 72.

234. CALLIES ET AL., *supra* note 72, at 91–95.

235. Giger v. City of Omaha, 442 N.W.2d 182, 192–193 (Neb. 1989).

236. *Eg.* CALLIES ET AL., *supra* note 72, at 113.

IV. HOW CONTEMPORARY SERVITUDES ARE ENFORCED

Traditional servitudes are creatures of state common law and are enforced by courts as such. Traditional servitudes generally continue to be enforced at common law using the traditional rules, despite some consideration of the Third Restatement's suggestion that labels and requirements be unified and modernized.[237] For example, in *Barnard Court, LLC v. Walmart, Inc.,* the Court of Appeals of Arkansas grappled with the traditional requirements for real covenants and equitable servitudes in determining whether Walmart's attempt to insert a fifty-year anti-competition servitude into a deed ran with the burdened parcel.[238] In *West v. Newberry Elec. Co-op,* the Court of Appeals of South Carolina applied traditional state common law rules for easements and servitudes in determining that a utility easement contained real covenants that the utility company had violated to the detriment of the subsequent servient estate owner.[239] As described above, the four examples of community servitudes considered in this article are each vulnerable to claims of unenforceability at common law, for varying reasons. This Part IV will explore how courts have found ways to enforce most of these servitudes despite their flaws at common law. The easiest way for a court to enforce a servitude is if the servitude is explicitly enabled by state legislation that supersedes problematic common law requirements.[240] Another common way that courts find servitudes enforceable is to infer enforceability through legislation that requires the use of these servitudes.[241] Finally, in the absence of either explicit or implicit authorizing legislation, courts have enforced community servitudes by bending or ignoring traditional common law rules, by looking to the law of contracts, and borrowing from public land use law.[242]

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237. *See, e.g.,* AKG Real Estate LLC v. Kosterman, 717 N.W. 2d 835 (Wis. Ct. App. 2006) (Court of Appeals of Wisconsin considers and declines to apply two provisions of RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES: the changed conditions provisions of § 7.10(2) and the provision at § 4.8(3) allowing a servient landowner to unilaterally relocate an easement.) While the courts rejection of § 4.8(3) was affirmed in unpublished opinion Desbrow v. Porter, 313 Wis.2d 523 (Wis. Ct. App. 2008) the decision to reject § 7.10(2) was distinguished and the section was adopted by the court in Muellenberg v. State Dept. of Trans., 866 N.W.2d 746, 754 (Wis. Ct. App. 2015).

238. Bernard Court, LLC v. Walmart, Inc., 598 S.W.3d 563, 565 (Ark. Ct. App. 2020).

239. West v. Newberry Elec. Coop., 593 S.E.2d 500, 502–04 (S.C. Ct. App. 2004).

240. *See supra* Part IV.A.

241. *See supra* Part IV.B.

242. *See supra* Part IV.C.

A. Enabling Legislation

This subsection will explore the various degrees to which state legislatures have adopted enabling acts for each kind of community servitude. These statutes create real property interests that run with the land as creatures of statute, rather than via common law rules. As Professors Merrill and Smith have explained, the benefit of statutory enablement is that legislative reform to property law can occur more quickly, more dramatically, and with more certainty than the glacial evolution of common law forms as interpreted by the judiciary.[243] What follows is a summary of the kinds of statutory enabling legislation related to each kind of community servitude category discussed in this Article, together with the rationale for each from a proprietorial vantage point. We see that in accordance with the second hypothesis articulated in Part II, enabling legislation is most frequently employed when incentives to spur voluntary participation of landowners are in highest demand.

1. CIC Servitudes

Almost every state has adopted a statutory scheme authorizing common interest communities and the validity of servitudes enforceable by the homeowners' association against all property owners in the community.[244] Ten states have adopted the Uniform Common Interest Ownership Act.[245] Most state enabling acts and the Uniform Common Interest Ownership Act do not explicitly refer to the common law requirements for creating valid servitudes, but simply contain language enabling common interest communities to establish and modify covenants, conditions, rules and restrictions applicable to all owners within the community.[246] Courts have interpreted these statutes as authorizing servitudes that run with the land so long as the servitudes are created in

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243. Thomas W. Merrill & Henry Smith, *Optimal Standardization in the Law of Property: The Numerus Clauses Principal*, 110 YALE L.J., 1, 61 (2000).

244. DUKEMINIER, ET AL., *supra* note 5, at 873.

245. Including the 1982, 1994 and 2008 Uniform Acts. https://www.uniformlaws.org/committees/community-home?communitykey=587d74e1-ae08-48be-b3c1-a6eae168e965&tab=groupdetails (last visited Oct. 9, 2020).

246. *See e.g.,* NM Stat. § 47-16-18 (2020); *see also* UNIF. COMMON INT. OWNERSHIP ACT § 3-102 (Amended 2014), https://www.uniformlaws.org/committees/community-home?communitykey=587d74e1-ae08-48be-b3c1-a6eae168e965&tab=groupdetails.

accordance with the statute, regardless of whether common law requirements for the creation of valid servitudes have been met.[247]

2. Conservation Easements

All fifty states have statutes that validate conservation and preservation easements despite common law shortcomings.[248] The first documented use of conservation servitudes seems to have been in the 1880s,[249] but the term was not coined until the late 1950s by journalist William H. Whyte, Jr.[250] Though the U.S. Fish and Wildlife Service and National Park Service were among the first users of conservation easements in the twentieth century,[251] states began to pass conservation easements laws in 1959.[252] Federal incentives in the Federal Highway Beautification Act and the U.S. Tax Code further nudged states to pass enabling legislation and individuals to create conservation easements.[253] By 1980, the federal tax incentives associated with creating perpetual conservation easements were permanent.[254] In 1981, what is now the Uniform Laws Commission promulgated the Uniform Conservation Easement Act[255] which has been adopted by 25 states and copied in part by numerous others.[256] Unlike common interest community enabling statutes, conservation easement enabling acts usually specifically state that conservation easements are covenants running with the land or equitable servitudes regardless of compliance with common law rules.[257] Given that the stated

247. *E.g.,* Weldy v. Northbrook Condominium Ass'n, 904 A.2d 188, 193 (Conn. 2004); Emerald Ridge Property Owners' Ass'n v. Thornton, 732 A.2d 804, 806 (Conn. 1999); Bergman v. Spruce Peak Realty, LLC, 847 F. Supp. 2d 653, 670–671 (Vt. 2012).

248. Jessica Owley, et al., *Climate Change Challenges for Land Conservation: Rethinking Conservation Easements, Strategies*, and Tools, 95 DENVER L. REV. 727, 743–744 (2018).

249. John L. Hollingshead, *Conservation Easements: A Flexible Tool for Land Preservation*, 3 ENVTL. LAW. 319, 333 (1997).

250. *Id.* at 325.

251. *Id.* at 333.

252. Federico Cheever & Nancy McLaughlin, *An Introduction to Conservation Easements in the United States*, 1 J. OF L., PROP., AND SOC'Y 107, 116 (2015).

253. *Id.* at 115.

254. *Id.* at 117.

255. *Id.*

256. 25 states, the US Virgin Islands, and the District of Columbia have adopted the Uniform Act, https://www.uniformlaws.org/committees/community-home?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd (last visited May 21, 2021).

257. *See* National Conference on Commissioners of Uniform State Laws, Uniform Conservation Easement Act (Amended 2007) §4 and Comments to §4, https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=95e58042-e8d2-2051-1868-617b5d89a7f9&forceDialog=0 (last visited May 21, 2021).

purpose of the UCEA is to ensure the ease and validity of conservation servitudes despite common law requirements, the dearth of cases challenging the validity of conservation easements prior to the issuance of the uniform act is somewhat surprising.[258] This preemptive legislation, removing any room for doubt that such delegations are valid despite discrepancies with traditional classifications, can be understood as an "incentive regulation tactic."[259] The federal tax incentive for creating conservation easements is another, more obvious incentive regulation tactic intended to coax free governors to dispose of their things (in this case their police powers over their land) in a way that promotes a stated governmental end.

