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ARTICLE

CONTRACT-WRAPPED PROPERTY

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CONTRACT-WRAPPED PROPERTY

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For nearly two centuries, the law has allowed servitudes that “run with” real property while with few exceptions refusing to permit servitudes attached to personal property. That is, owners of land can establish new, specific requirements for the property that bind all future owners — but owners of chattels cannot. In recent decades, however, firms have increasingly begun relying on contract provisions that purport to bind future owners of chattels. Courts’ interpretations of copyright law enabled these developments in the context of software licensing, but these licenses have started to migrate to chattels not encumbered by software. Courts encountering these provisions have mostly missed their significance, focusing instead on questions of contract doctrine, such as whether opening shrinkwrap constitutes assent to be bound. Property concepts never enter their analysis. The result of this oversight is that courts have de facto recognized equitable servitudes on chattels — a category that the common law has long rejected except in extraordinary circumstances. Yet because courts are often unfamiliar with property law principles, and because lawyers have failed to make property-based arguments, individual contracts cases are remodeling the architecture of property rights without anyone realizing it.

This Article identifies the unexpected emergence of servitudes on chattels via contract law. It explores the consequences of that development and argues that we should see it as deeply troubling. By unwittingly establishing equitable servitudes on chattels, this change in law threatens to undo longstanding precedent, disrupt settled expectations, and effectively recognize a new form of property. More generally, elevating contract over other private law doctrines disrupts the private law’s equilibrium in which a complementary suite of doctrines developed to promote economic liberty while curtailing opportunistic impulses. While the pathologies that have flourished internally in modern contract doctrine have been well studied by scholars, the way in which contract law is threatening to consume property and other areas of private law has received less attention. Using servitudes on personal property as a window into the larger problem of contract-dominated private law, this Article explores the private law’s role in shaping environmental conservation, autonomy, innovation, and the legitimacy of the law itself. Those values are all in jeopardy if contract law is allowed to encroach on property and to erode the very concept of ownership.

INTRODUCTION

Tamko roofing shingles are drab rectangles of laminated asphalt and fiberglass.¹ They don’t contain any chips, sensors, or software. Roofing suppliers sell these shingles the old-fashioned, low-tech way —

* Associate Professor of Law, Washington University in St. Louis. For helpful conversations and comments at various stages, I’m grateful to Jennifer Allison, Scott Baker, Andrea Boyack, Molly Brady, Yun-chien Chang, Kevin Collins, Travis Crum, Kevin Douglas, Jared Ellias, Dan Epps, Jill Fraley, Jens Frankenreiter, John Goldberg, Dan Klerman, Mark Lemley, Jed Lewinsohn, Henry Smith, Kathryn Spier, Carla Spivack, and Rory Van Loo, as well as the participants of the Harvard Private Law Workshop, American Law and Economics Association 2023 Annual Meeting, European Association of Law and Economics 2023 Annual Meeting, AALS New Voices in Property, University of Florida Faculty Workshop, Michigan State Faculty Workshop, WashU Law Faculty Workshop, and Cornell Faculty Workshop. Special thanks to Jacob Seeley for outstanding research assistance.

¹ See *Shingle Colors*, TAMKO, <https://www.tamko.com/all-shingle-colors> [<https://perma.cc/AFM5-84VS>].

no apps or subscriptions required. And yet, these shingles are changing the meaning of ownership. Like many manufacturers, Tamko shrink-wraps a contract around the packages of shingles that it sells to roofers.² Tamko's contract is unremarkable except in terms of whom it purports to bind. This contract, styled as a "Limited Warranty," purports to bind not merely the purchaser or installer of the shingles, but instead "the owner of the building at the time the Shingles are installed on that building" and "the first person to occupy the residence after its construction" if the residence is purchased from a builder.³ The agreement specifies that a homeowner may be bound "even though the Shingles were already installed" at the time of purchase.⁴ This agreement even attempts to reach further down the chain of title to secondary purchasers of the home if they purchase within the first five years of the warranty term.⁵

Because it attempts to bind downstream owners of the shingles, notwithstanding the lack of privity between Tamko and that downstream purchaser, this agreement attempts to create a de facto equitable servitude. The problem, though, is that under longstanding property doctrines, equitable servitudes on personal property are unenforceable.⁶ Equitable servitudes on real property may be enforceable, but only when they meet particular requirements, notably recording in official property records.⁷ In theory, these are mandatory property doctrines that should defeat Tamko's expansive contractual claims. And yet, Tamko keeps winning cases in which it attempts to enforce its alleged contract.⁸

What Tamko is trying to accomplish may seem aggressive, but there is every reason to think that it is merely the vanguard of a coming explosion of would-be servitudes on personal property. For nearly a century, scholars have wondered why courts enforced equitable servitudes on real property but not personal property.⁹ This question took on new

² For a few models Tamko claims to have molded notice of the terms onto the shingles themselves. *Krusch v. Tamko Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 589 (M.D.N.C. 2014).

³ *Tamko Fiberglass/Asphalt Shingle Limited Warranty*, TAMKO, [https://www.tamko.com/docs/default-source/limited-warranties/TAMKO-fiberglass-asphalt-shingle-limited-warranty-\(effective-march-1-2021\).pdf](https://www.tamko.com/docs/default-source/limited-warranties/TAMKO-fiberglass-asphalt-shingle-limited-warranty-(effective-march-1-2021).pdf) [<https://perma.cc/FX7G-JJYT>].

⁴ *Id.* If a homeowner does not agree to the terms, the agreement directs them to "RETURN ALL UNOPENED MARKETABLE PRODUCTS TO THE ORIGINAL PLACE OF PURCHASE FOR A REFUND." *Id.* Never mind, of course, that returning the shingles would mean peeling the roof off a house at the homeowner's expense.

⁵ *Id.*

⁶ RESTATEMENT (FOURTH) OF PROP. § 4.1 cmt. g (AM. L. INST., Tentative Draft No. 3, 2022) ("Traditionally, equitable servitudes . . . and nonpossessory property rights apply only to land, not to personal property."). See generally Zechariah Chafee, Jr., *Equitable Servitudes on Chattels*, 41 HARV. L. REV. 945 (1928) (explaining courts' refusals to allow equitable servitudes on chattels).

⁷ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.4 (AM. L. INST. 2000).

⁸ See *infra* section ILC.1, pp. 1095–103.

⁹ See Chafee, *supra* note 6, at 945; Zechariah Chafee, Jr., Comment, *The Music Goes Round and Round: Equitable Servitudes and Chattels*, 69 HARV. L. REV. 1250, 1254–55 (1956); Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1450–51 (2004).

urgency — and with that, new scholarly interest — starting in the early aughts with the proliferation of software licenses.¹⁰ These licenses appeared to attach to chattels and run with them just as servitudes might run with real property.¹¹ Servitudes enabled by software licenses initially seemed *sui generis*: while they were enabled by federal intellectual property law, state property law continued to refuse to recognize servitudes on chattels.¹² That refusal is now eroding.

This Article shows that courts across the country are now effectively recognizing equitable servitudes on private property largely under the guise of contract law — even if only California courts acknowledge, or even recognize, that that is what they are doing. Because courts consider these cases from the exclusive perspective of contract law, they ignore other private law doctrines that ought to provide guardrails to contracts' reach. After cataloging the unexpected emergence of equitable servitudes on chattels, this Article goes on to argue that we should find this development deeply troubling. Our legal system has long rejected almost all equitable servitudes on personal property,¹³ and for good reason. By unwittingly recognizing a new form of property, courts are upsetting deeply held intuitions about the meaning of ownership.¹⁴ This, in turn, tips the balance of the law promoting consumption over creation and more meaningful constructions of the self.

There are many reasons to be concerned about the rise of equitable servitudes on personal property. Equitable servitudes on chattels threaten the viability of ownership in fee simple,¹⁵ especially given contract doctrine's permissive approach to unilateral modification clauses.¹⁶ Moreover, in failing to engage with relevant property doctrine, attorneys and courts allow contract to crowd out noncontract private law doctrine and policy. Contracts-focused litigation fails to engage with the concerns that led earlier courts to reject equitable servitudes on chattels: notably, information costs, competition, and waste. And if equitable servitudes on personal property are permitted, we should expect them quickly to proliferate. For firms, the cost of including these servitudes on their goods is so low that they will likely become as common as

¹⁰ See Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 889 (2008); Christina Mulligan, *Personal Property Servitudes on the Internet of Things*, 50 GA. L. REV. 1121, 1122–23 (2016); Christina Mulligan, *Licenses and the Property/Contract Interface*, 93 IND. L.J. 1073, 1074–75 (2018) [hereinafter Mulligan, *Licenses*].

¹¹ Van Houweling, *supra* note 10, at 889.

¹² See Molly Shaffer Van Houweling, *Touching and Concerning Copyright: Real Property Reasoning in MDY Industries, Inc. v. Blizzard Entertainment, Inc.*, 51 SANTA CLARA L. REV. 1063, 1068, 1075–76 (2011).

¹³ See sources cited *supra* note 9.

¹⁴ See generally MICHAEL HELLER & JAMES SALZMAN, *MINE!: HOW THE HIDDEN RULES OF OWNERSHIP CONTROL OUR LIVES* (2021) (exploring the intuitive contours of private property).

¹⁵ See *infra* section III.C, pp. 1118–24.

¹⁶ See *infra* section II.B.2, pp. 1088–92.

contracts of adhesion. Were that to happen, people today could lock up future generations' personal property just as they have done for real property.¹⁷ Doing so would not only impose the preferences of today on tomorrow, but also could recreate feudal patterns of ownership, as control over use of goods concentrates in the hands of the few.¹⁸

Understanding the way in which contract law is threatening to overtake settled property doctrine has broader lessons for private law. Elevating contract over all other private law doctrines disrupts the broader equilibrium of the private law, in which a complementary suite of doctrines developed to promote liberty while curtailing opportunism.¹⁹ While the pathologies that have flourished internally in modern contract doctrine have been well covered,²⁰ with a few exceptions,²¹ the outsized role of contract itself has received less attention. This outsized role arguably begins in law schools, where students study the virtues of private ordering but may never encounter the many ancient substantive constraints on private ordering, or if they do encounter them, then only as curiosities exemplifying the bad old days of doctrinal formalism.

¹⁷ See, e.g., Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 773–74 (2002).

¹⁸ See Gregory S. Alexander, *The Dead Hand and the Law of Trusts in the Nineteenth Century*, 37 STAN. L. REV. 1189, 1191 (1985) (explaining the abolition of restraints on alienation “as the major defining characteristic of a liberal commercial society as opposed to a feudal one”); Joseph William Singer, *The Reliance Interest in Property Revisited*, 7 UNBOUND: HARV. J. LEGAL LEFT 79, 82 (2011) (“The defining characteristic of American property law is the abolition of feudalism. That means that we regulate property relationships to ensure that each person has freedom, dignity, and access to the means of a comfortable life.”); see also JOSHUA A.T. FAIRFIELD, OWNED: PROPERTY, PRIVACY, AND THE NEW DIGITAL SERFDOM 19–20 (2017) (explaining how “[l]icensing is the new infeudation,” *id.* at 20); Van Houweling, *supra* note 10, at 901–02 (noting that servitudes impose “dead-hand control” considered by some scholars to be characteristic of “feudal serfdom,” *id.* at 901).

¹⁹ This Article primarily focuses on the relationship between firms and consumers with respect to consumer goods. However, much of this analysis applies in business-to-business relationships as well. It is especially applicable to small businesses who have little comparative bargaining power against some of their essential suppliers. Moreover, the line between individuals and small businesses is blurry — especially given the rise of the so-called gig economy. Much of this analysis also applies to individuals, but individuals rarely have the desire or wherewithal to attempt to encumber their property with equitable servitudes, except in the case of heirlooms. For example, imagine a donor stipulating that the diamond in a family engagement ring may never be reset or used to commemorate a same-sex relationship.

²⁰ See, e.g., Friedrich Kessler, *Contracts of Adhesion — Some Thoughts About Freedom of Contract*, 43 COLUM. L. REV. 629, 640 (1943) (“[T]he law, by protecting the unequal distribution of property, does nothing to prevent freedom of contract from becoming a one-sided privilege.”); Todd D. Rakoff, *Contracts of Adhesion: An Essay in Reconstruction*, 96 HARV. L. REV. 1173, 1220–43 (1983) (explaining how contracts of adhesion confer advantages on the drafting parties in light of imperfect competition); MARGARET JANE RADIN, BOILERPLATE: THE FINE PRINT, VANISHING RIGHTS, AND THE RULE OF LAW 10–17 (2012) (explaining how contracts of adhesion can remove informed consent and basic rights, including jury trials in contract disputes).

²¹ See Ryan Martins, Shannon Price & John Fabian Witt, *Contract's Revenge: The Waiver Society and the Death of Tort*, 41 CARDOZO L. REV. 1265, 1299 (2020); J. Maria Glover, *Disappearing Claims and the Erosion of Substantive Law*, 124 YALE L.J. 3052, 3054 (2015); RADIN, *supra* note 20, at 10–17; see also Eyal Zamir featuring Ian Ayres, *A Theory of Mandatory Rules: Typology, Policy, and Design*, 99 TEX. L. REV. 283, 284 (2020).

In many ways, the *Third Restatement of Property* encouraged a shift away from viewing property as a source of mandatory constraints on contract by embracing reasonableness standards for enforcing customization devices like servitudes.²² Drafts of the *Fourth Restatement of Property*, particularly its explicit embrace of the *numerus clausus* principle,²³ are reasserting property as a bulwark against contract. Still, the thrust of modern private law is toward expanding the reach of contract doctrine, often at the expense of other longstanding doctrines.²⁴ Equitable servitudes on chattels are one window into this growing imbalance. Particularly, they are a window that reveals what is lost when freedom to contract subordinates other private law policy concerns. The future of this equilibrium in the private law has significant implications for the future of autonomy, dignity, creativity, and innovation.

Courts should reject equitable servitudes on personal property. They should strictly enforce property doctrine forbidding those servitudes and refuse to allow firms to use permissive contract doctrines to recreate them. Even if courts are unwilling to reject these servitudes entirely, a second-best solution would be to subject them to rules similar to those that apply to servitudes on real property. These rules are substantively more restrictive than the rules that normally apply to contracts.²⁵

This Article proceeds in four Parts. Part I lays the doctrinal foundation, beginning with equitable servitudes on real property and early questions about whether — and if so, how — equitable servitudes might work on chattels. Next, it traces how intellectual property law created a second pathway for de facto equitable servitudes on chattels, thereby arguably changing how courts view the property/contract interface.

Part II explores how an imperial contract doctrine is distorting the structure of the private law. This Part begins by arguing that property doctrine, with its substantive mandatory rules, often acts as a system of checks and balances on contract's excesses, particularly with respect to consumers. It then explains how three developments in contract practice — the decline of formation formalities, unilateral modification rights, and arbitration — have tended to recast a disproportionate share of private law disputes as contracts disputes. Four examples of modern equitable servitudes on chattels follow, including a case study of the Tamko shingles litigation. This Part closes with descriptive analysis of how lawyers framed a recent series of cases involving terms of service printed on or wrapped around roofing shingles. Rather than contest the

²² See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (AM. L. INST. 2000).

²³ RESTATEMENT (FOURTH) OF PROP. § 4 (AM. L. INST., Tentative Draft No. 3, 2022).

²⁴ See Martins, Price & Witt, *supra* note 21, at 1299.