3. Affordability Covenants

Only a handful of states have enacted specific affordability covenant enabling legislation, with several mirroring the Uniform Conservation Easement Act.[260] Like the Uniform Conservation Easement Act, these statutes often make explicit reference to traditional common law requirements and state that affordability covenants made in conformity with the enabling act are valid and enforceable notwithstanding the requirements at traditional common law.[261] There is not yet a uniform affordability covenant enabling act explicitly validating affordability covenants despite possible common law deficiencies. The threats to common law enforceability for affordability covenants and conservation easements are quite similar; based on common law classifications, both are best described as equitable servitudes where the benefit is held in-gross. Both devices have become commonplace in the U.S. since the 1980s and 1990s.[262] Neither device has faced significant court challenge or scrutiny, yet conservation easement enabling legislation is ubiquitous and affordability covenant enabling legislation is rare. An explanation for this discrepancy can be found in the private police power seemingly at play in each device. As mentioned above, federal and state legislation coaxes or induces

258. Hollingshead, *supra* note 249, at 333–334 (describing the National Park Service's difficulty in enforcing the first conservation easements created for scenic byway preservation in the 1930s and 1940s); Korngold, *supra* note 217, at 436; Mary Ann King & Sally K. Fairfax, *Public Accountability and Conservation Easements: Learning from the Uniform Conservation Easement Act Debates*, 46 NATURAL RESOURCES J. 65, 72–74 (2006).

259. FOUCAULT, *supra* note 126.

260. Elia, *supra* note 171, at 92–93.

261. *Id.* at 92–94.

262. *Id.* at 61 & 87–89.

private landowners to voluntarily create conservation easements. Conservation easement enabling legislation enhances the federal inducement by affirming that the value of the tax incentive will not be unexpectedly offset by clouds on title caused by the servitude, or even worse, clawed back by the IRS for failure to meet the Revenue Code requirements. On the other hand, people who buy properties laden with affordability covenants are seen as receiving a government handout or subsidy in the act of purchasing their property.[263] There is no need for the state to further induce low-income buyers by ensuring that the covenant does not unduly cloud title. In fact, a cloudy title is just what the state or local government wants to ensure that the "self-enforcing" affordability covenant is properly complied with upon transfer of an affordable unit.[264] The expense and delay of dealing with the cloud created by the affordability covenant is seen as part of the purchaser's bargain in exchange for the below-market-rate home they were given the opportunity to buy.

4. Development Agreements

Development agreements are subject to challenge as invalid delegations of the state's police power to private parties, or "contract zoning."[265] For this reason, state enabling legislation–enabling localities to enter into development agreements–has been described as "important, if not critical."[266] However, the reason that contract zoning may be invalid is because one legislative body generally is not authorized to bargain away the powers of its successor legislative body, in other words, there is a question as to whether a local legislative body's covenants in a development agreement related to specific parcels of land will run to subsequent legislative bodies.[267] In the jurisdictions that have passed

263. Alfaro v. Community Housing Improvement System & Planning Assn., Inc., 124 Cal. Rptr. 3d 271, 288 (Cal. Ct. App. 2009).

264. Affordability covenants are intended to be self-enforcing in that they rely on the private title insurance industry to enforce covenants upon sale rather the beneficiary of the covenant. This is because a servitude is an encumbrance on title, which a lender or buyer can usually insure over, but a violation of a servitude is a separate encumbrance on title which a lender or buyer typically cannot insure over. *See* Lohmeyer v. Bower, 227 P.2d 102, 108 & 110 (Kan. 1951); American Land Title Association Endorsement 9.3-06 (Covenants, Conditions and Restrictions–Loan Policy) (Revised Apr 02, 2012), http://titleinsurancecenter.com/Forms/EndorsementManual/_alta-cltaCrossReference.htm (last visited Dec. 3, 2021).

265. JULIAN CONRAD JUERGENSMEYER & THOMAS E. ROBERTS, LAND USE PLANNING AND DEVELOPMENT REGULATION LAW (3RD ED.) (West Publishing 2012) §5.31.

266. CALLIES ET AL., *supra* note 72, at 97.

267. *Id.* at 92–93.

development agreement enabling legislation, enabling one legislative body to create covenants that bind subsequent legislative bodies to specific parcels of land, the purpose of this legislation is to make clear that development agreements serve legitimate public purposes of the state in protecting and advancing the public health, safety, and welfare.[268]

Thirteen states have enabling acts for development agreements.[269] These acts are notable because they were passed in response to case law focused not on the enforceability of servitudes binding subsequent owners of the subject property, but on a locality's power to enter into contracts that run the risk of bargaining away the public police power. As a party to a development agreement, a locality is covenanting to do something (or refrain from doing something) with its public police power for some period of time.[270] For this reason, development agreement enabling statutes incorporate overt due process hallmarks, including the requirements for public hearings prior to a locality entering into a development agreement,[271] or even a voter referendum requirement.[272] Unsurprisingly, development agreement enabling statutes are carefully crafted to ensure that covenants made by the governmental body via development agreement will satisfy substantive and procedural due process, and will not constitute invalid contract zoning.[273] However, for several statutes, concern with ensuring valid exercise of public police power in the creation of these statutes extends to ensuring that the covenants a locality might try to negotiate from the developer also satisfy substantive due process. For example, the Hawaii development agreement enabling act enumerates the kinds of benefits a governmental entity might accept from a developer in a development agreement; all of them being benefits that explicitly relate to promotion of the public health, safety, and welfare.[274]

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268. *Id.* at 92.

269. AZ: ARIZ. REV. STAT. ANN. §9-500.05; CA: CAL. GOV'T CODE §65864; CO: COLO. REV. STAT. §§24-68-101 to -106; FL: FLA. STAT. ANN. §163.3220; HI: HAW. REV. STAT. §46-121 et seq; ID: IDAHO CODE ANN. §67-6511A (West 2021); LA: LA. REV. STAT. ANN. §33:4780.22; NV: NEV. REV. STAT. §278.0201; NJ: N.J. STAT. ANN. §40:55D-45.2; OR: OR. REV. STAT. §94.504; SC: S.C. CODE ANN. §6-31.10 et seq. (1993); VA: VA. CODE ANN. §15.2-2303.1; WA: WASH. REV. CODE ANN. §36.70B.170.

270. CALLIES ET AL., *supra* note 72, at 91.

271. *E.g.,* S.C. CODE ANN. §6-31-50 (1993); CAL. GOV'T CODE §65867; FLA. STAT. ANN. §163.3225; HAW. REV. STAT. §46-128.

272. *E.g.,* Cal. Gov't Code §65867.5.

273. CALLIES ET AL., *supra* note 72, at 101–107.

274. HAW. REV. STAT. §46-121 (1993).

B. Implied Statutory Authorization

While the explicit enabling legislation for common interest community servitudes and conservation easements has provided a ready source of law for determining questions of a particular covenant's validity, the validity of affordability covenants and covenants in development agreements, which generally do not have explicit enabling legislation, is sometimes determined by looking to the validity of other statutes or regulations.