²⁵ See *infra* pp. 1126–27.

propriety of what appears to be a servitude on a chattel, the plaintiffs engaged with the terms of service in contractual terms.²⁶

Having set up the equitable servitudes doctrine and its implications on the private law system, Part III turns to the doctrine's implications for society more broadly. This Part builds on earlier analysis of the economic implications of equitable servitudes on chattels, focusing on the consequences of equitable servitudes for the environment, autonomy, the self, and the legitimacy of the legal system as a whole. This Part makes the case that enforcing equitable servitudes on chattels would reduce welfare on many fronts.

With these implications in mind, Part IV loosely sketches out a doctrinal framework for equitable servitudes on chattels if they must exist. Specifically, courts should import the rigorous analyses that they perform on equitable servitudes on real property before enforcing any equitable servitude on chattel. In addition, to promote the efficient reuse of goods and materials, some kinds of entities must be able to sell goods free and clear of any servitudes. This framework, however, is a second-best approach. The first-best option would be for courts to recommit to not enforcing equitable servitudes on chattels, even when they are styled as contracts.

I. THE PUZZLE OF EQUITABLE SERVITUDES ON CHATTELS

The story of equitable servitudes on chattel is closely tied up with servitudes in real property law. As courts became less skeptical of servitudes running with the land, scholars,²⁷ and to a lesser extent, courts,²⁸ questioned whether the *law* should recognize similar servitudes on chattels. The history of servitudes on real property is itself a fraught topic and necessarily beyond the scope of this paper.²⁹ This Part will therefore recount only a compressed history of equitable servitudes to illuminate their most fundamental features. For our purposes, the most fundamental feature is that the obligation attaches to the asset, thereby automatically binding almost anyone owning or in possession of that asset as the asset changes hands over time. Before reaching the doctrinal puzzle of equitable servitudes on chattels, however, it is helpful to show exactly what they are.

²⁶ *E.g.*, *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 679 (11th Cir. 2018); *Am. Fam. Mut. Ins. Co. v. Tamko Bldg. Prods., Inc.*, 178 F. Supp. 3d 1121, 1124–25 (D. Colo. 2016); *Hoekman v. Tamko Bldg. Prods., Inc.*, No. 14-cv-01581, 2015 WL 9591471, at *3 (E.D. Cal. Aug. 24, 2015); *Hobbs v. Tamko Bldg. Prods., Inc.*, 479 S.W.3d 147, 150 (Mo. Ct. App. 2015); *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 587–88 (M.D.N.C. 2014).

²⁷ *See, e.g.*, Chafee, *supra* note 6, at 1013; Robinson, *supra* note 9, at 1451.

²⁸ *Cf.* Chafee, *supra* note 9, at 1254 (explaining that beyond price maintenance terms, courts only sporadically enforce equitable servitudes on chattels as such).

²⁹ For more fulsome histories of servitudes on real property, see Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1183–90 (1982).

A. Basic Servitudes on Chattels

Since so few courts have ever explicitly recognized equitable servitudes on chattels, it is unsurprising that there is no overarching authority to cite for a definition.³⁰ Instead, we'll proceed by analogy to real property since servitudes on chattels closely resemble servitudes on land. Where the *Restatement* defines a servitude on land as “a legal device that creates a right or an obligation that runs with land or an interest in land,”³¹ a servitude on a chattel can be defined as a legal device that creates a right or an obligation that runs with the chattel or an interest in the chattel. The most essential feature of a servitude is that it automatically binds successors in interests.³² That is, if you buy a piece of property with a servitude attached to it, you're bound by the servitude — even if you never agreed to it. It is this feature that distinguishes servitudes from mere contracts.³³

Because servitudes bind successors in interests, the beneficiary of the servitude can enforce the servitude against downstream interest holders.³⁴ Thus, servitudes dictating the aesthetic character of a neighborhood or limiting permissible uses of property remain enforceable even as the land changes hands.³⁵ In this way, the servitude puts the holder of the encumbered property and the beneficiary of the servitude into a long-term relationship with each other. This ongoing relationship stands in contrast to the finality that accompanies sales without servitudes.³⁶ Framed positively, this ongoing relationship may stabilize management of an asset over time.³⁷ Framed negatively, this ongoing relationship allows the past to control the present³⁸ and tends to concentrate further the benefits of ownership.³⁹ Limits on servitudes reflect sovereigns' different choices about how to best balance these concerns. For example, while many nations permit negative servitudes, only a few, notably the United States and Israel, permit wide-ranging servitudes that obligate

³⁰ Leading authorities on personal property do not contemplate that personal property may be encumbered with servitudes.

³¹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (AM. L. INST. 2000).

³² Carol M. Rose, *Servitudes*, in RESEARCH HANDBOOK ON THE ECONOMICS OF PROPERTY LAW 296, 297 (Kenneth Ayotte & Henry E. Smith eds., 2011).

³³ Molly Shaffer Van Houweling, *Exhaustion and Personal Property Servitudes*, in RESEARCH HANDBOOK ON INTELLECTUAL PROPERTY EXHAUSTION AND PARALLEL IMPORTS 44, 46 (Irene Calboli & Edward Lee eds., 2016); see Thomas W. Merrill & Henry E. Smith, *The Property/Contract Interface*, 101 COLUM. L. REV. 773, 851–52 (2001). The extent to which contract doctrine does and should influence servitude doctrine is a separate question taken up in Part II, below.

³⁴ See Rose, *supra* note 32, at 297.

³⁵ See *id.*

³⁶ See Van Houweling, *supra* note 33, at 46; Merrill & Smith, *supra* note 33, at 851–52.

³⁷ Rose, *supra* note 32, at 297.

³⁸ Van Houweling, *supra* note 10, at 900.

³⁹ See FAIRFIELD, *supra* note 18, at 19–20; see also Van Houweling, *supra* note 10, at 901–02.

the owner to undertake specific acts.⁴⁰ For good reason, most systems limit these affirmative obligations to those memorialized in leases and essential acts of neighborliness such as maintaining a party wall.⁴¹

A simple servitude on real property may look something like this: Owners subdivide Blackacre into two lots, Northacre and Southacre. They continue living on Northacre and sell Southacre to *A* subject to the covenant that the owner of Southacre never permit hunting on Southacre. Assuming that the covenant is properly documented and recorded, if *A* sells Southacre to *B*, *B* must continue to prohibit hunting on Southacre. If *B* does allow hunting, Owners can sue *B* for violation of the servitude.

Now consider a second example: Owners propagate heirloom rosebushes and sell some to Florist subject to the restriction that Florist cannot sell roses from their bush in the state in which Owners live.⁴² The enforceability of this agreement turns on questions of contract law and only implicates the two parties to the transaction, who earlier generations of lawyers would have described as being in privity with each other. Assuming the appropriate formalities are met, there is a contract between Owners and Florist. That contract will be enforceable unless it violates public policy,⁴³ but those circumstances are vanishingly narrow.⁴⁴ Even jurisdictions that might hesitate to enforce restraints on alienation generally enforce restraints protecting distribution territories against the parties that agree to the territorial boundaries.⁴⁵

The distinction between contracts and servitudes appears if, despite the agreement, Florist sells roses to Wedding Planner, who resides in the same state as Owners and knows about the agreement between Florist and Owners. Although Owners can sue Florist for breach of contract, what they really want may be a remedy against Wedding Planner. Contract law would offer no such remedy because there is no contract between Owners and Wedding Planner. Tort law, specifically interference with contract, may offer a remedy, if Owners show that Wedding Planner knew about the contract and intentionally procured its breach, resulting in damage to Owners.⁴⁶ However, proceeding in tort may not

⁴⁰ Bernard Rudden, *Economic Theory v. Property Law: The Numerus Clausus Problem*, in 3 OXFORD ESSAYS IN JURISPRUDENCE 239, 242–43 (John Eekelaar & John Bell eds., 1987).

⁴¹ See *id.* at 246–47.

⁴² The heirloom designation here is essential since there are patented roses that would add an unwanted layer of federal intellectual property law to this problem. See *David Austin Roses, Ltd. v. Jackson & Perkins Wholesale, Inc.*, No. 09-3027-PA, 2009 WL 10692839, at *2 (D. Or. Nov. 19, 2009).

⁴³ See RESTATEMENT (SECOND) OF CONTS. § 178 (AM. L. INST. 1981).

⁴⁴ See *id.* § 178(2)–(3).

⁴⁵ Although this kind of agreement logically has implications for competition, antitrust law has not consistently prohibited it for roughly half a century. See *Cont'l T.V., Inc. v. GTE Sylvania Inc.*, 433 U.S. 36, 59 (1977).

⁴⁶ See *Sysdyne Corp. v. Rousslang*, 860 N.W.2d 347, 351 (Minn. 2015) (explaining the elements of a tortious interference claim).

accomplish Owners' goals, since the applicable remedy is likely to be damages and what Owners really want is the exclusive right to sell their roses in the state where they reside.⁴⁷ Another option is that Owners could try to sue Florist under a theory of unjust enrichment,⁴⁸ but success there is far from certain.⁴⁹ Therefore, having the option to sue Florist on the basis of equitable servitude would allow Owners to seek an injunction against Wedding Planner, and perhaps even against Wedding Planner's clients if they also have notice of the agreement between Owners and Florist. Without a theory of equitable servitudes on chattels, however, an injunction may be difficult to get.⁵⁰ And without an injunction, brides in Owners' state may end up avoiding roses altogether if they must worry about Owners plucking the roses from their flower arrangements on their big day.

The ability of Owners' restrictions to follow the roses even after they change hands from Florist to Wedding Planner is the quintessential feature of equitable servitudes in action.⁵¹ The restriction — no sales in Owners' home state — follows the object no matter how many times it changes hands.⁵² All current and future owners of the roses are in a long-term relationship with Owners. The risk that this kind of restriction will not only upset expectations, but also increase information costs on all future purchasers, is why courts have long viewed equitable servitudes with suspicion.⁵³

B. Equitable Servitudes Before Software

Before the mid-nineteenth century, restrictions that ran with property were enforceable primarily when they satisfied the arduous requirements of real covenants at law.⁵⁴ But in its 1848 decision in *Tulk v. Moxhay*,⁵⁵ the English Court of Chancery created a path for covenants

⁴⁷ *Devs. Three v. Nationwide Ins. Co.*, 582 N.E.2d 1130, 1135 (Ohio Ct. App. 1990).

⁴⁸ See *Sebastian Int'l, Inc. v. Russolillo*, 186 F. Supp. 2d 1055, 1074 (C.D. Cal. 2000) (allowing a claim for unjust enrichment to proceed alongside a claim for tortious interference); see also *id.* (citing *First Nationwide Sav. v. Perry*, 15 Cal. Rptr. 2d 173, 176 (Ct. App. 1992)) (explaining that unjust enrichment requires plaintiffs to show that the defendant received unjust benefit at the plaintiff's expense).

⁴⁹ See *Devs. Three*, 582 N.E.2d at 1133–34 (cataloging the conflicting precedent on the measure of damages available for unjust enrichment claims against a third party for inducing breach of contract); see also Dennis M. Sullivan, Comment, *Plaintiff's Measure of Recovery for Tortious Inducement of Breach of Contract — Profits or Losses?*, 19 HASTINGS L.J. 1119, 1121 (1968) (comparing remedies in unjust enrichment to remedies for tortious interference).

⁵⁰ Professor Zechariah Chafee, Jr., noted the close relationship between claims for tortious interference and equitable servitudes on chattels when he kicked off the equitable servitudes conversation in 1928. See Chafee, *supra* note 6, at 971.

⁵¹ See Van Houweling, *supra* note 10, at 887.

⁵² See *id.*

⁵³ See *id.* at 887–88.

⁵⁴ See *id.* at 894–95.

⁵⁵ (1848) 41 Eng. Rep. 1143; 2 Ph. 774.

to run with the land through equity,⁵⁶ thereby not only bypassing the law's strict rules for running with the land but also dramatically expanding the scope of enforceable covenants on real property.⁵⁷ Nevertheless, despite embracing equitable servitudes on real property, courts remained suspicious of equitable servitudes on chattels.⁵⁸ The Supreme Court was initially somewhat more permissive of restrictions enforcing the benefits of patents⁵⁹ but it quickly imposed limitations.⁶⁰ While later innovations in intellectual property law have since endorsed servitude-like licensing regimes,⁶¹ most twentieth-century courts hesitated to recognize equitable servitudes on chattels except in service to intellectual property rights.⁶²

For example, in *John D. Park & Sons Co. v. Hartman*,⁶³ a discount drug reseller purchased branded pharmaceuticals from a druggist who had contracted with the manufacturer to only sell them subject to certain restrictions, including price controls. The reseller knew about the contract between the manufacturer and the druggist but, critically, never became a party to the contract.⁶⁴ The manufacturer sued the reseller in an attempt to enforce the contract, but the Sixth Circuit was wholly unpersuaded by the manufacturer's arguments. The court stated that "a contract restricting the use or controlling subsales cannot be annexed to a chattel so as to follow the article and obligate the subpurchaser by operation of notice."⁶⁵ The court even acknowledged that the rule regarding chattels was more restrictive than that for real property, explaining that "[a] covenant which may be valid and run with land will not run with or attach itself to a mere chattel."⁶⁶ The court then explicitly distinguished cases involving patents as presenting an exception to the general prohibition against servitudes on chattels, rather than as presenting an evolution in the law of personal property.⁶⁷

Beyond its blanket denunciation of servitudes on chattels as a matter of property law, the *Hartman* court presciently explained the relationship between this rule, agency doctrine, and public policy. One

⁵⁶ *Id.* at 1144, 2 Ph. at 777-78.

⁵⁷ See George L. Clark, *Equitable Servitudes*, 16 MICH. L. REV. 90, 94 (1917) (tracing the influence of *Tulk* throughout servitudes doctrine).

⁵⁸ Note, *Equitable Servitudes in Chattels*, 32 HARV. L. REV. 278, 279 (1919) (explaining that courts have "sometimes argued against allowing equitable servitudes in chattels at all").

⁵⁹ See *Henry v. A.B. Dick Co.*, 224 U.S. 1, 26-27 (1912).

⁶⁰ *Motion Picture Pats. Co. v. Universal Film Mfg. Co.*, 243 U.S. 502, 518 (1917) (purporting to overrule *Henry v. A.B. Dick Co.*, 224 U.S. 1).

⁶¹ See *infra* section I.C, pp. 1072-75.

⁶² See FAIRFIELD, *supra* note 18, at 28-29 (criticizing how courts have used copyright to attach licenses to things).

⁶³ 153 F. 24 (6th Cir. 1907).

⁶⁴ *Id.* at 39.

⁶⁵ *Id.*

⁶⁶ *Id.*

⁶⁷ *Id.* at 39-40; see also *id.* at 26 (explaining that the court viewed the case as an effort to expand doctrines available in patent and copyright cases to other categories of personal property).

technique for binding subsequent purchasers of goods to manufacturers' contracts is to assert an agency relationship between the initial purchaser and the reseller.⁶⁸ The *Hartman* court refused to budge from the economics of the transaction, saying, "[t]o call such a purchaser an 'agent' is to juggle with words."⁶⁹ The court then explained that "'Sale' is a word of precise legal import, and every wholesaler who orders goods under one of complainant's uniform contracts becomes a buyer, obtains the title, and may convey the title to another. The case must therefore turn upon the legality of the restrictions imposed by the complainant in sales"⁷⁰

As Professor Zechariah Chafee, Jr., observed, there are only a few cases that do explicitly enforce equitable servitudes on chattel.⁷¹ One theme that emerges in these cases is that the servitude is somehow essential for protecting the seller's brand or reputation. For example, in *Nadell & Co. v. Grasso*,⁷² the plaintiff purchased damaged containers of Kraft-brand fruit salad and agreed to repackage the salad before selling it so that the Kraft brand would not be associated with the damaged good.⁷³ The plaintiff then sold the salad to the defendant, who sold the damaged containers of fruit salad without abiding by the agreement to repackage them.⁷⁴ Looking to trademark law, the court found an emerging concept that manufacturers have "a property right in the goodwill toward [their] product[s] which [they] created"⁷⁵ and held that the plaintiff's agreement with the seller was enforceable against the defendant — as Professor Glen Robinson notes, the court validated Chafee's theory about when equitable servitudes on chattels ought be enforceable.⁷⁶ Still, this decision was not a blanket endorsement of equitable servitudes on chattels. It purported to impose the same limitations that apply to real property: equitable servitudes are enforceable only where they "directly concern and benefit what we may term the dominant tenement."⁷⁷ Notably, the court relied heavily on intellectual property in justifying the servitude. As framed, the equitable servitude is almost a gap-filler between patent and trademark, granting manufacturers greater control over their brands. The California Court of Appeal has recently interpreted *Nadell* as permitting equitable servitudes on

⁶⁸ See *infra* section II.C.1, pp. 1095–103 (explaining how the Eleventh Circuit used agency law to bind downstream purchasers by asserting that the initial purchaser was the agent of the downstream purchaser and therefore capable of binding them in contract).

⁶⁹ 153 F. at 38.

⁷⁰ *Id.*

⁷¹ See generally Chafee, *supra* note 6; Chafee, *supra* note 9.

⁷² 346 P.2d 505 (Cal. Dist. Ct. App. 1959).

⁷³ *Id.* at 507.

⁷⁴ *Id.* at 507–08.

⁷⁵ *Id.* at 510.

⁷⁶ Robinson, *supra* note 9, at 1457.

⁷⁷ *Nadell*, 346 P.2d at 510 (quoting *Werner v. Graham*, 183 P. 945, 947 (Cal. 1919)).

chattels in some situations.⁷⁸ But despite Chafee's efforts, other courts have not adopted this framework and there remain very few cases explicitly enforcing equitable servitudes on chattels.⁷⁹

The most suspect class of restrictions is restraints on alienation.⁸⁰ At common law, direct restraints on alienation are invalid if they are unreasonable.⁸¹ Direct restraints on alienation are a broad category, encompassing "absolute prohibitions on some or all types of transfers, including leases, prohibitions on transfer without the consent of another, prohibitions on transfer to particular persons, requirements of transfer to particular persons, options to purchase land, and rights of first refusal."⁸² Many of the common terms in a software license would fall into this category.

According to the *Third Restatement*, "[r]easonableness is determined by weighing the utility of the restraint against the injurious consequences of enforcing the restraint."⁸³ This test is stricter than the test for determining the validity of indirect restraints on alienation — servitudes that reduce the value of property — "because [direct restraints] clearly interfere with the process of conveying land and have long been subjected to common-law controls, which often have been more stringent than a reasonableness test."⁸⁴ Courts have arguably become more accepting of restrictions over time. For example, the *Third Restatement's* reasonableness test is more permissive than the *Second Restatement's* test,⁸⁵ which explained that "[a]ll restraints on alienation run counter t[o] the policy of freedom of alienation, so that to be upheld they must in some way be justified."⁸⁶

The reasonableness test was meant to recognize that some restraints served valuable policy goals, such as conservation or maintainance of retirement communities for their intended inhabitants.⁸⁷ However, these potential benefits needed to be considered in the context of potential costs. The *Third Restatement* recognizes potential harms such as market impediments, limited mobility, frustrated expectations, and

⁷⁸ See *infra* section II.C.2, pp. 1103–05.

⁷⁹ See Robinson, *supra* note 9, at 1455 (noting the scarcity of cases enforcing servitudes on chattels).

⁸⁰ Note, *Partial Restraints on Alienation*, 59 U. PA. L. REV. & AM. L. REG. 503, 503 (1911) ("One of the fundamental principles in the law of real property is that an estate in fee cannot be created subject to a provision that it shall not be transferred by the owner.")

⁸¹ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (AM. L. INST. 2000).

⁸² *Id.* cmt. b.

⁸³ *Id.* § 3.4.

⁸⁴ *Id.* cmt. b.

⁸⁵ Indeed, in 1959, the reasonableness test was the minority rule and only one state had definitively adopted it, although others appeared to be headed in that direction. Herbert A. Bernhard, *The Minority Doctrine Concerning Direct Restraints on Alienation*, 57 MICH. L. REV. 1173, 1176–77 (1959).

⁸⁶ RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 cmt. a (AM. L. INST. 1983).

⁸⁷ RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 cmt. c (AM. L. INST. 2000).

“demoralization costs associated with subordinating the desires of current landowners to the desires of past owners.”⁸⁸ To balance the benefits against the harms, the *Third Restatement* directs courts to consider the “nature, extent, and duration of the restraint,” with long-term restraints on interests in fee simple being more suspicious than shorter-term restraints, or those on lesser estates such as leaseholds.⁸⁹

The *Second Restatement* provides an illuminating example⁹⁰:

O, owner of a diamond ring, makes an otherwise effective deed of gift thereof to her son S of her entire interest in the ring “but S is hereby prohibited from making any transfer of the ring until he is engaged to be married, this restraint being imposed on S so that the ring, a family heirloom, will be available to S to use as an engagement ring.” The disabling restraint, though removable by S at any time he becomes engaged, is invalid. S is free to transfer the ring and any interest therein at any time.⁹¹

In this case, it is very likely that the grantor would not have transferred the ring without the limitation. After all, O could have held the ring until S was ready to become engaged. Nevertheless, any such agreement between the parties is unenforceable in court. O must look to social norms and sanctions for deterrence and, if S does violate the agreement, a remedy. To be sure, social sanctions are not the same as legal sanctions, but that is not an invitation to disregard their effectiveness.⁹²

This brings us to the question of why the common law developed such a strong policy against servitudes in general and against restraints on alienation in particular. Professor Molly Van Houweling organizes the main critiques of servitudes into three categories: notice and information costs, the problem of the future, and externalities.⁹³ These three categories apply both to servitudes on real property and servitudes on chattels, albeit somewhat differently.⁹⁴ Part III discusses these critiques in greater detail.

For now, the main scholarly critique of courts’ unwillingness to recognize servitudes on chattels is that they interfere with freedom of contract, and that the virtues of this freedom outweigh the potential

⁸⁸ *Id.*

⁸⁹ *Id.*

⁹⁰ The *Second* and *Draft Fourth Restatements* are explicit that the common law prohibits equitable servitudes on chattels. The *Third Restatement* is ambiguous in that it neither limits servitudes to real property nor contemplates that they may apply to chattels. See Van Houweling, *supra* note 10, at 888.

⁹¹ RESTATEMENT (SECOND) OF PROP.: DONATIVE TRANSFERS § 4.1 cmt. e, illus. 5 (AM. L. INST. 1983).

⁹² See Meirav Furth-Matzkin & Roseanna Sommers, *Consumer Psychology and the Problem of Fine-Print Fraud*, 72 STAN. L. REV. 503, 516 & n.58 (2020).

⁹³ Van Houweling, *supra* note 10, at 890.

⁹⁴ *Id.*

problems highlighted above.⁹⁵ Robinson has further argued that the traditional hostility to equitable servitudes on chattels makes little sense in a world in which copyright law functionally permits them.⁹⁶

C. *The Software Wrinkle*

Intellectual property in general, and copyright in particular, has long had the potential to create servitude-like restrictions on goods by arranging legal rights.⁹⁷ This is not necessarily because of any feature in the relevant statutes per se, but because courts have endorsed the idea that the only way for people to lawfully use copyright-protected software is to have a license to use the software, even if they own the object in which the software is embedded.⁹⁸ Software licenses opened the door for more detailed contractual relationships that extend to terms well beyond intellectual property rights.⁹⁹

Since licenses are fundamentally contracts,¹⁰⁰ the range of terms they may contain is broad. In some circuits, courts use “misuse or abuse of copyright” to limit the breadth of software licenses, particularly when the added terms create antitrust concerns.¹⁰¹ Two circuits have broadened this “misuse or abuse” defense to apply when copyright owners attempt “to use an infringement suit to obtain property protection . . . that copyright law clearly does not confer, hoping to force a settlement.”¹⁰² Still, intellectual property licenses are broad and flexible enough that they facilitate price discrimination and other trade restrictions that had long remained out of reach under equitable servitudes doctrine alone.¹⁰³

The restrictive power of intellectual property licenses expanded with the explosion of software in the 1990s. The Ninth Circuit unwittingly

⁹⁵ See Robinson, *supra* note 9, at 1484–85; Chafee, *supra* note 6, at 984; Note, *supra* note 58, at 279.

⁹⁶ Robinson, *supra* note 9, at 1452–53.

⁹⁷ See generally Nancy S. Kim, *Revisiting the License v. Sale Conundrum*, 54 LOY. L.A. L. REV. 99 (2020) (studying firms’ attempts to restrict use of fully paid products).

⁹⁸ See Mulligan, *Licenses*, *supra* note 10, at 1097.

⁹⁹ See *id.* at 1109 (describing how courts have struggled to determine the scope of software licenses and whether any violation of the license is copyright infringement notwithstanding the subject of the violated term).

¹⁰⁰ See generally Kim, *supra* note 97 (explaining licenses as contracts to control the use of a fully paid product).

¹⁰¹ See *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191, 206 (3d Cir. 2003) (recognizing copyright misuse doctrine as a defense); *Prac. Mgmt. Info. Corp. v. Am. Med. Ass’n*, 121 F.3d 516, 521 (9th Cir. 1997) (same); *Alcatel USA, Inc. v. DGI Techs., Inc.*, 166 F.3d 772, 793 (5th Cir. 1999) (same); *Lasercomb Am., Inc. v. Reynolds*, 911 F.2d 970, 978 (4th Cir. 1990) (same).

¹⁰² *Assessment Techs. of WI, LLC v. WIREdata, Inc.*, 350 F.3d 640, 647 (7th Cir. 2003); see also *Lasercomb*, 911 F.2d at 979–80 (recognizing a broader misuse or abuse of copyright defense when “the copyright is being used in a manner violative of the public policy embodied in the grant of a copyright,” *id.* at 978).

¹⁰³ See Herbert Hovenkamp, *Post-Sale Restraints and Competitive Harm: The First Sale Doctrine in Perspective*, 66 N.Y.U. ANN. SURV. AM. L. 487, 537–38 (2011); Mulligan, *Personal Property Servitudes on the Internet of Things*, *supra* note 10, at 1124 n.15.

brought the debate about equitable servitudes on chattels into the information age, arguably changing the shape of modern property ownership unless and until Congress acts to undo its work. In *MAI Systems Corp. v. Peak Computer, Inc.*,¹⁰⁴ the Ninth Circuit held that merely running software could be copyright infringement because running software creates a temporary copy of that software in a computer's random-access memory (RAM).¹⁰⁵ The result of *MAI* has been that anything containing software comes with a license, even when the software is incidental to the thing.¹⁰⁶ That license transforms what it means to own the thing and, in some cases, purports to make it impossible to "own" a thing altogether.¹⁰⁷ Where previously courts had been highly skeptical of efforts to glue licenses onto things, software provided a federal statutory hook for doing just that.¹⁰⁸

The scholarly reaction to *MAI* has been uniformly negative. Professor Aaron Perzanowski divides the criticism into two forms: arguments that the decision is inconsistent with the Copyright Act¹⁰⁹ and arguments that it is bad policy.¹¹⁰ The doctrinal criticisms of the case are inapplicable to this Article, but many of the policy critiques are directly applicable to the broader problem of servitudes on chattels. RAM copy doctrine gives digital creators rights that other creators lack, notably by eviscerating the first sale doctrine,¹¹¹ without which anyone — even subsequent purchasers without notice — who wants to use an object is subject to the terms of the software license that accompanies the object. Those terms may speak strictly to the rights protected by the Copyright Act, but they are often much broader.¹¹²

The effect is what commentators call software exceptionalism: publishers cannot restrict the right to resell tangible books and board games, but they can restrict the right to resell eBooks and video games.¹¹³ Under *MAI*, once software touches a thing, ownership of that thing may be impossible if the creator purports to license it instead of

¹⁰⁴ 991 F.2d 511 (9th Cir. 1993).

¹⁰⁵ *Id.* at 518.

¹⁰⁶ Fifteen years later, in *Cartoon Network LP, LLLP v. CSC Holdings, Inc.*, 536 F.3d 121 (2d Cir. 2008), the Second Circuit held that some RAM "copies" were too temporary to constitute copyright infringement. *Id.* at 130. *Cartoon Network* has not changed firms' incentives to include an end user license agreement with most software, especially since copyright offers a robust sanctions regime that may disincentivize most users from testing the limits of these licenses. Mulligan, *Licenses*, *supra* note 10, at 1078, 1096; *see also* Aaron Perzanowski, *Fixing RAM Copies*, 104 NW. U. L. REV. 1067, 1071–75 (2010) (explaining *MAI*, its progeny, and their impact).

¹⁰⁷ Professor Christina Mulligan poignantly observed that the rise of software servitudes on chattels has also given rise to "the locution 'user' rather than 'owner' of an article." Mulligan, *Personal Property Servitudes on the Internet of Things*, *supra* note 10, at 1124.

¹⁰⁸ *See id.* at 1123; Van Houweling, *supra* note 10, at 885–86.

¹⁰⁹ 17 U.S.C. §§ 101–805.

¹¹⁰ Perzanowski, *supra* note 106, at 1075.

¹¹¹ *Id.* at 1079.

¹¹² *See* Mulligan, *Licenses*, *supra* note 10, at 1109.

¹¹³ *Id.* at 1100; Perzanowski, *supra* note 106, at 1079.

selling it, notwithstanding the economic realities of the transaction.¹¹⁴ As Perzanowski and Professor Chris Hoofnagle discovered, these license-based restrictions on ownership do not comport with customer expectations.¹¹⁵ Professor David Nimmer, Elliot Brown, and Gary N. Frischling argue that contract has the potential to disrupt copyright's longstanding "delicate balance" between the rights of the producer and the rights of the user.¹¹⁶ Nevertheless, many courts have sanctioned firms' use of software licenses to control consumers' use of objects.¹¹⁷ Intellectual property doctrines such as patent exhaustion and first sale in copyright are said to originate "in common-law rules limiting servitudes,"¹¹⁸ but courts have hesitated to imply a strong prohibition on servitudes into intellectual property law.¹¹⁹

The presence of some restrictive software licenses in the market of tangible things increases information costs on all would-be secondhand purchasers who face stiff sanctions if their use violates the original license under which the object was sold.¹²⁰ At the very least, these licenses can trap consumers into subscriptions for products that they could previously own, resulting in higher prices for consumers over time.

Beyond increased information costs, Professor Christina Mulligan identifies a more troubling consequence of software licenses on things: waste.¹²¹ Using the example of appliances that run software, she explains how the object itself may be resalable and repurposable under the first sale doctrine, but the software that runs the appliance may not

¹¹⁴ *MAI Sys. Corp. v. Peak Comput., Inc.*, 991 F.2d 511, 518 n.5 (9th Cir. 1993) ("Since MAI licensed its software, the Peak customers do not qualify as 'owners' of the software and are not eligible for protection under § 117."); see also Brian W. Carver, *Why License Agreements Do Not Control Copy Ownership: First Sales and Essential Copies*, 25 BERKELEY TECH. L.J. 1887, 1899–900 (2010) ("A cursory, unsupported footnote, consisting of a single declarative sentence, in the Ninth Circuit's *MAI Systems Corp. v. Peak Computer* opinion has done more damage to the appropriate development of the law with respect to transfer of title of copies than perhaps anything else.").