1. Affordability Covenants

As discussed above, only a handful of states have passed explicit affordability covenant enabling legislation, and there is no uniform law on the subject.[275] This is despite the fact that affordability covenants are used in every state and territory in the U.S. to create stocks of affordable housing that are publicly subsidized but privately owned. Considering the number of affordability covenants that exist and the fact that their validity at common law is not beyond doubt, it is surprising how little case law exists addressing the validity of these covenants at common law. As I will explain below, in the few cases that have considered the validity of affordability covenants, Courts have often looked to the overall affordable housing program implemented by a governmental body to determine whether the program is valid legislative or administrative action. Finding that the overall affordable housing program satisfies substantive and procedural due process and does not create an uncompensated taking, in other words is valid public land use law, courts often validate-by-proxy the individual, private land use devices that give the affordable housing program its effect. The most notable recent example of this is *San Jose v. California Builders Industry Association*, wherein the California BIA challenged the City of San Jose's Inclusionary Zoning statute as an uncompensated regulatory taking.[276] Finding the Inclusionary Zoning program valid legislative action not triggering *Nolan/Dollan* takings analysis, the California Supreme Court validated San Jose's inclusionary zoning program without ever addressing the validity of the servitudes that create the burdens on each individual subject

275. *See supra* Part IV.A.3.

276. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (2015); Giger v. City of Omaha, 442 N.W. 2d 182, 192–193 (Neb. 1989) (authority to enter into development agreements authorized by mixed Dillon Rule and home rule statutes).

parcel.[277] A trial court decision from Virginia is rare for its thoroughness in addressing the reasons that courts enforce affordability covenants. In the case *Fairfax County Redevelopment and Housing Authority v. Riekse*, the court upheld a specific affordability covenant that gave the Fairfax Housing Authority a purchase option upon the death of the property owner or before the property owner attempted to sell the property to a third party.[278] Before eventually, and somewhat peremptorily, declaring that the covenant satisfied all common law requires necessary to run with the land pursuant to state law, the Court provided an extensive explanation about the valid legislative enablement of the Housing Authority and its affordable housing programs.[279] The Court explained:

> Problematic societal conditions which lead to legislative action can also require a re-examination of principles and interpretations which might frustrate properly enacted laws designed to remedy there [sic] modern problems. In this case I must interpret the requirements for a valid restrictive covenant in light of duly enacted laws bearing upon the transaction which created the estate at issue and the parties involved in creating that estate. . . . If I were to adopt a narrow interpretation of "touch and concern the land" by holding that an unfettered sale of the property did not "touch and concern" the land I would frustrate actions taken by [the Housing Authority] and agreed to by the Grantees in pursuit of the legislative goals set out in [the Housing Authority's Enabling Act]."[280]

In addition to legislation related to a jurisdiction's affordability covenants program impliedly enabling affordability covenants by including the creation of such covenants, the Uniform Common Interest Ownership Act incorporates the idea of affordability covenants among the types of servitudes that a declarant or home owner's association may create.[281]

Despite their prevalence and the dearth of statutory enabling legislation, affordability covenants have rarely been litigated, so far.[282] In those few instances where land owners have challenged their validity based on traditional common law principles, courts

277. Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (2015).

278. Fairfax Cty. Redevelopment and Hous. Auth. v. Riekse, 2009 WL 7323923 (2009).

279. *Id.* at 4.

280. *Id.* at 5.

281. UCIOA (2014) §2-105(a)(12).

282. Elia, *supra* note 171, at 63.

typically enforce them.[283] Notably, courts justify enforcement of affordability covenants not necessarily by illustrating how the covenants satisfy traditional common law requirements, but by pointing to the valid public purpose the covenant is intended to further.[284] For example, in a California case where a condominium owner challenged an affordability covenant burdening his property as being an unreasonable restraint on alienation, the court upheld the covenant because "[affordability covenants] support rather than offend the policies of [California]."[285] Beginning its analysis, the California court classified the affordability covenant as a "covenant and restriction" applicable to condominiums, which the legislature had declared enforceable as equitable servitudes so long as they were "reasonable."[286] In finding that the affordability covenant was reasonable, the court found that the covenant is in keeping with the state's public policy goal of providing low and moderate income housing.[287]

As mentioned above, in Virginia's *Riekse* case, when a property owner challenged whether an affordability covenant satisfied the requirement that a real covenant "touch and concern land", the trial court interpreted the "touch and concern" requirement broadly enough to encompass affordability restrictions to which the county housing development agency is a party.[288] In so doing, the Virginia trial court explained that a narrower interpretation would have frustrated the legislative intent of the state's affordable housing statute.[289] In New York, when a property owner sued for a writ of mandamus to override an affordability covenant and allow the property owner to convert a property to market rate residential use, the court held that the housing agency's decisions to enforce the covenant and therefore deny permission to convert was administrative action subject to rational basis review.[290] In upholding the housing agency's decision to enforce the covenant,

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283. *Id.* at 64.

284. *Id.* at 85.

285. Village of Oceanside v. McKenna, 215 Cal. App. 3d 1420, 1428 (1989).

286. *McKenna*, 215 Cal. App. 3d at 1426 (1989), citing CA CIV. CODE §1354, now CA Civ. Code §5975. (in support of this article's thesis, note that the California legislature imposed a reasonableness requirement on equitable servitudes applicable to condominiums. Traditional common law requirements impose no such reasonableness requirement).

287. *McKenna*, 215 Cal. App. 3d at 1427–1428.

288. Fairfax Cty. Redevelopment & Hous. Auth. V. Riekse, 78 Va. Cir. 108, 112–113 (2009).

289. *Id.*

290. Tivoli Stock L.L.C. v. N.Y.C. Dep't of Hous. Pres. & Dev., No 108052/06, 2006 WL 3751468, at *6 (N.Y. Sup. Ct. Dec. 12, 2006).

the court found that the housing agency's decision had a foundation in fact and was neither arbitrary nor capricious.[291]

2. Development Agreements

As with affordability covenants, relatively few jurisdictions have passed explicit development agreement enabling legislation. Unlike affordability covenants, there is a significant body of case law pertaining to attacks on the enforceability of development agreements. As discussed above, these cases often challenge the validity of the local government's action as impermissible contract zoning, or impermissible delegations or restrictions on the public police power. A number of courts have found that a locality's ability to enter into development agreements is impliedly valid based on the other statutes or regulations delegating and articulating the powers of the locality. For example, development agreements have been upheld as valid pursuant to home rule statutes, from state general planning and zoning enabling acts, and redevelopment acts.[292]

C. Common Law Enforcement

While the source of validation for many community servitudes is explicit or implied enabling legislation, it is important to note that courts have enforced community servitudes via the common law, as well.

1. CIC Servitudes

Perhaps the most notable example of this is the development of equitable servitude jurisprudence in the United States beginning in the mid-twentieth century as a tool to validate reciprocal negative easements in residential subdivisions.[293] Judicial validation of covenants binding properties in common interest communities dates back to the watershed case *Neponsit*

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291. *Id.*

292. *See* Save Elkhart Lake, Inc. v. Village of Elkhart, 512 N.W.2d 202, 205 (Wis. App. 1993) (Village's ability to enter into development agreements implied by general delegation of state police powers to villages via home rule act.); Texas Local Government Code §§42.044 & 42-047 (authorizing development agreements between municipalities and extraterritorial developers of industrial areas and Planned Unit Developments).

293. Despite their confusing label, reciprocal negative easements are a form of equitable servitude. *See* CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 170, 174 (Callaghan & Co., 2nd ed. 1947).