¹¹⁵ Aaron Perzanowski & Chris Jay Hoofnagle, *What We Buy When We Buy Now*, 165 U. PA. L. REV. 315, 343–45 (2017); Jason Daley, *Why New Restrictions on Library E-Book Access Are Generating Controversy*, SMITHSONIAN MAG. (Nov. 4, 2019), <https://www.smithsonianmag.com/smart-news/librarians-are-arms-about-new-ebook-restrictions-1-180973459> [<https://perma.cc/K7YE-LSCD>] (positing that a publisher's restriction on library purchases of eBooks would lead to longer wait times for library patrons). Eliminating ownership in the software context arguably deprives people of what Professor Christopher Serkin describes as property's core function, namely protecting reliance by moderating the pace of change. See Christopher Serkin, *What Property Does*, 75 VAND. L. REV. 891, 910–11 (2022).

¹¹⁶ David Nimmer, Elliot Brown & Gary N. Frischling, *The Metamorphosis of Contract into Expand*, 87 CALIF. L. REV. 17, 22–23 (1999).

¹¹⁷ See generally Kim, *supra* note 97; Nancy S. Kim, *The Software Licensing Dilemma*, 2008 BYU L. REV. 1103.

¹¹⁸ *Helferich Pat. Licensing, LLC v. N.Y. Times Co.*, 778 F.3d 1293, 1305 (Fed. Cir. 2015).

¹¹⁹ See, e.g., *id.* at 1307.

¹²⁰ Mulligan, *Licenses*, *supra* note 10, at 1095–96.

¹²¹ *Id.* at 1097.

be.¹²² This dichotomy creates the potential for a twofold waste: First, people who could benefit from secondhand goods may not be able to access them as the goods go un- or underused by their original “owner.”¹²³ Second, there is the physical waste of resources if the initial purchaser of a thing — even a large thing like a refrigerator — can only dispose of the item, or pay a fee to recycle or repurpose it, when they no longer need it.¹²⁴ “The law works to artificially limit the good’s value.”¹²⁵

One example of this waste is HP’s Instant Ink subscription program, which monitors users’ printer use and sends replacement cartridges based on usage; its recommended household plan costs consumers \$5.99 per month and corresponds to one hundred printed pages. Even when the ink cartridge can print more than that, the additional capacity is locked by HP-controlled software.¹²⁶ That remaining ink is theoretically functional — as are the other cartridges that a consumer may have after cancelling their subscription — yet unusable to the consumer¹²⁷ and therefore likely to end up in a landfill. In an age of climate disaster, it is morally abhorrent that the law may bind purchasers to landfilling usable goods and their recyclable materials.

To the extent that these software licenses purport to bind all users of an item, they act as equitable servitudes on chattels.¹²⁸ The root of the problem with these servitudes lies not in the private law of contracts and property, but in the federal statutory law. Unless the Supreme Court intervenes to reshape decades of precedent, the now-well-documented problems that these servitudes create can be fixed only by Congress. Because these servitudes are statutory creatures, this Article will set them aside and focus instead on those servitudes that are creeping onto chattels without a software hook.

II. IMPERIAL CONTRACT DOCTRINE

What happens to ownership when firms use contract to fundamentally alter what it means to own something? Legal commentators have

¹²² *Id.*; see also Elizabeth I. Winston, *Why Sell What You Can License? Contracting Around Statutory Protection of Intellectual Property*, 14 GEO. MASON L. REV. 93, 96–98 (2006) (giving early examples of software licenses that appeared to restrict the resale of the chattel embodying that software).

¹²³ Mulligan, *Licenses*, *supra* note 10, at 1097–98.

¹²⁴ *Id.* at 1098.

¹²⁵ *Id.*

¹²⁶ Charlie Warzel, *My Printer Is Extorting Me*, THE ATLANTIC (Feb. 1, 2023), <https://www.theatlantic.com/technology/archive/2023/02/home-printer-digital-rights-management-hp-instant-ink-subscription/672913> [<https://perma.cc/TPP6-HDU9>].

¹²⁷ *Id.*

¹²⁸ See Thomas M.S. Hemnes, *Restraints on Alienation, Equitable Servitudes, and the Feudal Nature of Computer Software Licensing*, 71 DENV. U. L. REV. 577, 592–98 (1994); Van Houweling, *supra* note 10, at 889; Van Houweling, *supra* note 12, at 1070–71.

observed that contracts are undermining ownership.¹²⁹ Professor Joshua Fairfield has argued that contracts are inserting information costs into transactions that property doctrine long ago streamlined.¹³⁰ Relationships that once had predictable configurations now come laden with contracts that curtail or outright prevent a thing from being owned.¹³¹ Servitude-like software licenses have already revealed their power to thwart ownership over the objects we bring into our homes.¹³² For example, consumer electronics manufacturers can brick otherwise usable goods with software updates, without being required to offer a refund.¹³³ As companies attempt to use servitude-like contracts to bind downstream owners of things, ownership itself is threatened. Where ownership previously had a mostly predictable meaning, contract is now attempting to reconfigure the rights that traditionally have comprised ownership. Indeed, one way to interpret modern servitudes on chattels is as undoing ownership altogether.

This Part first portrays property and contract doctrine as counterweights to each other that ideally exist in a welfare-optimizing balance of predictability and customization. It then explains how this balance has been upset by the interaction of small shifts in contracts law with the overall decline in private law cases that proceed to judicial opinions. Four examples of modern equitable servitudes on chattels then follow. The final section of this Part is a small case study of how lawyers attempted to fight Tamko's efforts to compel arbitration against its disappointed shingles customers. These cases reveal that lawyers themselves elevate the contractual elements of cases even when they might avail themselves of property arguments, which may explain why contracts doctrine dominates these opinions.

A. *The Private Law Equilibrium*

Equitable servitudes exist at the boundary between property and contract. They are contract-like in that they are agreements between private individuals that create court-enforceable obligations. When interpreting servitudes, courts sometimes look to principles of contract interpretation.¹³⁴ Equitable servitudes are property-like in that they

¹²⁹ See Chris Jay Hoofnagle, Aniket Kesari & Aaron Perzanowski, *The Tethered Economy*, 87 GEO. WASH. L. REV. 783, 793–94 (2019); Mark A. Lemley, *The Law and Economics of Internet Norms*, 73 CHI.-KENT L. REV. 1257, 1274 (1998). See generally FAIRFIELD, *supra* note 18; AARON PERZANOWSKI & JASON SCHULTZ, *THE END OF OWNERSHIP: PERSONAL PROPERTY IN THE DIGITAL ECONOMY* (2016).

¹³⁰ FAIRFIELD, *supra* note 18, at 161–62.

¹³¹ See, e.g., PERZANOWSKI & SCHULTZ, *supra* note 129, at 118–19.

¹³² See generally Mulligan, *Personal Property Servitudes on the Internet of Things*, *supra* note 10 (arguing that software licenses are federal law-enabled servitudes on chattels).

¹³³ See, e.g., Karl Bode, *Sonos Backs Off Plan to Brick Older, Still Functioning Speakers*, TECHDIRT (Mar. 13, 2020, 3:09 PM), <https://www.techdirt.com/2020/03/13/sonos-backs-off-plan-to-brick-older-still-functioning-speakers> [<https://perma.cc/998Z-A8L7>].

¹³⁴ See, e.g., *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 475 (Tenn. 2012).

attempt to bind all holders of the encumbered object, even if those parties had no part in the formation of the covenant. Equitable servitudes are also property-like in that they are enforceable by property rules, namely injunctions, even when the only remedy for a contract governing the same behavior might be damages. In practice, equitable servitudes allow parties to customize their property rights by festooning them with contract terms.

Sitting on the boundary of property and contract, equitable servitudes are emblematic of the law's delicate balance between predictability and customization.¹³⁵ Even after courts begrudgingly began enforcing equitable servitudes on real property, they drew the line at equitable servitudes on chattels except in rare cases.¹³⁶ The costs of allowing contracts to glom onto personal property were just too high.¹³⁷ This refusal was a substantive choice that courts and legislatures repeatedly made and reaffirmed throughout the twentieth century.¹³⁸ The unenforceability of equitable servitudes on chattels is one of property doctrine's substantive mandatory rules.

But things are changing. The private law operates as a semicohesive system governing the rights and obligations between parties. Today, some of the most pressing questions in the private law ask about the boundaries on freedom to contract.¹³⁹ The rise of *de facto* equitable servitudes on chattels is an example of the balance of power shifting toward contract and, in so doing, allowing contract to adopt property-like features, notably substituting notice for assent.¹⁴⁰

Shifting this balance expands the reach of contract law's problems. Nearly a decade ago, Professor Margaret Radin argued that the doctrinal degradation of contract law was enabling a democratic degradation as firms used terms creating equitable servitudes in adhesion contracts to replace the law of courts and legislatures with firms' own bespoke rules.¹⁴¹ Terms creating equitable servitudes shifted the balance of power toward firms in all kinds of relationships, including employment, travel, and warranty. To be sure, some of contract's newfound power was the result of legislative choices, but most of the shift came from courts themselves. Today, we are beginning to see the intrusion of terms creating equitable servitudes onto software-free things.

¹³⁵ Henry E. Smith, *Property as the Law of Things*, 125 HARV. L. REV. 1691, 1706–08 (2012).

¹³⁶ Chafee, *supra* note 6, at 954–56.

¹³⁷ See *infra* Part III, pp. 1111–25.

¹³⁸ See, e.g., Robinson, *supra* note 9, at 1455; *cf. also id.* at 1464–80 (outlining the history of jurisprudence regarding restrictions on intellectual property).

¹³⁹ See generally Hanoach Dagan & Michael Heller, *Autonomy for Contract, Refined*, 40 LAW & PHIL. 213 (2021) (explaining limits on the freedom to contract imposed to preserve public good).

¹⁴⁰ See Mark A. Lemley, *Terms of Use*, 91 MINN. L. REV. 459, 472 (2006); Nancy S. Kim, *Adhesive Terms and Reasonable Notice*, 53 SETON HALL L. REV. 85, 101–02 (2022).

¹⁴¹ See generally RADIN, *supra* note 20.

Here, it is fair to question whether the idea of property law principles as a source of substantive mandatory rules remains accurate.¹⁴² But, as we shall see, there are other points of interface between contract and property where courts do prevent contract from inserting unexpected customization into rights that otherwise track property rights.¹⁴³ Limiting the reach of customization is important: because, as Professors Thomas Merrill and Henry Smith explain, “in rem rights impinge upon a very large and open-ended class of third persons, the legal rules must be designed so as to minimize the information-cost burden imposed on a great many persons beyond those who are responsible for setting up the right.”¹⁴⁴ As contract creeps deeper into the traditional domains of property, it undoes some of the design choices that reduce these information costs.

These design choices might be less essential if there were alternative means for accomplishing the same goals: notably, minimizing information costs for third parties and preserving flexibility for the future. Unfortunately, there are not. Society has two paths for imposing its will on private contracts: procedural rules and substantive rules. The latter are far more effective than the former at protecting individuals from firm overreach.¹⁴⁵ Procedural protections try to ensure that consumers can make informed decisions. They police *how* consumers bind themselves with contracts. Getting procedural rules right is important for the legitimacy of the system of law itself. Courts would be tarnished if they enforced contracts formed under duress or deceit.¹⁴⁶ Contract would become yet another tool for might makes right — which is the opposite of law.

One common tactic to avoid claims of procedural imperfections in contracts is to provide consumers with notice of suspicious contract terms.¹⁴⁷ Consumer protection regulations often decline to prohibit unexpected terms, preferring instead to require that firms disclose such terms prominently.¹⁴⁸ These disclosure rules are meant to be information generating, thereby lowering consumers’ information costs. Here, the procedure — giving consumers conspicuous notice — shields the substance of the contract from judicial critique. Today, a rich literature

¹⁴² Lemley, *supra* note 129, at 1265 (“The idea that private ordering should be able to alter or replace existing substantive law is clearly in the ascendancy.”).

¹⁴³ *Infra* pp. 1079–81.

¹⁴⁴ Merrill & Smith, *supra* note 33, at 802.

¹⁴⁵ See generally Zamir featuring Ayres, *supra* note 21 (making the case that substantive mandatory rules are superior to procedural rules for improving consumer welfare).

¹⁴⁶ *Id.* at 294 (explaining that parties seeking to legally enforce a contract are not engaging in a purely private activity).

¹⁴⁷ John D. Calamari, *Duty to Read — A Changing Concept*, 43 *FORDHAM L. REV.* 341, 343–45 (1974) (explaining that a failure to sufficiently call provisions of a contract to a party’s attention is grounds for termination).

¹⁴⁸ See Merrill & Smith, *supra* note 33, at 799–803 (explaining the choice between substantive protection regimes and notice regimes); Zamir featuring Ayres, *supra* note 21, at 284.

exists theorizing how to improve disclosure regimes and cataloging their persistent failures.¹⁴⁹ Moreover, procedural protections have little value when the substantive options are all bad.

Substantive protections remove options from contracting altogether. Professors Eyal Zamir and Ian Ayres argue that substantive mandatory rules “can be appropriate when the law is trying to protect people outside or inside the contract . . . , especially where procedural mandatory rules are likely to be ineffective.”¹⁵⁰ They argue that “[j]ust as regulators set minimal standards for the safety of physical products . . . , they should set such standards for the safety of contractual products, which may be just as risky.”¹⁵¹ Following then-Professor Elizabeth Warren and Professor Oren Bar-Gill,¹⁵² they argue that disclosure is not a sufficient protection against dangerous contracts any more so than it is against dangerous toys and cars.¹⁵³

Property doctrine has long been a source of substantive mandatory rules that provide a counterweight to contract law’s freedoms. The goals behind mandatory rules include promoting efficiency in bargaining,¹⁵⁴ reducing verification costs,¹⁵⁵ and limiting opportunistic behavior.¹⁵⁶ There are many justifications for property being a system of mandatory rules, and the most compelling of these focus on the obligations that property imposes on those without an ownership or possessory interest. According to Professor Wesley Hohfeld’s now canonical analysis, every property right imposes a duty to respect that right on everyone else who encounters that property.¹⁵⁷ That is, every property right is good against the world. If property rights are nonstandardized, they may impose information costs on a large number of people who have to learn how to interact with that particular type of property in space and over time. Even if those information costs are low on a case-by-case basis, they may be high when multiplied over large numbers of

¹⁴⁹ See, e.g., Eric A. Posner, *ProCD v Zeidenberg and Cognitive Overload in Contractual Bargaining*, 77 U. CHI. L. REV. 1181, 1184–85 (2010).

¹⁵⁰ Zamir featuring Ayres, *supra* note 21, at 287.

¹⁵¹ *Id.* at 299–300.

¹⁵² See generally Oren Bar-Gill & Elizabeth Warren, *Making Credit Safer*, 157 U. PA. L. REV. 1 (2008).

¹⁵³ Zamir featuring Ayres, *supra* note 21, at 285; see also Eyal Zamir & Yuval Farkash, *Standard Form Contracts: Empirical Studies, Normative Implications, and the Fragmentation of Legal Scholarship*, 12 JERUSALEM REV. LEGAL STUD. 137, 163 (2015) (“As the subprime crisis has demonstrated, unsafe contracts can involve risks to individuals and society that are no less damaging than the risks of unsafe drugs and toys.”).