Property Owners' Association v. Emigrant Industrial Savings Bank.[294] In *Neponsit,* the high court in New York upheld a neighborhood covenant obligating property owners to pay homeowner association fees, finding that an obligation to pay community fees may touch and concern land if those fees are related to amenities associated with the burdened parcel.[295] The *Neponsit* court also smoothed over concerns about horizontal and vertical privity by finding that the property owners' association, while it owned no real estate, had the ability to enforce the covenants as an agent on behalf of the owners of the other parcels in the common interest community.[296]

2. Conservation Easements

As briefly noted above, the Uniform Conservation Easement Act's explicit purpose is "sweeping away certain common law impediments" to enforceable conservation easements.[297] Given the near-universal adoption of conservation easement enabling legislation, one might suppose that a significant body of case law must exist that invalidated conservation easements in the absence of enabling legislation. Surprisingly, there is no such body of case law. In the 1930s and 1940s, when the National Park Service used conservation easements to protect scenic byways in North Carolina and Alabama, the enforceability of these easements was challenged and upheld by courts in at least two cases.[298] Nevertheless, the litigation and their general unpopularity led the National Park Service to acquiring interests in fee simple, instead.[299] State courts in Massachusetts and Virginia have also found conservation easements created before or outside the parameters of state conservation easement enabling acts to be

294. Neponsit Property Owners Ass'n., Inc. v. Emigrant Indus. Savings Bank, 15. N.E. 2d 793, 797 (N.Y. 1938).

295. *Id.*

296. Neponsit Property Owners Ass'n., Inc. v. Emigrant Indus. Savings Bank, 278 N.Y. 248, 262 (N.Y. 1938); The court in Neponsit held that the homeowner's association was effectively the agent for the neighboring landowners, whose interests were appurtenant. That court also held that the association fees and dues were used to maintain neighborhood amenities in which the burdened parcel enjoyed a beneficial interest, thereby touching and concerning the burdened parcel.

297. Executive Committee of the National Conference of Commissioners on Uniform State Laws, Amendments to Uniform Conservation Easement Act, Feb. 3, 2007, p2., https://www.uniformlaws.org/HigherLogic/System/DownloadDocumentFile.ashx?DocumentFileKey=b6285897-79bb-857f-e015-e07ad638a4fc&forceDialog=0.

298. Cheever & McLaughlin, *supra* note 252, at 115.

299. *Id.*

valid.[300] In both cases, the courts overlooked or declined to apply traditional common law rules, and instead explicitly relied upon the public purpose of the easements.[301] In the Massachusetts decision, the Supreme Judicial Court explained, "Where the beneficiary of the restriction is the public and the restriction reinforces a legislatively stated public purpose, old common law rules barring the creation and enforcement of easements in gross have no continuing force."[302] The Massachusetts court went on to apply a public policy and reasonableness test, citing to the Restatement (Third) of Property: Servitudes in draft form.[303]

3. Affordability Covenants

There are few reported cases involving challenges to the validity of affordability covenants. In those cases that do exist, courts have generally enforced the covenants as equitable servitudes, relying on a property owner's notice of the covenant at the time of purchase and on the valid public purpose underlying the government action involved in creating a stock of affordable housing. For example, in *Alfaro v. Community Housing Improvement System & Planning Assn., Inc.*, the California Court of Appeals enforced affordability covenants against homeowners based on the owners' constructive notice of the covenants recorded in the subdivision's tract plat.[304] In *Fairfax Housing and Development Authority v. Riekse*, the Virginia trial court upheld an affordability covenant that gave the Fairfax Housing Authority an option to purchase a burdened parcel at a specified price should the property owner die or attempt to sell the property.[305] The trial court found that the option, described in the deed as a real covenant that ran with the land, satisfied the common law requirements for vertical and horizontal privity, it was in writing, and there was intent that it should run.[306] The court went on to find that the covenant touches and concerns the land because the rental and sale restrictions "affect the natural

300. *See* Bennett v. Comm'r of Food & Agric. 576 N.E.2d 1365 (Mass. 1991); United States v. Blackman, 613 S.E.2d 442 (Va. 2005).

301. *Bennett*, 576 N.E.2d at 1367; *Blackman*, 613 S.E.2d at 449.

302. *Bennett*, 576 N.E.2d at 1367.

303. *Id.*

304. Alfaro v. Cmty. Hous. Improvement Sys. & Planning Ass'n, Inc., 171 Cal. App. 4th 1356, 1374 (2009).

305. Fairfax Cty. Redevelopment and Hous. Auth. v. Riekse, 2009 WL 7323923, 5 (2009).

306. *Riekse*, 2009 WL 7323923 at 3.

use and enjoyment of the property . . ."[307] However, in reaching this conclusion about satisfaction of the common law "touch and concern" requirement, the court leaned heavily on the implicit statutory authorization described above.[308] In fact, the similarities between judicial reasoning in upholding affordability covenants without enabling legislation and that of Massachusetts and Virginia cases upholding conservation easements without the benefit of enabling legislation are strikingly similar. Both stress the important public policy objectives furthered by the servitudes and suggest that a subsequent purchaser's constructive, recorded notice is sufficient to justify the servitude running with the land.

4. Development Agreements

Lawsuits against private landowners or developers to enforce covenants made to a governmental entity in a development agreement are rare.[309] Most development agreement lawsuits involve third-party plaintiffs challenging the governmental entity's authority to enter into the development agreement or the developer suing the governmental entity for breach of contract.[310] In these suits, the legal issues presented most often relate to questions of municipal law and contract law, not whether the servitudes run with the land.[311]

D. Summary of Part IV

Courts frequently enforce conservation servitudes, common interest community covenants, and affordability covenants by pointing to a subsequent owner's constructive notice of a recorded covenant. This lends credence to the argument of scholars like Richard Epstein, who assert that efficient recording systems have cleared away the historic justifications for limiting servitudes in excess of limitations on parties' freedom of contract.[312] However, in the decades since the publication of the Restatement (Third) of Property: Servitudes, which declared a unification of the law of

307. *Id.* at 5.

308. *Id.* at 3.

309. *See* Burns Concrete, Inc. v. Teton Cnty., 384 P.3d 364 (Idaho, 2016) (county counterclaimed against developer for breach of contract following developer's suit against county).

310. CALLIES ET AL, *supra* note 72, at 91–95; Wegner, *supra* note 170, at 1002–1008.

311. Wegner, *supra* note 170, at 1002–1008.

312. Epstein, *supra* note 10, at 1358.

servitudes under the banner of freedom of contract,[313] courts have been resistant to following the breadcrumb trail laid out by Epstein from validity of a servitude based on constructive notice to unfettering servitude law to the limits of contract law.[314] Steward Sterk suggests that the reason for this reluctance may be tied to economic inefficiencies that would result from strictly applying contract doctrine to "unique" real estate where the remedy of strict performance is readily at hand, namely, adverse impacts on third parties, high transaction costs in removing servitudes, and intergenerational unfairness.[315] Sterk points to traditional limitations on servitudes, particularly "the touch or concern" doctrine, durational limits, and the changed condition doctrine, as imperfect but still useful checks on the harms, or economic inefficiencies, that would otherwise flow from enforcing servitudes with unfettered private freedom of contract.[316] The debate between Epstein and Sterk explores important issues related to intergenerational fairness and the limits of a landowner's power to severally alienate specific property rights. However, it unfolds within the traditional understanding of servitudes as purely private devices in a property regime premised on preference satisfaction rather than as delegation of private police power in a property regime premised on propriety. When viewed through the lens of police powers, traditional restraints on a landowner's power to sever and alienate private police powers from the rest of an estate function very similarly to restraints on a governmental body in delegating its public police powers. Through this lens, the police powers recognized as belonging to a private landowner are those powers proper for good management of that owner's land. They are the powers necessary for that governor to manage the land as a resource in a proprietorial property system where the private owner has been entrusted with responsibility to exercise heteronomous powers for the security and prosperity of all the people and objects under the governor's control. A grantor-governor's decision to alienate from their successors-in-interest those powers necessary to manage their homestead, *familia*, or domain, is immediately suspect; similar to a testator's instructions

313. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES ch. 2, intro. note (Am. L. Inst. 2000).

314. Andrew Russell, *The Tenth Anniversary of the Restatement (Third) of Property: Servitudes: A Progress Report*, 42 U TOLEDO L. REV. 753, 765–766 (2011).