¹⁵⁴ Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 24 (2000).

¹⁵⁵ *Id.* at 24–42 (explaining the “measurement costs” imposed on third parties by nonstandardized, nonmandatory rules, *id.* at 26).

¹⁵⁶ See Henry Hansmann & Reinier Kraakman, *Property, Contract, and Verification: The Numerus Clausus Problem and the Divisibility of Rights*, 31 J. LEGAL STUD. S373, S382–83 (2002).

¹⁵⁷ See generally Wesley Newcomb Hohfeld, *Fundamental Legal Conceptions as Applied in Judicial Reasoning*, 26 YALE L.J. 710 (1917).

people.¹⁵⁸ Similarly, nonstandard property interests would impose high information costs on prospective buyers, lessees, and lenders.

Turning to time, the forms of property recognized in the common law by the forthcoming *Restatement of Property* are flexible enough to ensure that assets are both usable and available in the future.¹⁵⁹ The basic forms of property may not be ideal for everybody in all cases, but they work well enough for many people in most cases. If these forms were more specialized, the assets might become obsolete too quickly, creating waste wherever property can be found. Such waste would be especially destructive in the physical world, since putting land to appropriate use is essential to meeting humans' most basic needs for survival and flourishing: housing, food, and stability. Preventing excessive fragmentation of property interests protects the same essentials. If utilizing property requires significant transaction costs to assemble the necessary rights — if those rights can be assembled at all — welfare-enhancing transactions may not occur.

Mandatory rules work only if they are actually mandatory, meaning that firms cannot avoid them by using contract to opt out of property categories. Preserving the “mandatoriness” of property’s rules is a longstanding problem at the intersection of property and contract. For example, secured transactions law tightly polices the line between a lease and a loan paid on installment because insolvency laws treat leased and owned property differently. Unscrupulous parties may attempt to game the system by using contract to label a transaction as a lease or a sale according to the parties’ preferences.¹⁶⁰ Whatever the contract may say, it is only evidence of what the transaction is and not the final word. Instead, courts apply a multifactor test to determine whether a challenged transaction is a lease or a sale. For example, in *In re Hunt*,¹⁶¹ the owner of Malad Plumbing offered to sell the business to his employee, Donny Hunt.¹⁶² To quickly raise the money necessary to buy the business, Mr. Hunt teamed up with a friend, Gary Shephard.¹⁶³ Hunt and Shephard did not reduce their agreement to writing.¹⁶⁴ When the business failed and Hunt filed for Chapter 7 bankruptcy, he listed Shephard as the lessor of various valuable equipment under a “rent-to-own agreement.”¹⁶⁵ If Shephard owned the property, it would not be

¹⁵⁸ Merrill & Smith, *supra* note 33, at 793–95.

¹⁵⁹ See generally RESTATEMENT (FOURTH) OF PROP. (AM. L. INST., Tentative Draft No. 3, 2022).

¹⁶⁰ See RAY ANDREWS BROWN, THE LAW OF PERSONAL PROPERTY § 9.2 (3d ed. 1975) (explaining that sellers might attempt to manipulate when title passes to buyers but that title will pass at delivery at the latest, regardless of payment).

¹⁶¹ 540 B.R. 438 (Bankr. D. Idaho 2015).

¹⁶² *Id.* at 440.

¹⁶³ *Id.*

¹⁶⁴ *Id.*

¹⁶⁵ *Id.*

turned over to the bankruptcy trustee and sold.¹⁶⁶ However, if Hunt owned the property and Shephard merely had an unperfected security interest, bankruptcy law would require that it be turned over.¹⁶⁷ That Hunt and Shephard agreed that their agreement was a lease was not dispositive. The court explained that “legal ownership in this context is not resolved based solely by the belief of the parties, but by reference to all of the facts of the case and the requirements of state law.”¹⁶⁸ The bankruptcy court turned to state law, itself modeled on Article 9 of the Uniform Commercial Code,¹⁶⁹ and found that even written agreements purporting to be leases will be reconstrued as security interests when, at the end of the alleged lease, the lessee has the right to acquire title to the property for nominal consideration.¹⁷⁰

Put differently, the lesson from *Hunt* is that parties cannot contract around property’s categories of interests, consistent with property law’s rejection of costs imposed on third parties. Some courts have reached the same conclusion when parties attempt to contract out of bailment relationships despite the economic reality that their relationship is, in fact, a bailment.¹⁷¹ Still, the necessity of a contract, actual or implied, to the transaction can muddy the analysis.

Similarly, firms that provide secure storage may attempt to disclaim a bailment relationship by contract, but many courts will look not to the contract but to the nature of the relationship to determine whether bailment doctrine applies.¹⁷² In both secured transactions and bailment, the facts on the ground determine the allocation of property rights. Contract shapes those facts, but, in theory, it cannot override property’s mandatory rules.

Professors Eyal Zamir and Ian Ayres document three debates around the desirability of mandatory rules. The first, which they call the “liberal perspective,” revolves around whether substantive mandatory rules are too strong an incursion on contracting parties’ freedoms.¹⁷³ In their view, one response to this perspective is that mandatory rules in one area “enhance people’s positive liberty . . . by providing them with the means of taking control of their lives and realizing their fundamental purposes.”¹⁷⁴ The second debate concerns whether mandatory rules are economically efficient.¹⁷⁵ While unregulated freedom to contract may

¹⁶⁶ *Id.* at 441.

¹⁶⁷ *Id.*

¹⁶⁸ *Id.* at 442 (citing *Whitworth v. Krueger*, 558 P.2d 1026, 1029 (Idaho 1976)).

¹⁶⁹ U.C.C. § 9 (AM. L. INST. & UNIF. L. COMM’N 2010).

¹⁷⁰ *Hunt*, 540 B.R. at 443 (quoting IDAHO CODE § 28-1-203(b) (2013)).

¹⁷¹ See, e.g., *Saribekyan v. Bank of Am., N.A.*, No. B285607, 2020 Cal. App. Unpub. LEXIS 25, at *6, *24 (Ct. App. Jan. 3, 2020), *modified*, 2020 Cal. App. Unpub. LEXIS 119 (Ct. App. Jan. 6, 2020).

¹⁷² See generally Danielle D’Onfro, *The New Bailments*, 97 WASH. L. REV. 97 (2022).

¹⁷³ Zamir featuring Ayres, *supra* note 21, at 293.

¹⁷⁴ *Id.* at 294.

¹⁷⁵ *Id.*

be efficient in perfectly competitive markets, well-documented market failures found in almost all consumer-oriented spaces may tend to render substantive rules more efficient instead.¹⁷⁶ The third debate concerns the distribution of resources. Zamir and Ayres argue that substantive mandatory rules may “promote the welfare of the underprivileged by giving them entitlements that objectively improve their well-being.”¹⁷⁷ Without substantive mandatory rules, consumers are often left feeling like the law condones taking something away from them, especially as contracts erode ownership and laden everyday items with subscription costs.¹⁷⁸ These distributional concerns are entangled with autonomy and dignity because ownership is an essential tool for constructing the self.¹⁷⁹

Unlike in contract, substantive mandatory rules are common in property.¹⁸⁰ These substantive mandatory rules form the *numerus clausus* principle, which explains that courts only recognize certain configurations of rights as property.¹⁸¹ Customization is not a feature of property.¹⁸² Merrill and Smith describe this difference in attitude toward customization as one of the “central” differences between property and contract.¹⁸³ In other words, the different forms of property are different bundles of substantive mandatory rules.¹⁸⁴ And when owners attempt to create new forms of real and personal property, “courts interpret the property interest as the standard form that most closely approximates the interest.”¹⁸⁵

Any asset may be subject to both in rem and in personam rights. For example, covenants may encumber a parcel of real estate.¹⁸⁶ If these covenants run with the land, they bind all current and future owners to their conditions, while also providing beneficiaries of the covenants with a remedy if the parcel falls out of compliance with those conditions.¹⁸⁷ To prevent covenants from excessively interfering with ownership of the

¹⁷⁶ *Id.* See generally Katrina M. Wyman, *In Defense of the Fee Simple*, 93 NOTRE DAME L. REV. 1 (2017) (arguing against the view that the fee simple’s restrictions result in inefficient allocation of land).

¹⁷⁷ Zamir featuring Ayres, *supra* note 21, at 301.

¹⁷⁸ See generally PERZANOWSKI & SCHULTZ, *supra* note 129.

¹⁷⁹ See *infra* section III.C, pp. 1118–24.

¹⁸⁰ Merrill & Smith, *supra* note 154, at 3.

¹⁸¹ *Id.* at 3–4; RESTATEMENT (FOURTH) OF PROP. § 4.1 (AM. L. INST., Tentative Draft No. 3, 2022).

¹⁸² RESTATEMENT (FOURTH) OF PROP. § 4 (AM. L. INST., Tentative Draft No. 3, 2022).

¹⁸³ Merrill & Smith, *supra* note 154, at 3.

¹⁸⁴ The fixed list of property forms is one of the animating principles of the forthcoming *Fourth Restatement of Property*. RESTATEMENT (FOURTH) OF PROP. § 4 (AM. L. INST., Tentative Draft No. 3, 2022).

¹⁸⁵ *Id.*

¹⁸⁶ *Id.* § 4.2 reporters’ note 4.

¹⁸⁷ *Id.*

parcel, only those that “touch and concern” the land are binding on future owners.¹⁸⁸

Neighbors are free to bind themselves within the limits of contract doctrine. As the Tennessee Court of Appeals explained, the content of covenants is covered by the public policy animating contracts where the law “plainly reflects the public policy allowing competent parties to strike their own bargains.”¹⁸⁹ Once the parties wish to bind future landowners — that is, once they engage in a transaction with greater risk of negative externalities — property’s mandatory rules kick in. Specifically, to run with the land, covenants must “touch and concern” the land.¹⁹⁰

The primary criticism of the touch and concern requirement is that it is impossible to define with much certainty.¹⁹¹ In one early formulation, the King’s Bench explained that a covenant that does “not directly affect[] the nature, quality, or value of the thing demised, nor the mode of occupying it, is a collateral covenant, which will not bind the assignee of the term, though named.”¹⁹² Some commentators, however, focused on the economic relationship — whether the covenant decreased the value of the burdened parcel while increasing the value of the benefited parcel.¹⁹³ But later courts balked at covenants merely obligating the payment of money for services without something more like upkeep of common spaces.¹⁹⁴ Of course, nothing prevents owners and neighbors from attempting to style agreements for personal services as covenants that run with the land. But if they ever need to enforce these agreements, careful courts look past the form to the substance of the agreement and will recast those that do not touch and concern the land as mere contracts or in personam rights.¹⁹⁵ In other words, the touch and

¹⁸⁸ The *Third Restatement of Property* attempted to simplify away the “touch and concern” requirement, but courts have not followed suit. See Note, *Touch and Concern, The Restatement (Third) of Property: Servitudes, And a Proposal*, 122 HARV. L. REV. 938, 940–45 (2009) (explaining how the *Third Restatement* tried and failed to eliminate the touch and concern requirement for servitudes to run with the land). The forthcoming *Fourth Restatement* would restore the requirement. See RESTATEMENT (FOURTH) OF PROP. (AM. L. INST., Tentative Draft No. 3, 2022).

¹⁸⁹ *Schodowski v. Tellico Vill. Prop. Owners Ass’n*, No. E2015-01145-COA-R3-CV, 2016 Tenn. App. LEXIS 275, at *20 (Ct. App. Apr. 22, 2016) (quoting *Hughes v. New Life Dev. Corp.*, 387 S.W.3d 453, 475 (Tenn. 2012)).

¹⁹⁰ *Spencer’s Case* (1538) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b (holding that a covenant will run with the land if it “touch[es] or concern[s] the thing demised”).

¹⁹¹ Note, *supra* note 188, at 939 (“The requirement has endured decades of scholars’ failed attempts at articulating a definitive definition, test, or rationale for the requirement, and it has weathered severe criticism.”).

¹⁹² *Congleton v. Pattison* (1808) 103 Eng. Rep. 725, 727; 10 East 130, 136 (opinion of Ellenborough, C.J.).

¹⁹³ See, e.g., Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645 (1914).

¹⁹⁴ See, e.g., *Eagle Enters., Inc. v. Gross*, 349 N.E.2d 816, 819 (N.Y. 1976).

¹⁹⁵ See generally *Merrill & Smith*, *supra* note 33, at 800 (explaining that in personam rights are those that involve few costs to third parties).

concern requirement was and is a restraint on the substance of the obligations that owners can impose on future holders of property.

Historically, property's mandatory rules covered all conveyances of real estate and chattels. If a consumer bought a chattel from a store, the consumer understood their rights vis-à-vis that chattel. Future parties encountering that chattel would understand that they might have to worry about whether the chattel was lost, mislaid, or abandoned, but they need not worry that the chattel could impose additional obligations on them because property's mandatory rules curtailed that possibility.

Commentators have observed that property's mandatory-rule approach is encouraged, particularly where customization imposes high costs on third parties, especially future holders of interests in the asset.¹⁹⁶ Rather than limiting the enforcement of licenses to be like servitudes on chattels, courts may make such servitudes enforceable in the same way that licenses are between the bargaining parties. There are two lines of reasoning that suggest that this outcome is possible and even likely. The first is the Eleventh Circuit's language in *Dye v. Tamko Building Products, Inc.*,¹⁹⁷ where the court quipped: "Moreover, and in any event, that big-box items come with purchase terms and conditions should hardly come as a surprise to modern consumers."¹⁹⁸ According to the court, the prevalence of shrinkwrap agreements gave consumers "fair notice" that chattels might be subject to contracts even when the consumers had no actual knowledge of the contract.¹⁹⁹ It is possible that the law will continue down this path and that ownership in fee will no longer be the default presumption. The way to avoid that outcome is to recognize property as a domain of substantive mandatory rules and to resist the encroachment of contract into its space.²⁰⁰

B. Pressure in the System

This section explores why equitable servitudes on chattels are emerging now. I have already argued that software licenses normalized contracts that follow objects instead of people,²⁰¹ but that is not the whole story. The proliferation of software licenses made changes throughout contract doctrine that both raised the status of contracts in the private law and made it easier for firms to attempt to attach contracts to chattels. At the same time, the common law has continued to wither, boxed in by statutes and starved of cases that are well litigated

¹⁹⁶ *Id.* at 802–06.

¹⁹⁷ 908 F.3d 675 (11th Cir. 2018).

¹⁹⁸ *Id.* at 682.

¹⁹⁹ *Id.* at 683.

²⁰⁰ To be sure, even if courts are inclined to resist contract's encroachment into property, intellectual property — specifically copyright law — may prove to be a Trojan horse as more and more things contain trace amounts of software. See *supra* section I.B, pp. 1067–72. The problem of intellectual property creep is one for Congress to fix.

²⁰¹ See *supra* section I.C, pp. 1072–75.

and conclude with the issuance of an opinion on the merits. A more accurate description of the state of modern servitudes doctrine is that courts have not told firms that they cannot encumber personal property with servitudes, not that courts have enthusiastically endorsed the expansion of equitable servitudes. Finally, developments in various personal property markets stand to make equitable servitudes even more attractive to firms in the future.

I. Making and Modifying Contracts. — Adhesion contracts are terms that a consumer must accept to proceed with a service or use a product. They differ from other contracts in that the consumer has no option to negotiate the terms of the agreement.²⁰² The consumer can only accept or reject the contract or choose from “a menu of choices from a single firm.”²⁰³ More than half a century ago, Professor Friedrich Kessler explained that these take-it-or-leave-it contracts proliferate when one party to the contract has a monopoly or when all of the competitors use the same terms.²⁰⁴ Since then, adhesion contracts have proliferated,²⁰⁵ with courts first blessing shrinkwrap contracts, then expanding those blessings to include clickwrap and even browsewrap or scrollwrap contracts.²⁰⁶

Shrinkwrap contracts are agreements that consumers assent to by opening a product’s packaging, even if they do not ultimately use the product. To be binding, consumers need to receive notice of the contract before they open the product, but they need not have had the chance to read the contract. The paradigmatic shrinkwrap contract is the licensing agreement that used to appear on a sticker on the plastic-wrapped packaging around discs of software. Similarly, clickwrap contracts are a variation of shrinkwrap contracts that are attached to the use of an internet website. Firms notify consumers that by using the website, they agree to be bound by terms and conditions that are available elsewhere and can be accessed by clicking a link. If the consumer proceeds to use the website, the consumer is bound to the contractual terms.

Browsewrap is another potential path for imposing servitudes on chattels. Browsewrap, sometimes called scrollwrap, refers to efforts by firms to designate the act of browsing a website as consent to terms linked on that website. If consumers must order a product through a manufacturer’s website, use the website to register their goods, or look to the website for assistance with their product, the terms governing the website might also attempt to govern the use of the chattels. These

²⁰² See Arthur Allen Leff, *Contract as Thing*, 19 AM. U. L. REV. 131, 142 (1970).

²⁰³ Danielle D’Onfro, *Error-Resilient Consumer Contracts*, 71 DUKE L.J. 541, 556 (2021).

²⁰⁴ Kessler, *supra* note 20, at 631–32.

²⁰⁵ David A. Hoffman, *Defeating the Empire of Forms*, 109 VA. L. REV. 1367, 1425 (2023) (arguing that we make more contracts every day or two than people made every year a decade ago and in a lifetime a generation ago).

²⁰⁶ See generally NANCY KIM, WRAP CONTRACTS: FOUNDATIONS AND RAMIFICATIONS (2013).

terms might bind both direct purchasers and downstream purchasers alike.

Courts' willingness to enforce contracts by notice facilitates de facto equitable servitudes on chattels by making it possible that a notice printed onto or wrapped around a chattel will be a binding agreement. Otherwise unremarkable adhesion contracts evolve into equitable servitudes when they try to bind future owners of the chattel. This is what Tamko's warranty does when it purports to bind not only the home builder, but also the home purchaser and even future owners.

The problems with adhesion contracts have been well documented.²⁰⁷ Where commentators used to fret that these agreements violated basic contracting principles,²⁰⁸ the draft *Restatement of Consumer Contracts* appears to suggest that assent is no longer an essential element of contract.²⁰⁹ It is widely accepted that consumers do not read the endless adhesion contracts with which they interact daily: even if consumers could understand the legalese in which firms write these contracts, their length makes reading burdensome. Moreover, as Ayres and Professor Alan Schwartz note, consumers may be better off if the expectation is that the contracts are not read, because these contracts may, in fact, be more enforceable in a world in which reading is the norm.²¹⁰

Once consumers are bound by a contract, there is limited case law providing protection against the terms of that contract changing.²¹¹ Just as the legal standards governing consent to formation have weakened,

²⁰⁷ See generally, e.g., Yannis Bakos, Florencia Marotta-Wurgler & David R. Trossen, *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014) (demonstrating that consumers do not read adhesion contracts); Ian Ayres & Alan Schwartz, *The No-Reading Problem in Consumer Contract Law*, 66 STAN. L. REV. 545 (2014) (exploring the implications of norms against reading contracts); Uri Benoliel & Shmuel I. Becher, *The Duty to Read the Unreadable*, 60 B.C. L. REV. 2255 (2019) (demonstrating that many adhesion contracts are unreadable even when consumers try); Yonathan A. Arbel & Andrew Toler, *ALL-CAPS*, 17 J. EMPIRICAL LEGAL STUD. 862 (2020) (showing that courts care about adhesion contract formatting despite consumers not reading adhesion contracts); Lauren E. Willis, *Performance-Based Consumer Law*, 82 U. CHI. L. REV. 1309 (2015) (arguing that the disclosure model of consumer protection embedded in consumer contract law is ineffective); Kessler, *supra* note 20, at 632 (explaining that adhesion contracts "have become one of the many devices to build up and strengthen industrial empires"); Rakoff, *supra* note 20 (assessing adhesion contracts' relation to dickered contracts and finding that the terms in most adhesion contracts ought to be unenforceable); RADIN, *supra* note 20 (assessing the decline of assent and its implications).

²⁰⁸ Lemley, *supra* note 140, at 465 (describing how "in today's electronic environment, the requirement of assent has withered away to the point where a majority of courts now reject any requirement that a party take any action at all demonstrating agreement to or even awareness of terms in order to be bound by those terms").

²⁰⁹ RESTATEMENT OF CONSUMER CONTS. §§ 2–3 (AM. L. INST., Tentative Draft No. 2, 2022).

²¹⁰ Ayres & Schwartz, *supra* note 207, at 605; see also Tess Wilkinson-Ryan, *The Perverse Consequences of Disclosing Standard Terms*, 103 CORNELL L. REV. 117 (2017).

²¹¹ Juliet M. Moringiello & William L. Reynolds, *From Lord Coke to Internet Privacy: The Past, Present, and Future of the Law of Electronic Contracting*, 72 MD. L. REV. 452, 471–72 (2013).

so too have standards around consent to modification.²¹² Today, consumer contracts sometimes also include a unilateral right, upon notice to the consumer, to modify the terms of the agreement, as well as a provision indicating that, by continuing to use the product, the consumer consents to the modification.²¹³ Thus, even if a savvy consumer understands that the contract is the product and chooses accordingly, the product may change. These clauses are relevant for our purposes because they can make the contract more restrictive over time, potentially curtailing consumers' rights to use, modify, and even alienate goods.

The implications of unilateral modification rights are radical. No object subject to an agreement with a unilateral modification right can be "owned" in any traditional sense of the word because the firm can rearrange the consumers' rights.²¹⁴ The unilateral modification right gives the firm an option to take back some or all the benefit that it purported to sell, even when it does not require buyers to return the object.²¹⁵ In sum: firms selling goods that are subject to unilateral modification clauses are selling access, not ownership.²¹⁶

Selling access alone may be desirable in some cases — for example, consumers may prefer the access that a media streaming service like Disney+ offers, which would eliminate their need to store an ever-expanding collection of movies on DVD. But unilateral modification rights can make it difficult for consumers to strike their preferred bargains.²¹⁷ To date, the examples of firms imposing big surprises on consumers are mostly confined to the area of intellectual property.²¹⁸ Consider the recent controversy at video game platform Steam.²¹⁹ When users "buy" games on Steam — sometimes for as much as seventy dollars — they are only accessible via Steam.²²⁰ Steam "sells" these games for roughly the same price on discs at physical retail locations. Consumers who buy the discs can play the game as long as they have a console that plays that generation of disc. Consumers who buy the game on Steam can play the game only as long as Steam has an agreement with the game creators to make it available. Gamers were recently

²¹² See RESTATEMENT OF CONSUMER CONTS. §§ 2–3 (AM. L. INST., Tentative Draft No. 2, 2022).

²¹³ Ayres & Schwartz, *supra* note 207, at 588.

²¹⁴ See Shmuel I. Becher & Uri Benoliel, *Sneak In Contracts*, 55 GA. L. REV. 657, 668 (2021).

²¹⁵ See *id.*

²¹⁶ See *id.*

²¹⁷ See *id.* at 669.

²¹⁸ The best explanation for why surprises are not more common may be that firms often treat consumers better than their contracts require them to. Lucian A. Bebchuk & Richard A. Posner, *One-Sided Contracts in Competitive Consumer Markets*, 104 MICH. L. REV. 827, 833–34 (2006).

²¹⁹ Jonathan Lee, *After Backlash, Ubisoft Says It Isn't Revoking Access to Owned Games*, WASH. POST (July 13, 2022, 10:25 AM), <https://www.washingtonpost.com/video-games/2022/07/13/assassins-creed-steam-delisting-ubisoft/> [<https://perma.cc/E6KH-ERVG>].

²²⁰ Zak Khan, *What Is Steam: The Popular Gaming Platform Explained*, ANDROID AUTH. (Oct. 17, 2023), <https://www.androidauthority.com/what-is-steam-3254981/> [<https://perma.cc/9YZD-HL5G>].

alarmed to learn that Ubisoft, the creator of the popular *Assassin's Creed* series, was planning to turn off access to some of its games on the Steam platform.²²¹ These consumers were alarmed to find out that they did not own their games, despite having paid for them.²²² But, as the *Washington Post* explained, “[f]rom a consumer perspective, games are no longer a product. They’re a service you pay for indefinitely until the publisher decides to pull the plug.”²²³ It is an empirical question whether consumers would pay equivalent value for access to a digital asset versus ownership of a tangible asset if they understood the implications of unilateral modification rights.

From a consumer protection perspective, the problem with these agreements is not that game publishers retain the option to retire games — it is that consumers do not understand what this option means. In addition to the harms to the consumer, these options may create broader social harms as archivists and scholars lose access to material because it is impossible for them to own and preserve a copy. When these games eventually fall into the public domain, it is unclear how future creators will be able to access them for the raw material from which to create new art.

The most radical implication for equitable servitudes on property comes via unilateral modification rights: a chattel subject to unilateral modification rights by the manufacturer or seller cannot be owned in fee simple by anyone other than the holder of that modification right.²²⁴ Rather, any alleged ownership is subject to the later terms imposed by the beneficiary of the servitude.²²⁵ These modifications may change the chattel’s use, disposal, alienability, or other core attributes.²²⁶ Put differently, it is impossible for owners to know which sticks in the bundle of rights they hold in a world in which another party has the right to rearrange the sticks.

2. *The Decline of Private Law Case Law.* — Contract doctrine gained traction against other private law doctrines right as the cases needed to liquidate the conflicts between contracts and these doctrines dried up. For decades, commentators have documented how trials are vanishing from the U.S. legal system.²²⁷ Professor Marc Galanter

²²¹ Lee, *supra* note 219.

²²² *Id.*

²²³ *Id.*

²²⁴ See David Horton, *The Shadow Terms: Contract Procedure and Unilateral Amendments*, 57 UCLA L. REV. 605, 651 (2010).

²²⁵ See *id.*

²²⁶ *Id.*

²²⁷ See generally Marc Galanter, *The Vanishing Trial: What the Numbers Tell Us, What They May Mean*, 10 DISP. RESOL. MAG. Summer 2004, at 3 (quantifying the decline in civil, tort, and contracts trials from 1962 to 2002); Gillian K. Hadfield, *Where Have All the Trials Gone? Settlements, Nontrial Adjudications, and Statistical Artifacts in the Changing Disposition of*

warned that the declining number of trials deprives the legal system of “benchmarks” for deciding future cases.²²⁸ Rather than “bargaining in the shadow of law,” our system “may well become one of adjudication in the shadow of bargaining.”²²⁹ The result may be a reversal of the roles of bargaining and adjudication.²³⁰

Twenty years later, Galanter’s hypothesis is more attractive still. Without a steady drip of well-reasoned opinions to renew and refresh the common law, available precedent has become increasingly remote from current disputes.²³¹ The primary sources that judges work with are limited to the alleged contract between the parties and an increasingly contract-focused case law that militates in favor of just enforcing the contract.

Professors Morgan Ricks and Ganesh Sitaraman have identified an important second thread that weaves into private law cases and twists them toward contract. They argue the common law baseline is being forgotten in the age of statutes.²³² Professor Frederick Schauer explains that where courts might have previously wielded their common law power to update the law, a decline in belief that the law reflects society’s “relatively uniform customs” may have generated skepticism toward entrusting the law to judges.²³³ In many areas, federal, state, and even municipal lawmakers have undertaken the job of codifying the law.²³⁴ But there are and there will always be gaps, particularly in areas of rapid change such as technology. When confronted with such a gap, the presence of a contract relieves judges from their common law obligations. Instead, they can just enforce the contract. What is lost is analysis of whether the contract is the correct and just lens for understanding what the relationship is and how the law should treat it.

Federal Civil Cases, 1 J. EMPIRICAL LEGAL STUD. 705 (2004) (documenting the rise of nontrial dispositions in federal civil court cases); Margo Schlanger, *What We Know and What We Should Know About American Trial Trends*, 2006 J. DISP. RESOL. 35 (surveying studies and commentary on the vanishing trials phenomenon). See also Brian J. Ostrom, Shauna M. Strickland & Paula L. Hannaford-Agor, *Examining Trial Trends in State Courts: 1976–2002*, 1 J. EMPIRICAL LEGAL STUD. 755, 770 (2004) (documenting the decline in civil jury and bench trials in ten states’ courts from 1992 to 2002).

²²⁸ Galanter, *supra* note 227, at 6.

²²⁹ *Id.*

²³⁰ *Id.*

²³¹ See generally Marc Galanter & Angela Frozena, *The Continuing Decline of Civil Trials in American Courts*, POUND CIV. JUST. INST. (2011), <https://www.poundinstitute.org/wp-content/uploads/2019/04/2011-Forum-Galanter-Frozena-Paper-1.pdf> [<https://perma.cc/4ZKF-CE25>].

²³² See generally Ganesh Sitaraman & Morgan Ricks, *Tech Platforms and the Common Law*, 73 DUKE L.J. (forthcoming 2024).

²³³ Frederick Schauer, *The Failure of the Common Law*, 36 ARIZ. ST. L.J. 765, 775 (2004).

²³⁴ Sitaraman & Ricks, *supra* note 232.

The structure of the common law system predisposes it to prioritize contracts over bigger, systemic interests.²³⁵ This predisposition begins at the foundational question of which interests are visible to the private law at all. As Professor Hanoch Dagan explains, “the bipolar encounter between plaintiff and defendant” tends to exclude the concerns of both impacted third parties and society more broadly.²³⁶ There is a robust debate among private law theorists about the extent to which society’s concerns should inform the content of the private law.²³⁷ Regardless of whatever one might believe the private law should do, it does not systematically balance the centrality of the dispute under adjudication and social concerns.²³⁸ This reality means that most courts consider only the issues and arguments presented to them, and that if the parties focus their efforts on the contractual dimensions of a relationship, a court is likely to focus its energies there as well. Therefore, if the parties fight about the enforceability of a contract merely on principles of contract doctrine, a court has no obligation to consider the effects of that framing on other areas of the law, notably property.

A universe in which courts hear multiple cases on most issues and have regular opportunities to revisit issues is one in which we might expect the litigants to introduce broader societal interests for consideration, albeit in fragments and only when the interests align with those of litigants. A universe in which courts hear few disputes and rarely have the chance to reconsider doctrine, especially if courts feel disempowered to reconsider doctrine, is one in which it is unlikely that broader societal interests will be set before the court.

To be sure, robust amici participation can blunt the narrowness brought on by a dearth of cases, but only to the extent that courts read the amici.²³⁹ Amici can also mitigate the impact of poor or merely timid lawyering on the part of the litigants.²⁴⁰ This is particularly important in cases that pit consumers against firms, since the parties are likely to have vastly different budgets, access to talented lawyers, and willingness

²³⁵ *But see* David A. Hoffman & Cathy Hwang, *The Social Cost of Contract*, 121 COLUM. L. REV. 979, 998 (2021) (describing “an anticanon of other-regarding contract cases: a set of disfavored and odd cases that result from extraordinary facts”).