315. Stewart Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 660 (1985).

316. *Id.* at 616.

that her house should be destroyed after she dies. In this light, it is predictable and logical that the traditional rules of servitudes would disfavor one owner's attempt to alienate powers associated with land that would run to subsequent owners of that land. The traditional rules that Sterk points to, such as that a servitude touch and concern land, that they not create unreasonable restraints on alienation, that they be subject to the doctrine of changed conditions, can all be understood as attempts to ensure that a subsequent landowner has the powers they need to properly manage land in the proprietorial sense.

From a proprietorial vantage point, community servitudes differ from traditional servitudes in that the intention in community servitudes is to reallocate police power from the private landowner to another governor (that may, in fact, be a local democratic institution of which the landowner is a member) who will consider the land to be a part of its domain–meaning something the new governor has a responsibility to secure, regulate, and nurture. For example, a house in a common interest community is a part of the homeowner's household and a part of the common interest community; an affordable housing unit is part of a low-income homeowner's household and part of a city's housing stock; land subject to a conservation easement is the landowner's household and part of a non-profit or government entity's land conservation portfolio. In each instance, the landowner and the holder of the community servitude have responsibilities to some population to properly manage the land as a resource. In contrast, the owner of a dominant estate or benefited parcel in a traditional servitude assumes no proprietorial duty for a servient estate or burdened parcel.

V. SERVITUDES AS TACTICS OF GOVERNING RESOURCES

A. Police Power Inherent in Creation of Valid Enabling Legislation

Laws enabling various forms of contemporary servitudes are ultimately grounded in the state's reserved police powers to regulate land, rather than in the landowner's private police powers as elucidated by judges at common law. As Thomas Merrill and Henry Smith have explained, the use of statutory law to describe and revise property law forms can be a direct and effective way of

defining property law's *numerus clausus*.[317] When it comes to deciding whether a conservation easement is valid, we need not decipher the meandering changes in common law precedent; we can simply look to the statute.

Servitudes enabled by statute are not based on changes in the common law of servitudes or property law's limits on a landowner's ability to alienate portions of their private police power. Rather, they function as an exercise of state police power superseding and augmenting the landowner's private police power as limited by common law. For example, a private land owner might decide that she wants to regulate her land so that it can never be developed but will remain an environmental conservation area in perpetuity. To effectuate her proprietorial will, the landowner alienates her development rights by granting the Nature Conservancy a conservation easement. The traditional common law rules hold novel negative easements invalid; the landowner's private police power does not entitle her to invent a new form of negative easement that divests future owners of the property of development rights in perpetuity.[318] The state conservation easement enabling act supersedes the common law to declare, "Yes, an owner's right to alienate her private police power will be extended for this purpose."[319] Nevertheless, in considering the validity of servitudes enabled by legislation, the state's ability to supersede and augment the private police power of an owner of a servient estate is necessarily derived from the state's police power and therefore subject to the rules governing its valid exercise.[320] In other words, because an enabling statute is only valid insofar as it is rationally related to promotion of the public health, safety, and welfare, the legislature's law declaring the extent of the landowner's ability to alienate her police power in her property must promote security and prosperity in the government's domain,

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317. Merrill & Smith, *supra* note 243, at 63.

318. One of the many mysteries of property law: our hypothetical landowner could likely accomplish her goal at traditional common law by conveying her estate as a defeasible fee subject to a possibility of reverter or right of entry in herself, but not subject to an executory interest in a third party.

319. As discussed in the material above, the Supreme Judicial Court of Massachusetts did decide that a conservation easement could satisfy common law rules, but it did this by explicitly jettisoning the traditional rules and adopting the public policy-based rules espoused by the RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES. Nevertheless, the Uniform Laws Commission and those states adopting the Uniform Conservation Easement Act considered the threat of conservation easements being found unenforceable at common law significant enough to explicitly override those traditional common law impediments via statute.

320. *See* NOLON ET AL, *supra* note 56, at 766; *see also* Giger v. City of Omaha, 232 Neb. 676, 688–689 (1989).

over which the legislature is a manager and the landowner and her property are governed resources.[321] For a servitude enabling act to be a valid law, it must satisfy the markers of valid exercises of the public police power. In other words, the kind of servitude statutorily enabled must be reasonably related to the public health, safety, and welfare, or the government's legitimate interest in and responsibility for police.[322] In contrast, a hypothetical racially restrictive covenant enabling act declaring racially restrictive covenants valid in a jurisdiction would not be a valid law because due process and equal protection rights are limits on the state police power.[323]

Returning to Rose's four strategies for managing resources, enabling acts represent an example of "Property" or "Russian Dolls" in that the state recognizes private property rights so that an individual can make certain, voluntary, "free," decisions to order their land in a way that promotes overarching ordering goals of the state as a governor of its domain, including the landowner's land. Most servitudes enabled by legislation satisfy this substantive due process requirement by advancing public benefit objectives specifically articulated in state legislation or the state constitution.[324] Servitude enabled by legislation typically avoid issues of procedural due process and takings due to the voluntary contractual nature of servitudes. In practice, the voluntariness of servitudes has come into question most in the context of developers entering into development agreements and residents buying into common interest communities.

If contemporary servitudes were grounded purely in contract law, as suggested by Richard Epstein and largely adopted by the reporters of the Restatement of Property (Third): Servitudes, these enabling statutes would grant parties latitude in entering into these servitudes as broad as their contracting powers; generally,

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321. The RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES takes a watered-down, contractarian approach in its declaration that to be valid, servitudes cannot violate public policy. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

322. For example, if a state were to statutorily enable racially restrictive covenants, the enabling law and the covenants created pursuant to the enabling law would both be v*oid*. *See* Buchanan v. Wharley, 245 U.S. 60, 74 (1917) (striking down racially restrictive zoning ordinance as invalid exercise of police power).

323. *See Buchanan*, 245 U.S. at 82 (1917).

324. *E.g.,* S.C. Code Ann. §6-31-10(A)(4) (1993) (articulating public benefits derived from development agreements); ME. Rev. Stat. Ann. Tit. 33 §477-A(1) (2007) (conservation easement must state "benefit to the general public intended to be served by restriction on uses of the real property subject to the conservation easement"); Or. Rev. Stat. Ann. §456.275 (legislative findings regarding public health, safety and general welfare concerns related to shortage of decent, safe, and sanitary affordable housing).

they would be enforceable so long as they were not illegal or contrary to public policy.[325] However, we see in the language of the enabling acts themselves that governmental power to enable community servitudes is by the same measure as the state police power, that is, the kind of servitudes enabled must be reasonably related to promoting the public health, safety, and welfare.[326] Covenants imposed by common interest communities must be reasonably related to the "[p]rotection, preservation or property operation of the property and the purposes of the [common interest community] Association as set forth in its governing instruments."[327] Conservation easement enabling acts are so explicitly linked to the public benefit in conservation and preservation that the holders of the covenants are typically restricted to being either governmental or non-profit entities.[328] Affordability covenant enabling statutes often follow the same structure as conservation easement enabling acts.[329]

While most discussion of modern servitudes focuses on justifications for enforcement of servitudes at common law, it is worth remembering the vast majority of servitudes in America today base their validity on enabling legislation, not the common law. Servitude enabling acts' purposes are to legitimize specific forms of private regulatory authority, but this legitimization occurs under the auspices of the public police power and subject to the due process and other constitution limitations applicable to exercises of the public police power.