²³⁶ Hanoch Dagan, *The Limited Autonomy of Private Law*, 56 AM. J. COMPAR. L. 809, 809 (2008).

²³⁷ *Id.* at 811–13 (explaining the debate between “autonomist” and “instrumentalist” accounts of the private law).

²³⁸ *Id.*

²³⁹ The frequency with which courts cite amicus briefs may be a good indicator of how often they read the briefs and, at least in the Supreme Court, citations to amicus briefs have increased with the rise in the volume of amicus briefs. *See* Joseph D. Kearney & Thomas W. Merrill, *The Influence of Amicus Curiae Briefs on the Supreme Court*, 148 U. PA. L. REV. 743, 757–58 (2000).

²⁴⁰ Though controversial in the past, there is little doubt today that amici act as advocates for one side rather than as disinterested “friends” of the court. *See* Allison Orr Larsen & Neal Devins, *The Amicus Machine*, 102 VA. L. REV. 1901, 1909–14 (2016).

to litigate issues for the betterment of the law itself.²⁴¹ Unfortunately, amici participation outside of cases involving social and macroeconomic issues is uneven at best.²⁴² Without parties to bring in broader societal concerns, courts may be deciding cases that, although they appear to be merely simple contractual disputes, in fact stretch the boundaries of contract law.

Professors Florencia Marotta-Wurgler and Samuel Issacharoff have quantified a shift away from state toward federal adjudication of contract claims.²⁴³ This shift has resulted in fewer issues reaching apex courts capable of promulgating binding common law on that issue.²⁴⁴ Because many consumer contract cases arise as class actions or motions to compel arbitration,²⁴⁵ those cases are removable to federal court.²⁴⁶ At the same time, diversity jurisdiction allows even disputes involving pure state-law questions to proceed in federal court.²⁴⁷ In other words, bringing a consumer contracts case in state court and keeping it there is difficult, especially considering the economics of litigating individual cases to a potentially precedential opinion.

The Federal Arbitration Act²⁴⁸ (FAA) has likely accelerated the decline in private law cases that proceed all the way to opinions on the merits.²⁴⁹ The FAA has fostered contract supremacy both directly and indirectly. Directly, cases that go to arbitration do not generate precedent for the common law system.²⁵⁰ If there are substantive private law constraints on modern contracts, those constraints are not memorialized in opinions. Indirectly, the FAA cuts off courts' analysis of many of the contracts that do appear before them. The Supreme Court has dramatically limited the grounds on which courts can refuse to send cases to arbitration.²⁵¹ Arbitration clauses act as contracts within contracts, which means that even if substantive private law would prohibit the

²⁴¹ Judge Posner was one of the few recent judges to hold on to the idea that amici should have a limited role, believing a limited role could help even out the legal firepower of the two parties. See *Ryan v. Commodity Futures Trading Comm'n*, 125 F.3d 1062, 1063 (7th Cir. 1997) (“[T]here are, or at least there should be, limits [to when an amici should be allowed]. . . . An amicus brief should normally be allowed when a party is not represented competently or is not represented at all, . . . or when the amicus has unique information or perspective that can help the court beyond the help that the lawyers for the parties are able to provide.” (citing, inter alia, *New England Patriots Football Club, Inc. v. Univ. of Colo.*, 592 F.2d 1196, 1198 n.3 (1st Cir. 1979))).

²⁴² Paul M. Collins, Jr. & Wendy L. Martinek, *Who Participates as Amici Curiae in the U.S. Courts of Appeals?*, 94 JUDICATURE 128, 132–35 (2010).

²⁴³ Samuel Issacharoff & Florencia Marotta-Wurgler, *The Hollowed Out Common Law*, 67 UCLA L. REV. 600, 614–16 (2020).

²⁴⁴ *Id.* at 629.

²⁴⁵ *Id.* at 613–14, 616.

²⁴⁶ *Id.* at 619–20.

²⁴⁷ *Id.* at 619 n.34.

²⁴⁸ 9 U.S.C. §§ 1–16.

²⁴⁹ Hoffman, *supra* note 205, at 31–32.

²⁵⁰ *Id.* at 31.

²⁵¹ *Id.* at 32.

enforcement of a particular contract, that contract may be sent to arbitration as long as the agreement to arbitrate is validly formed.²⁵²

There is no question today that arbitration agreements on shrink-wrap — though controversial when first permitted²⁵³ — are enforceable.²⁵⁴ The open question for servitudes doctrine is whether an arbitration clause printed on an object would be enforceable by someone other than the first purchaser. That is, can a mandatory arbitration clause run with a chattel?

Without cases that reach opinions on the merits, it can be difficult to know what the law is. Even if cases like *Dye* are the closest that courts have come to recognizing equitable servitudes on chattels, there is a dearth of case law reaffirming the prohibition on these servitudes. Section II.D, below, argues that one explanation for the lack of modern case law addressing equitable servitudes is the litigation choices consumers' attorneys make. But the litigation choices of any one attorney would be less important for the law as a whole if there were more cases overall on which courts could reach opinions on the merits.²⁵⁵

3. *Firm-Friendly Terms.* — Rational firms would not bother to encumber chattels with equitable servitudes unless those servitudes gave them value. The kinds of terms that firms would want to style as servitudes likely track what they already have in their consumer contracts: waivers, limitations on remedies, procedural hurdles to recovery, choice of law, and arbitration.²⁵⁶ These are the same kinds of terms that Radin describes as supplanting the choices of democratically elected lawmakers with the desires of firms.²⁵⁷ That firms would want a stronger, arguably in rem version of these terms is unsurprising.

A waiver structured as a servitude lets firms choose their liability resulting from their products in perpetuity. Imagine if the waiver on

²⁵² *Id.* at 31.

²⁵³ *Cf.* Posner, *supra* note 149, at 1193 (describing *ProCD, Inc. v. Zeidenberg*, 86 F.3d 1447 (7th Cir. 1996), the case that endorsed shrinkwrap contracts, as “probably the most criticized case in the modern history of American contract law”).

²⁵⁴ *See* *Schnabel v. Trilegiant Corp.*, 697 F.3d 110, 121–22 (2d Cir. 2012) (“Whether or not there is notice to the consumer on the outside of the packaging that terms await him or her on the inside, courts have found such licenses to become enforceable contracts upon the customer’s purchase and receipt of the package and the failure to return the product after reading, or at least having a realistic opportunity to read, the terms and conditions of the contract included with the product.”).

²⁵⁵ *See generally* Diego A. Zambrano, *Federal Expansion and the Decay of State Courts*, 86 U. CHI. L. REV. 2101 (2019) (describing how litigation has shifted from state to federal court and the resulting loss of state courts’ ability to shape state law).

²⁵⁶ *Cf.* Martins, Price & Witt, *supra* note 21, at 1294 (“[C]ontract is increasingly winning the ongoing tug-of-war over enforcement. Where tort’s victory once seemed assured, the last three decades of waiver law development have, in many states, tipped the balance back in favor of contract.”).

²⁵⁷ RADIN, *supra* note 20, at 33.

Tamko's limited warranty had instead been on lead paint²⁵⁸ or 3M's combat earplugs.²⁵⁹ Had courts enforced the limitation against downstream owners, the firms' liability — from litigation to payout — may have looked very different. If firms can use servitudes to limit the period for which they are liable for harms arising from their products, they may end their risk of litigation prior to the manifestation of their products' harms. In allowing firms a path to customize their liability beyond the initial purchaser of their good, servitudes on chattels stand to undo products liability doctrine altogether. In other words, allowing equitable servitudes on chattels to edge into property doctrine would reshape the law of obligations generally.

In addition to these standard consumer-facing terms, equitable servitudes on chattels could also grant firms greater control over the supply of their goods. Two related trends may make firms more interested in control: robust secondary markets and pervasive counterfeiting. Whether out of economic necessity, environmental concern, or aesthetic preferences, thrifting has become more common in recent years.²⁶⁰ Fashion designer Virgil Abloh famously predicted that streetwear would die as consumers turned to secondhand markets for more custom looks.²⁶¹ A recent report by Accenture explains that “buying one-off new items is no longer the primary shopping experience many of us desire. . . . Product lifetimes are being extended by consumers' growing desire to recycle and repurpose.”²⁶² For manufacturers, both longer product lives and growing secondary markets may be existential threats to their ability to maintain profits unless they can capture some of the value passing through that secondary market.²⁶³

Servitudes are one strategy for retaining control after the first sale. Accenture even ventures that “with the emergence of new models such

²⁵⁸ Like a roofing shingle, paint is arguably not a chattel after it is applied to a building, but any shrinkwrap or noticed contract on paint would likely be on the paint in the can, when it is still a chattel.

²⁵⁹ See generally Mari Gaines, *3M Earplug Lawsuit Settled: Everything You Need to Know*, FORBES: ADVISOR (Oct. 18, 1:09 PM), <https://www.forbes.com/advisor/legal/product-liability/3m-earplug-lawsuit> [https://perma.cc/VFR4-Y524].

²⁶⁰ Suzanne Kapner, *The Rise of Hand-Me-Down Inc.*, WALL ST. J. (Aug. 16, 2019, 2:46 PM), <https://www.wsj.com/articles/the-rise-of-hand-me-down-inc-11565947804> [https://perma.cc/2295-FFY4].

²⁶¹ Nancy MacDonell, *Will We Buy Mostly Vintage Clothes in the Future?*, WALL ST. J. (Jan. 30, 2020, 11:35 AM), <https://www.wsj.com/articles/will-we-buy-mostly-vintage-clothes-in-the-future-11580402104> [https://perma.cc/6R24-DQB8].

²⁶² JILL STANDISH ET AL., ACCENTURE, *THE RETAIL EXPERIENCE REIMAGINED 17* (2021), https://www.accenture.com/_acnmedia/PDF-152/Accenture-POV-06-Full-Report-Retail-Experience-Reimagined.pdf [https://perma.cc/V77Q-C5QJ].

²⁶³ This is an old problem in the used book market. Textbook publisher Pearson recently contemplated using blockchain to “participate” beyond the first sale, getting a cut of the secondary market. Britney Nguyen, *One of the Biggest Textbook Publishers Is Tired of Not Making Any Money When You Buy a Used Textbook — And Wants to Explore Using NFTs to Get a Cut*, BUS. INSIDER (Aug. 6, 2022, 7:39 AM), <https://www.businessinsider.com/publisher-pearson-explores-nfts-make-money-off-used-textbook-sales-2022-8> [https://perma.cc/H77P-2LDD].

as rent and return and the growing popularity of subscription, ‘ownership’ is being redefined,”²⁶⁴ touting Ikea’s “sofa-as-a-service” model as one potential future.²⁶⁵ Firms could try renting their goods to consumers, but then they would have to manage the inventory at the end of the lease. Firms may prefer to not take the item back²⁶⁶ yet still wish to prevent it from being resold on just any market. Many firms are experimenting with markets for their own used goods — the equivalent of the certified preowned car, but for clothing and housewares.²⁶⁷ These bespoke secondary markets give manufacturers a cut of the resale price, whereas on an open market, the manufacturer receives nothing when its product resells. An equitable servitude could attempt to force owners to resell through designated channels from which the original manufacturers are guaranteed a cut of the profits.

Thriving resale markets also create brand concerns for manufacturers as listings for counterfeit goods become intermingled with those for authentic pieces.²⁶⁸ Counterfeit goods can harm consumers’ impression of a brand’s quality.²⁶⁹ Furthermore, too many counterfeit goods or distribution through down-market channels can harm a brand’s cachet.²⁷⁰

Secondary markets may also frustrate consumers when resellers scoop up the supply of desirable products on the primary market and list the inventory at a premium on the secondary market.²⁷¹ While some

²⁶⁴ STANDISH ET AL., *supra* note 262, at 17.

²⁶⁵ *Id.* at 20.

²⁶⁶ See Kevin Purdy, *Why It’s So Hard to Get Rid of Used Mattresses*, N.Y. TIMES: WIRECUTTER (Apr. 24, 2018), <https://www.nytimes.com/wirecutter/blog/get-rid-of-used-mattresses> [<https://perma.cc/T8PR-2A5W>] (explaining why returning an item like a mattress is so difficult); Jaclyn Peiser, *The Age of Free Online Returns Is Ending*, WASH. POST (Dec. 9, 2022, 6:00 AM), <https://www.washingtonpost.com/business/2022/12/09/free-returns-holiday-shopping> [<https://perma.cc/8LUB-M5CA>] (explaining the costs that returns impose on retailers).

²⁶⁷ See, e.g., Charity L. Scott, *Urban Outfitters to Take on Poshmark with Its Own Thrift Store App*, WALL ST. J. (Aug. 24, 2021, 5:02 PM), <https://www.wsj.com/articles/urban-outfitters-to-take-on-poshmark-with-its-own-thrift-store-app-11629802800> [<https://perma.cc/4DFT-QE4K>].

²⁶⁸ Cf. Walter Loeb, *With the Secondhand Designer Market Booming, Consumers Should Be Wary of Fakes*, FORBES (Sept. 6, 2019, 7:10 AM), <https://www.forbes.com/sites/walterloeb/2019/09/06/secondhand-designer-apparel-can-be-fake--even-if-macys-or-jcpenney-sells-it> [<https://perma.cc/PUC4-QAPJ>] (warning consumers to be wary of counterfeit products on the resale market).

²⁶⁹ Sanjeev Sularia, *The Counterfeit Problem and How Retailers Can Fight Back in 2020*, FORBES (Mar. 17, 2020, 7:30 AM), <https://www.forbes.com/sites/forbestechcouncil/2020/03/17/the-counterfeit-problem-and-how-retailers-can-fight-back-in-2020> [<https://perma.cc/6AKV-4KHQ>].

²⁷⁰ Cf. Misty White Sidell, *Louis Vuitton, Chanel, Hermès Bags Hit Amazon Through Secondhand Distributor*, WOMEN’S WEAR DAILY (Oct. 20, 2022, 12:02 AM), <https://wwd.com/fashion-news/designer-luxury/louis-vuitton-chanel-hermes-bags-hit-amazon-secondhand-distributor-1235394863> [<https://perma.cc/Z3WB-2JMD>] (“When asked if WGACA is nervous about potential blowback from the brands they are selling on Amazon, Weisser said: ‘We have always been a distributor of brands that don’t want to be distributed.’”).

²⁷¹ Luxury designers have long employed purchase limits to stem currency arbitrage of the goods. Eric Wilson, *Retailers Limit Purchases of Designer Handbags*, N.Y. TIMES (Jan. 10, 2008), <https://>

firms may be happy to have sold through their inventory, others may lament the lost relationship with their customers and the blow to their reputation caused by the high prices.²⁷²

Manufacturers have long wanted servitudes to control the channels of commerce. Zechariah Chafee identified several early efforts at these restrictions when he took up the question of equitable servitudes a century ago.²⁷³ Servitudes are a desirable tool for this problem because they grant the beneficiary a remedy against the platform or subsequent purchaser. By contrast, a contract provides a remedy against only the first purchaser, and extracting damages from that person may do little to address a firm's immediate concerns.²⁷⁴

C. Modern Servitudes Beyond Software

Beyond intellectual property, only one court has recently endorsed equitable servitudes on chattels as enforceable rights, but the doctrine is heading in that direction. This section begins by looking at the Tamko shingles litigation to show the influence of software licenses and adhesion contracts on facts that could otherwise suggest an equitable servitude. It then discusses the one recent case to squarely address equitable servitudes on chattels. Finally, it offers two unlitigated examples to give a more fulsome picture of the landscape of equitable servitudes on chattels.²⁷⁵

1. The Tamko Shingles Litigation. — The one factor that lends legitimacy to adhesion contracts is that consumers have notice that they are being bound. But even this norm is eroding. In the case of shrink-wrap agreements, the person who opens the shrinkwrap has notice of the contract, but what about a subsequent purchaser? There, things become complicated.