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325. Indeed, this is the general rule for validity of servitudes as articulated in the Restatement (Third) of Property: Servitudes. Though, paradoxically, the Restatement goes on to state that servitudes are contrary to public policy if they are arbitrary or capricious - terms more commonly associated with due process challenges to public land use regulations. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

326. *See* Uniform Conservation Easement Act, Prefatory Note, (2007) p. 2, https://www.uniformlaws.org/viewdocument/final-act-with-comments-16?CommunityKey=4297dc67-1a90-4e43-b704-7b277c4a11bd&tab=librarydocuments; *see also*, Jessica Owley, *Conservation Easements at the Climate Change Crossroads*, 74 L. & CONTEMPORARY PROBLEMS 199, 204 (2011) (listing the IRS's guidelines for tax deductible conservation easements in the public interest); Julian Juergensmeyer, THOMAS ROBERTS, ET AL., LAND USE PLANNING AND DEVELOPMENT REGULATION LAW (4th ed), §5.31 (discussing local governments' covenants in development agreements as "not a contract in the common law sense . . . California's statute declares a development agreement to be a legislative act, while Hawaii's declares it an administrative act."(citing Cal. Gov't Code §65867.5 and Haw. Rev. Stat. §§ 46-121 to 46-132).

327. City of Oceanside v. McKenna, 215 Cal. App. 3d 1420, 1428–1429 (1989) (citing Laguna Royale Owners Ass'n. v. Darger, 119 Cal. App. 3d 670, 683-684 (1981)).

328. Executive Committee of the National Conference of Commissioners on Uniform State Laws, Amendments to Uniform Conservation Easement Act, Feb. 3, 2007.

329. Elia, *supra* note 171, at 92–93.

B. Police Power Without Explicit Enabling Legislation

As discussed in Part III, while many contemporary servitudes are created in accordance with statutory law, there are also examples of contemporary servitudes enforced by courts without explicit enabling legislation.[330] These common law cases are an instance of the judiciary using its power to articulate the limits of a private landowner's authority over their land, including their power to recombine property rights in new ways, vis á vis previous or subsequent owners of the same estate, independent of the state's legislative police powers. We can divide these judicially enabled servitudes into two subcategories: traditional servitudes where the benefit and regulatory power created by the servitude are unified, and community servitudes where the benefit and regulatory power are separated–the benefit of the servitude accrues to a governed domain of which the burdened parcel is a part. In both subcategories, the court's limits on the landowner's private police power are more understandable through a proprietorial property regime that seeks to recognize private property rights necessary to maintain "proper good order" than a wealth maximization regime.

1. Police Powers in Traditional Servitudes

As discussed in Part II, traditional servitudes are those where the benefit of the servitude and the recipient of the regulatory power conveyed in the servitude are held by the same entity. The holder of the covenant wields their regulatory power for the benefit of their own household, *familia*, or domain, which does not include the servient estate. This is what we think of as a traditional private servitude like an appurtenant access easement, a utility easement, or a covenant between neighbors to maintain a party wall or driveway.

Historically, courts disfavored servitudes because of their propensity to create title uncertainty, or to borrow Carol Rose's terminology, the threat of "disorder" for subsequent owners of the property.[331] A property owner's inherent powers to control their land did not include unfettered powers to alienate novel allocations of their private police power from the remainder of the estate

330. *See supra* Part IV B & C.

331. Rose, *supra* note 15, at 239.

because doing so threatened good order by giving rise to controversy over clouds on title and by depriving a landowner of the powers that they rightfully need to manage their domain. Richard Epstein has argued that, thanks to effective recording systems, the threat of disorder should no longer stand as an impediment to a landowner being free to pursue wealth maximization by alienating some portion of their private police power over land via servitudes.[332] In this argument, Epstein argues that courts should make decisions that prioritize a property regime based on freedom of contract rather than propriety.[333] In other words, he makes the normative claim that judges should interpret a landowner's private police power as broadly as possible so that a landowner may pursue wealth maximization as fulsomely as possible, rather than subscribing to a proprietorial view of property which would cognize private property rights as first and foremost those rights necessary for maintaining good order.[334] There is, perhaps, good reason for Epstein to expect this from courts. On first glance, it appears to be the direction that courts took in the early twentieth century in adjusting common law nuisance remedies in response to industrialization.[335] In *Boomer v. Atlantic Cement Co*, when a cement company that played a large role in a town's local economy created private nuisances for a handful of neighbors, the court fashioned a new remedy, allowing the cement company to buy an easement to continue the nuisance, rather than granting the plaintiffs an injunction.[336] However, courts traditionally interpreted common law property rights through a proprietorial lens and have left it to legislatures to animate a property regime organized according to wealth maximization or preference satisfaction, as described below.

For example, in *Boomer*, the court repeatedly laments the fact that the New York legislature has not stepped in to pass laws addressing private nuisances created by economically important land uses.[337] It's ultimate remedy, allowing the nuisance-maker to buy an easement over the plaintiffs' land, is not based on the defendant's freedom of contract or best interest in wealth maximization, but because of the importance of the defendant's

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332. *See* Epstein, *supra* note 10, at 1354.

333. *See* Epstein, *supra* note 10, at 1360.

334. *See* Epstein, *supra* note 10, at 1354 & 1360.

335. *See* Boomer v. Atlantic Cement Co., 257 N.E.2d 870 (N.Y. 1970).

336. *Id.*

337. *Boomer*, 257 N.E.2d 870, 871.

business to the local economy.[338] In other words, the *Boomer* court defined the conflicting common law rights in a way to give each party the entitlements proper to each station as necessary to maintain order and well-being for the entire community: Boomer and their neighbors were entitled to payment for suffering the nuisance, but not to the power to enjoin the nuisance and Atlantic Cement was entitled to continue making a private nuisance, but only if it paid its burdened neighbors.[339] Carol Rose has similarly identified this trace of the proprietorial property regime in takings jurisprudence, which she argues can be arbitrary if analyzed through a wealth maximization or preference satisfaction lens, but markedly more comprehensible when viewed through a proprietorial lens.[340] If we set aside the assumption that in defining the contours of a private owner's property rights, courts are operating pursuant to a wealth maximization property regime and instead entertain the possibility that judges, in exercising their power, are more likely to operate pursuant to a proprietorial property regime, we see that there is no finger on the scale pulling the court toward increasing an owner's private powers over their land. Instead, the preference continues to be, as it has always been, on ensuring certainty and clarity of title in order to preserve "decent good order" and to ensure that a property owner possesses those rights that are "proper" according to their status or station. From this perspective, maintaining the formal differences between easements, real covenants, and equitable servitudes, while no longer strictly necessary, makes sense.

Setting aside Oliver Wendell Holmes Jr.'s famous view on the subject,[341] adhering to precedent increases clarity, consistency, and certainty in property law. Similarly, from a wealth maximizing perspective on private property rights, it is debatable whether some traditional requirements, like that a servitude must touch and concern land, aid, or hinder efficiency,[342] however, it is less

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338. *Id.* at 874–875.

339. *Id.*

340. Rose, *supra* note 15, at 245.

341. Oliver Wendell Holmes, Jr., *The Path of the Law*, 10 HARVARD L. REV. 457, 469 (1897) ("It is revolting to have no better reason for a rule of law than that so it was laid down in the time of Henry IV.").

342. This question of the continued efficiency benefits of traditional servitude requirements is at the heart of the dialectic between Uriel Reichman, Richard Epstein and Steward Sterk. In Toward a Unified Concept of Servitudes, Reichman argued for the continued value of the touch and concern doctrine based on the inefficiency of servitudes that do not touch and concern land. Reichman, *supra* note 6, at 1233. Epstein responded saying that future inefficiencies caused by a servitude should be taken into account in the original bargain between grantor and grantee at the time a servitude is created, thereby

contentious to note that the touch and concern doctrine furthers the purpose of ensuring that a governor (at any level of the Russian Doll) is using their private police power for some action related to the property itself, rather than for the governor's personal benefit.[343] A classic example of a covenant not touching or concerning land in a traditional servitude is a covenant for the burdened land owner to paint the portrait of the benefited land owner. Through a contractual lens, this might be a perfectly useful and efficient covenant between the original parties. However, viewing the covenant as a servitude through a proprietorial lens, the covenant is an exercise of private police power, but not related to promoting the security or prosperity of either the burdened or the benefited parcel. In fact, the covenant hinders the security and prosperity of the burdened parcel because it creates an arbitrary cloud on title, the completion of which may be difficult to verify. In this sense, the touch or concern doctrine functions as a judicial check on a property owner's discretion in properly managing the real property that is part of their domain.

2. Police Powers in Community Servitudes

Just as viewing juridical interpretations of a landowner's property rights through a proprietorial lens helps explain why courts continue to apply the old classifications and requirements to traditional servitudes, this same proprietorial lens also explains why those same courts uphold community servitudes even though these servitudes may not conform to traditional requirements. In the four examples of community servitudes described in this

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maximizing efficiency. Epstein, *supra* note 10, at 1360. Sterk responded to Epstein [Epstein piece] and "Freedom from Freedom of Contract: the Continuing Utility of the Touch and Concern Doctrine."

343. Uriel Riechman essentially made this proprietorial claim:

> Private property is sanctioned by society not only to promote efficiency, but also to safeguard individual freedom. Servitudes are a kind of private legislation affecting a line of future owners. Limiting such "legislative powers" to an objective purpose of land planning eliminates the possibility of creating modern variations of feudal serfdom. There might be nothing objectionable in personal agreements concerning personal labor, adherence to ideologically prescribed modes of behavior, or promises to buy from a certain supplier. When such obligations, however, become permanently enforced against an ever-changing group of owners, the matter acquires different dimensions. One point needs emphasis: The courts are not involved in measuring efficiency gains; this is clearly the prerogative of the parties. The courts only deny the permanency of agreements clearly unrelated to land use.

See Reichman, *supra* note 6, at 1233.

Article, courts have shown a propensity to enforce servitudes against private property owners even in the absence of enabling legislation.

As discussed above, where enabling legislation can be viewed as a program for recognizing a landowner's more extensive police power for the limited purpose of that landowner passing power to another governor of a domain that includes the servient estate, non-statutorily enabled contemporary servitudes that defy traditional requirements require courts to use their juridical powers to restate the private police powers inherent in private property ownership. In these instances, courts have consistently looked to the valid public purpose served by the program requiring or impliedly authorizing the servitude, the voluntary action of the landowner in creating the servitude, and, if relevant, any subsequent burdened parcel owner's notice of the covenant rather than traditional servitude requirements, like whether a covenant touches or concerns land or whether a negative easement fits within the four traditional forms.[344]

Why do courts consistently look to these factors? One possibility is that these factors parallel the requirements for valid public land use laws with valid public purposes. A servitude's valid public purpose is a convenient substitute for substantive due process and the servient estate owner's voluntary participation is a good substitute for procedural due process. But why do courts borrow from principles of public land use regulation in deciding whether certain kinds of servitudes should be recognized at common law while preferring to impose the traditional rules for other servitudes? If our robust American recording systems make it possible to recognize in a private property owner's broad powers to alienate their private police powers for any reason,[345] why do courts only stretch the common law of servitudes when the servitude in question contributes to a well-established public purpose and separates the beneficial interest from the governance power conveyed? A private property regime animated by wealth maximization would have to consider such a rule arbitrary. However, from the perspective of a proprietorial property regime, the distinction is rational.

344. Patch v. Springfield School Dist., 989 A.2d 500, 508 (2009).

345. Epstein, *supra* note 10.

3. Servitudes and Proper Powers to Police

The questions posed in the preceding subsection can be addressed through a proprietorial lens. In community servitudes, the landowner and the entity to whom the landowner is entrusting governing power both claim the burdened land as objects of their respective domains. For example, a house in a common interest community is the domain of the homeowner and of the homeowners association. The homeowner has the heteronomous right to govern their home as an instance of the management strategy Rose describes as "Property"[346] and the homeowners' association has the heteronomous right to govern based on the servitudes granting the HOA governing powers for the benefit of the community of which the house is a part.

In traditional servitudes, the landowner of the dominant estate does not claim the servient estate as an object of its governing domain; instead, the servitude is intended to benefit the dominant estate which does not include the servient estate. Therefore, community servitudes reallocate the powers necessary to properly govern the objects of a domain with no net loss of the necessary power, but traditional servitudes run the risk of removing governing power from the servient estate holder without reinvesting that power in another governor who bears responsibility for the servient estate as a part of their own domain—a net loss of the governing power necessary to properly tend to the servient estate—a suspect move from a proprietorial vantage point.

For example, in *Giger v. City of Omaha*, the plaintiff challenged the City of Omaha's ability to enter into a development agreement as illegal contract zoning that attempted to bargain away the state police power.[347] In finding that the development agreement did not bargain away the city's police power, the Supreme Court of Nebraska stated, "In fact, this agreement is in reality an enhancement of the city's police power. . . we find that the agreement actually enhances the city's regulatory control over the development rather than limiting it."[348] Unfortunately, the Giger court did not elaborate on the nature or source of this intriguing police power enhancement.[349] Three points about the police power are implicit in the Court's statement: first, the City of Omaha has

346. Rose, *supra* note 27, at 9–10.

347. Giger v. City of Omaha, 232 Neb. 676, 682 (1989).

348. *Id.* at 688.

349. *Id.*

a police power over Giger's land; second, a private landowner possesses or can create their own police powers over their land separate from the City's public police power; third, a private landowner can alienate some portion of their private police powers to the City.

It is generally recognized that development agreements are a means of localities gaining rights and powers "[b]eyond what [they] could reasonably require through subdivision exactions, impact fees, and other conditions under the normal exercise of its regulatory authority or police power."[350] Case law examining the legitimacy of what Judith Welch Wegner has referred to as "contingent zoning"[351] focuses on whether governments impermissibly bargain away their police powers when granting servitudes in development agreements[352] and whether local governments perpetrate uncompensated takings under the guise of their contract powers in negotiating exactions.[353] There has been little, if any, focus on whether covenants provided by the landowner in a development agreement for the benefit of a local government should be enforced as valid servitudes that run with the land to bind successor-owners. As in *California BIA v. City of San Jose*, the courts and parties seem to presuppose that if the legislative action establishing an Inclusionary Zoning requirement is valid, then the servitude created by a private landowner to effectuate statutory requirements will be valid and successful in binding subsequent owners of the servient estate with proper notice.[354]

In distinguishing between community and traditional servitudes, we can see why courts upholding the validity of community servitudes at common law rely on the valid public purpose of the governmental program or policy giving rise to the servitude. This substantive due process check is a means of ensuring that the power necessary to properly govern property is not being stripped from the group of governors who bear proprietorial responsibility for the property, whether it be the private landowner or some other governmental or quasi-

350. CALLIES ET AL, *supra* note 72, at 3.

351. Wegner, *supra* note 170, at 981–982 (Welch Wegner's term "contingent zoning" encompasses all forms of individualized zoning arrangements, regardless of their validity).

352. CALLIES ET AL, *supra* note 72, at 93–95.

353. Michael H. Crew, *Development Agreements after Nollan v California Coastal Commission*, 22 URB. LAW. 23, 46 (1990) (noting the difficulty in determining "whether a landowner's acceptance of a condition is truly voluntary instead of a submission to government coercion.").

354. *See* Cal. Bldg. Indus. Ass'n v. City of San Jose, 351 P.3d 974 (2015).

governmental group that counts the servient estate as part of its domain. But why do courts also rely on the voluntary actions of the original party to the servitude and the valid notice of successors in interest to the servient or burdened estate? In a proprietorial system of property, these stand-ins for procedural due process are what Foucault described as the insertion of freedom into governmentality, not only as an individual's legitimate opposition to state oppression, but as a tactic of governing well.[355] Servitudes provide a useful illustration of Foucault's point.

The reason that servitudes can be used tactically for governmental purposes like conservation, affordable housing, securing public benefits from developers, and restraining homeowner's behavior beyond the states' Constitutional limits is precisely because of the understanding that a landowner is freely and voluntarily entering into servitude contracts, or buying servitude-burdened property, in furtherance of their own preference satisfaction ends. Just as this freedom of private individuals is justification for our government under law, in the realm of servitudes, the freedom of landowners in entering into or buying servitude-burdened property in pursuit of their presumed preference satisfaction is justification for the legitimacy of the private law created in the servitude. In this sense, community servitudes provide an example of what Jody Freeman has described as "publicization," or the extending of public law norms into private actors.[356] In enabling and upholding community servitudes, legislatures and courts have shown a willingness to recognize broader powers of landowners to alienate private police powers, but subject to the norms of police that guide public law and regulation.

Another facet of the rhetorical importance of a landowner's free and voluntary participation in granting community servitudes was displayed in Chief Justice Roberts's majority opinion in *Cedar Point Nursery v. Hassid*.[357] In that case, the Court first found that a California regulation granting union organizers the right to enter agricultural employers' land was not a mere exercise of police powers in regulating land, but created an easement in gross on the plaintiff's farms for the benefit of the union organizers.[358] In declaring that the state law created a servitude, without the farm

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355. FOUCAULT, *supra* note 126, at 353.

356. Jody Freeman, *Extending Public Law Norms Through Privatization*, 116 HARVARD L. REV. 1285, 1327 (2003).

357. Cedar Point Nursery v. Hassid, 594 U.S. __ (2021).

358. Cedar Point Nursery v. Hassid, 594 U.S. __, slip page 7 (2021).

owners' consent, the Court went on to find that the regulation constituted a per se taking for which just compensation must be paid to the farm owners. [359] Once again, the Court eschewed the opportunity to address the private police powers of a landowner over the people and objects in their domain and instead focused on a landowner's rights to be free from the police powers of an overarching governor (the state), this time by using a servitude as a foil. Justice Roberts stressed the centrality of a landowner's right to exclude by quoting Blackstone's familiar phrase about a landowner's police power: "According to Blackstone, the very idea of property entails 'that sole and despotic dominion which one man claims and exercises over the external things of the world, in total exclusion of the right of any other individual in the universe.'"[360] Chief Justice Roberts went on to explain that government-authorized physical invasions of a landowner's right to exclude are *per se* takings.[361]

VI. CONCLUSION

The history of servitudes contains a number of notable shifts in the law. For example, the emergence of equitable servitudes and recognition of implied reciprocal negative servitudes both signaled important shifts toward greater powers of landowners to enter into servitudes. In this Article, I've attempted to identify another significant shift in the law of servitudes—a distinction between traditional and community servitudes. The Article explores the distinction by examining why courts persist in applying the traditional categories and rules for servitudes in some cases, while blurring the categories and applying new, more permissive rules based in public policy and notice in other cases. I have done this by examining the current law of servitudes through a proprietorial lens.

To articulate an alternative framework for servitudes based in a proprietorial regime for property rights rather than a preference satisfaction regime centered on freedom of contract, I first described the roots of propriety as a historical governance tactic for maintaining hierarchical social order, and the kind power vested in governors at each level of the hierarchy that enables them to pursue order within their domain: police power. I then demonstrated how a proprietorial regime continued through the

359. Cedar Point Nursery v. Hassid, 594 U.S. __ (2021).

360. Cedar Point Nursery v. Hassid, 594 U.S. __, slip page 7 (2021).

361. Cedar Point Nursery v. Hassid, 594 U.S. __, slip page 8 (2021).

transition from monarchic government aimed at security of sovereign power to Western liberal democracy aimed at security of the population. In this transition, not only does hierarchical, police-power-wielding governance continue as essential architecture or our societal framework, but also, "law" or consent of free and autonomous subjects becomes an additional tactic for promoting the security of the population. The laws of economics as a social science justify recognition of private property rights because a private owner can be expected to manage a privately-owned resource to maximize their private benefit. Because the private owner and the private resources they manage are all part of the state's governmental domain, a private owner's maximized benefit tends to correspond with the security and prosperity of the larger population. To ensure this outcome, the state may need to police the landowner by regulating the landowner or the resources within their domain, or it may incentivize certain voluntary actions that a landowner makes so as to better align the landowner's interests with the interests of the larger population.

Viewed through a proprietorial lens, servitudes, as redistributions of a private owner's police powers, are suspect to the extent that they attempt to alienate the powers necessary for a governor to properly govern land a part of their domain. In traditional servitudes, where the servient estate is not nested within the dominant estate holder's domain, the traditional rules of servitudes including requirements that covenants touch and concern land, and not create unreasonable restraints on alienation, function as checks on a property owner's discretion as governor to alienate the police powers necessary to properly govern a domain.

On the other hand, in community servitudes, where the purpose of the servitude is to nest the servient estate within the domain of another layer of governing authority, there is no dissipation of governing power necessary to properly govern the servient estate. Traditional rules like whether the servitude touches and concerns the land, or operates as an unreasonable restraint on alienation, are not necessary. Instead, the questions become whether the servitude furthers the legitimate ends of a governor whose domain includes the servient estate and whether the grantor freely and voluntarily entered into the servitude as stand-ins for substantive and procedural due process.

By showing that traditional and community servitudes are both intelligible according to rules of propriety, this article attempts to demonstrate that a private owner's property rights to alienate governance powers have always been determined according to these proprietorial rules that are primarily concerned

with community order and wellbeing, rather than individual wealth maximization. In this way, my hope is that this Article contributes to the body of scholarship intent on revealing "progressive property theory beyond academia".[362]

The question of whether the grantor freely and voluntarily entered into the servitude is essential because the servitude is specifically not an exercise of the state's police power; it is a tactic of law—a property owner's free, autonomous, and voluntary decision to enter into a transaction in the best interest of the property owner and their domain.

Understanding servitudes through a proprietorial lens not only promotes coherence and predictability in the law, but it also sheds light on many of the policy questions surrounding community servitudes that loom on the horizon. For example, Owley has questioned whether perpetual conservation easements actually further the best interests of the public and the environment.[363] In prior work, I have questioned whether affordability covenants should be viewed as fungible assets of a jurisdiction's affordable housing portfolio.[364] Other scholars have questioned whether and how conservation easement holders and common interest communities should have the power to enforce their governance rights over third-parties.[365] These questions all lie in the blurry area between public and private land use controls. Studying servitudes as manifestations of the various tactics of land management, including powers of both police and law wielded by public and private actors, will better equip us to answer these questions.

Creative new servitudes are reshaping the foundations of land use planning in American society. These servitudes often do not meet traditional requirements for servitudes, and yet they are embraced by lawmakers, courts, and private property owners. The most influential justification for this sea change in the last four decades has been a claim that property rules are giving way to contract rules–freeing private owners to fulsomely pursue preference satisfaction according to liberal economic principles.[366]

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362. Weiss, *supra* note 22, at 285.

363. Owley, *supra* note 168, at 123–124.

364. Elia, *supra* note 171, at 96–97.

365. Jessica E. Jay, *Enforcing Perpetual Conservation Easements Against Third-Party Violators*, 32 UCLA J. ENVTL. L. & POL'Y 80, 82 (2014); David J. Kennedy, *Residential Associations as State Actors: Regulating the Impact of Gated Communities on Nonmembers*, 105 YALE L. J. 761 (1995).

366. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES Introduction (Am. L. Inst. 2000).

Yet the implications of this libertarian theory have not fully borne out in case law–courts persist in applying traditional rules for servitudes in some instances, but not in others.[367] Viewing these servitudes through a proprietorial lens helps make sense of these legal developments and will help us ensure that however they are justified, contemporary servitude laws continue to meet society's needs.

367. *See supra* notes 29 & 30.