Consider Tamko shingles, a popular roofing product that has underperformed for many homeowners, leading to litigation.²⁷⁶ Tamko packs

www.nytimes.com/2008/01/10/fashion/10CAPS.html [<https://perma.cc/H5C9-KQ7B>] (quoting Saks Fifth Avenue executive who said, "We are very sensitive, first and foremost, to serving the customer, but secondly to any potential for reselling by customers").

²⁷² See DELOITTE, MONEY-MAKING BOTS: THE LEGAL THREAT DESTROYING CONSUMER TRUST 8 (2021), <https://www2.deloitte.com/content/dam/Deloitte/uk/Documents/risk/deloitte-uk-risk-money-making-bots.pdf> [<https://perma.cc/H877-TSUZ>] (explaining that scalpers may be the source of customers' frustration but that customers direct their ire at the original seller).

²⁷³ Chafee, *supra* note 6, at 948–50; *see also* Chafee, *supra* note 9, at 1254–56 (reassessing efforts to impose resale restrictions nearly thirty years after his first study).

²⁷⁴ *See* Hovenkamp, *supra* note 103, at 543 (exploring the power of injunctive remedies versus contract remedies where intellectual property creates servitude-like restrictions).

²⁷⁵ Given the pervasiveness of arbitration clauses and the barriers that consumers face in bringing or defending civil suits through the issuance of an opinion, it may be a long time before courts can confront the question of equitable servitudes on chattels directly.

²⁷⁶ *See* Karin Price Mueller, *When a 30-Year Roof Lasts Only 7.5 Years*, NJ.COM (Mar. 15, 2018, 3:00 PM), https://www.nj.com/business/2018/03/when_a_30-year_roof_only_last_75_years.html

its shingles in a wrapper with a limited warranty²⁷⁷ and claims that by using and retaining the shingles, the homeowners and future purchasers of the home are subject to the limited warranty.²⁷⁸ On its face, this limited warranty attempts to create an equitable servitude on the shingles and likely also the home itself, in that it purports to bind downstream owners of the shingles.²⁷⁹ The terms purport to apply to the “the owner of the building at the time the Shingles are installed on that building,” and, if that party is a builder, then “the first person to occupy the residence after its construction . . . even though the Shingles were already installed,” as well as “someone who purchases” from the first occupant of the home within five years of installation.²⁸⁰ After the contractor opens the packaging to install the shingles, there is no step that any downstream owner must take to assent to the terms of the contract.²⁸¹ The terms make it appear that keeping the shingles on the house is consent to the contract.

The substance of the contract is unremarkable for a consumer contract. It attempts to waive implied warranties, limit damages, and shorten the time to bring an action.²⁸² It has a binding arbitration clause that has a narrow carveout for individual actions in small claims court,²⁸³ which, given the cost of a new roof,²⁸⁴ may be of limited use.²⁸⁵ The contract shifts litigation costs to the English rule, which requires the loser to pay the winners’ costs and reasonable attorneys’ fees.²⁸⁶ Although styled as a warranty, this agreement takes more rights from consumers than it gives. If consumers get any value from the agreement, it can lie only in the utility of the shingles. Unsurprisingly, in court cases it is almost always Tamko, rather than the homeowner, who seeks to enforce the warranty agreement.

[<https://perma.cc/HD2L-2F96>]; *Williams v. Tamko Bldg. Prods., Inc.*, 451 P.3d 146, 149–50 (Okla. 2019); *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 679 (11th Cir. 2018); *Am. Fam. Mut. Ins. Co. v. Tamko Bldg. Prods., Inc.*, 178 F. Supp. 3d 1121, 1124 (D. Colo. 2016); *Hoekman v. Tamko Bldg. Prods., Inc.*, No. 14-cv-01581, 2015 U.S. Dist. LEXIS 113414, at *2–3 (E.D. Cal. Aug. 24, 2015); *Hobbs v. Tamko Bldg. Prods., Inc.*, 479 S.W.3d 147, 149–50 (Mo. Ct. App. 2015); *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 587 (M.D.N.C. 2014).

²⁷⁷ See *Williams*, 451 P.3d at 150.

²⁷⁸ *Tamko Fiberglass/Asphalt Shingle Limited Warranty*, *supra* note 3.

²⁷⁹ *Id.*

²⁸⁰ *Id.*

²⁸¹ However, the original owner does have to “provide TAMKO with written notice within thirty (30) days after the transfer.” *Id.*

²⁸² *Id.*

²⁸³ *Id.*

²⁸⁴ See, e.g., *Mueller*, *supra* note 276 (“Stahl’s three roofing estimates came in for \$15,075, \$16,150, and \$17,039.”).

²⁸⁵ See *Cara O’Neill*, *50-State Chart of Small Claims Court Dollar Limits*, NOLO (Mar. 2023), <https://www.nolo.com/legal-encyclopedia/small-claims-suits-how-much-30031.html> [<https://perma.cc/7WAV-AWSJ>].

²⁸⁶ *Tamko Fiberglass/Asphalt Shingle Limited Warranty*, *supra* note 3; Herbert M. Kritzer, *The English Rule*, 78 A.B.A. J. 54, 55 (1992).

Consumer litigation against Tamko mostly turns on these contracts. The facts of the Tamko cases mostly follow the same broad pattern: A contractor or subcontractor purchases the shingles. That contractor or subcontractor opens the packaging that is printed with the arbitration clause. The homeowner never sees or has knowledge of the arbitration clause.²⁸⁷ Years later, when the shingles fail, the homeowner or their insurer sues the manufacturer, Tamko Buildings Products, Inc. At that point, Tamko attempts to compel arbitration.²⁸⁸ Tamko typically frames the lawsuit as a claim arising under the contractual warranty even in cases in which the plaintiff intentionally raises only common law claims to avoid implicating the alleged contract.²⁸⁹ In a few cases, the terms and conditions were embossed into the roofing shingles themselves, but that litigation has progressed along the same broad lines as the shrink-wrap cases.²⁹⁰

Because of the arbitration clause, lawsuits between dissatisfied customers and Tamko end up being decided on motions to compel arbitration. There, Tamko has used expansive theories of contract acceptance to attempt to enforce the contract against downstream purchasers.²⁹¹ The simplest fact patterns are those in which a homeowner hires a roofer who buys and installs the shingles. Because the roofers open the shrink-wrap and discard the agreement printed on the plastic, the homeowners usually argue that they have no knowledge of the agreement and therefore cannot be bound to it.²⁹²

Courts have split on the question of whether these facts bind the homeowner.²⁹³ The Eleventh Circuit, applying Florida contract and agency law, held:

²⁸⁷ For example, the plaintiffs in *American Family Mutual Insurance Co. v. Tamko Building Products, Inc.*, 178 F. Supp. 3d 1121 (D. Colo. 2016), asserted that “[a]t no time did any member of the American Family’s insureds’ Boards of Directors ever receive, read or agree to any packaging, writing, agreement or contract containing provisions with an arbitration clause before they became aware that they did not meet impact resistance standards.” Plaintiff’s Memorandum Brief in Opposition to Defendant TAMKO Building Products, Inc.’s Motion for Stay Pending Ruling on Motion to Dismiss or Compel Arbitration ¶ 3, *Am. Fam. Mut. Ins. Co.*, 178 F. Supp. 3d 1121 (No. 15-cv-02343); *see also* Williams v. Tamko Bldg. Prods., Inc., 451 P.3d 146, 150 (Okla. 2019); Hobbs v. Tamko Bldg. Prods., Inc., 479 S.W.3d 147, 149 (Mo. Ct. App. 2015); Hoekman v. Tamko Bldg. Prods., Inc., No. 14-cv-01581, 2015 U.S. Dist. LEXIS 113414, at *2 (E.D. Cal. Aug. 24, 2015).

²⁸⁸ *See, e.g., Am. Fam. Mut. Ins. Co.*, 178 F. Supp. 3d at 1124; *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 679 (11th Cir. 2018); *Hobbs*, 479 S.W.3d at 150.

²⁸⁹ *See, e.g.,* Transcript of Motions Hearing at 4–7, *Hobbs v. Tamko Bldg. Prods., Inc.*, No. 14Ao-CC00110 (Mo. Cir. Ct. Aug. 15, 2014) (explaining that the warranty was at the heart of the suit but acknowledging that the plaintiffs did not bring a breach of warranty claim).

²⁹⁰ *See, e.g.,* Response in Opposition to TAMKO’s Motion to Stay Based on Arbitration Agreement or Alternatively to Compel Arbitration and RSG-Greensboro’s Motion to Stay Pending Arbitration at 2, *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584 (M.D.N.C. 2014) (No. 14-cv-00116) [hereinafter Response in Opposition to TAMKO’s Motion].

²⁹¹ *See, e.g., Dye*, 908 F.3d at 680; *Hobbs*, 479 S.W.3d at 150.

²⁹² *See Hobbs*, 479 S.W.3d at 151.

²⁹³ *Compare id.* at 152, *with Dye*, 908 F.3d at 678.

(1) that the manufacturer's packaging here sufficed to convey a valid offer of contract terms, (2) that unwrapping and retaining the shingles was an objectively reasonable means of accepting that offer, and (3) that the homeowners' grant of express authority to their roofers to buy and install shingles necessarily included the act of accepting purchase terms on the homeowners' behalf.²⁹⁴

The court later continued:

Moreover, and in any event, that big-box items come with purchase terms and conditions should hardly come as a surprise to modern consumers. Post-purchase, acceptance-by-retention warranties are ubiquitous today — think furniture, home appliances, sporting goods, etc. It's not only objectively reasonable to assume that such items come with terms and conditions, it's also eminently reasonable to assume that by opening and retaining those items a consumer necessarily accepts the accompanying terms and conditions.²⁹⁵

The court even said, “[T]his expectation — and with it, fair notice — has been building for some time.”²⁹⁶

Seeking reimbursement for claims paid to a condominium association and a homeowners' association, American Family Mutual Insurance Company sued Tamko on six claims, including negligence and strict liability.²⁹⁷ In response, Tamko argued all of American Family's claims were subject to arbitration because the arbitration clause on the shingles covered “EVERY CLAIM, CONTROVERSY, OR DISPUTE OF ANY KIND WHATSOEVER . . . REGARDLESS OF WHETHER THE ACTION SOUNDS IN WARRANTY, CONTRACT, STATUTE OR ANY OTHER LEGAL OR EQUITABLE THEORY.”²⁹⁸ Since all of American Family's claims “unquestionably ‘relat[ed] to or ar[ose] out of the’ shingles,”²⁹⁹ Tamko argued that they all must be dismissed or sent to arbitration.³⁰⁰

Replying to Tamko's motion to compel, American Family argued that “[i]t is inconceivable that this Court could bind American Family to an arbitration agreement that it never saw and accompanied a

²⁹⁴ *Dye*, 908 F.3d at 678.

²⁹⁵ *Id.* at 682–83 (citing *Kolodziej v. Mason*, 774 F.3d 736, 742 (11th Cir. 2014)).

²⁹⁶ *Id.* at 683.

²⁹⁷ Plaintiff's Memorandum Brief in Opposition to Defendant TAMKO Building Products, Inc.'s Motion to Dismiss or Compel Arbitration at 1, *Am. Fam. Mut. Ins. Co. v. TAMKO Bldg. Prods., Inc.*, 178 F. Supp. 3d 1121 (D. Colo. 2016) (No. 15-cv-02343). These cases also included claims for breach of express and implied warranties and misrepresentation, to which Tamko argued that American Family was estopped from asserting claims sounding in express warranties while attempting to carve out the arbitration clause contained in the same contract. Defendant TAMKO Building Products, Inc.'s Motion to Dismiss or Compel Arbitration at 4, 9, *Am. Fam. Mut. Ins. Co.*, 178 F. Supp. 3d 1121 (No. 15-cv-02343).

²⁹⁸ Defendant TAMKO Building Products, Inc.'s Motion to Dismiss or Compel Arbitration, *supra* note 297, at 2.

²⁹⁹ *Id.* at 13.

³⁰⁰ *Id.* at 13–14.

product it did not purchase.”³⁰¹ Tamko’s successful counterargument:³⁰² American Family’s beneficiaries were bound by the arbitration clause because their contractors and their subcontractors were agents of the building owners when they opened the packaging and thereby agreed to the arbitration clause.³⁰³ That the insurer would be in the same position as their insured vis-à-vis a contract makes sense, but the lack of analysis about whether the insureds were in fact bound by Tamko’s alleged contract is striking.

Tamko’s agency argument even prevailed in a case where the plaintiff homeowner’s contractor purchased the shingles through a roofing supply company that was a codefendant in the products liability case.³⁰⁴ In that case, *Krusch v. TAMKO Building Products, Inc.*,³⁰⁵ the following notice was molded into each individual shingle:

PURCHASE OF THIS PRODUCT IS SUBJECT TO THE TERMS, CONDITIONS AND LIMITATIONS OF A LIMITED WARRANTY WHICH IS INCORPORATED INTO THE PURCHASE TRANSACTION. THERE ARE NO OTHER WARRANTIES, EXPRESS OR IMPLIED FOR THIS PRODUCT. FOR A COPY OF THE LIMITED WARRANTY OR THE INSTALLATION INSTRUCTIONS, CONTACT YOUR TAMKO DISTRIBUTOR. CALL TAMKO AT 1-800-641-4691, OR VISIT *WWW.TAMKO.COM*.³⁰⁶

These shingles were then affixed to the roof of the house such that the structure was crowned in Tamko’s terms and conditions.³⁰⁷ Even if the homeowner did discover the terms embossed into the shingles on his roof, at that point, it would have been too late to return them to Tamko.³⁰⁸ Despite the homeowner having no knowledge that these terms were nailed to the roof of his house, the court bound him to the terms using a theory of agency.³⁰⁹

Throughout the litigation proceedings in *Krusch*, the parties focused on contract doctrine alone. They considered questions such as whether arbitration clauses needed to be signed and other nuances of shrinkwrap agreements.³¹⁰ They argued about whether the timing of the agreement

³⁰¹ Plaintiff’s Memorandum Brief in Opposition to Defendant TAMKO Building Products, Inc.’s Motion for Stay Pending Ruling on Motion to Dismiss or Compel Arbitration, *supra* note 287, ¶ 4.

³⁰² See *Am. Fam. Mut. Ins. Co.*, 178 F. Supp. 3d at 1126, 1129.

³⁰³ Defendant TAMKO Building Products, Inc.’s Reply in Support of Motion to Dismiss or Compel Arbitration at 4–5, *Am. Fam. Mut. Ins. Co.*, 178 F. Supp. 3d 1121 (No. 15-cv-02343). Other federal courts have agreed with this argument. See, e.g., *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 589–90 (M.D.N.C. 2014); *Hoekman v. Tamko Bldg. Prods., Inc.*, No. 14-cv-01581, 2015 U.S. Dist. LEXIS 113414, at *17–18 (E.D. Cal. Aug. 24, 2015).

³⁰⁴ *Krusch*, 34 F. Supp. 3d at 587, 589–90.

³⁰⁵ 34 F. Supp. 3d 584.

³⁰⁶ *Id.* at 589.

³⁰⁷ *Id.* at 587.

³⁰⁸ See Response in Opposition to TAMKO’s Motion, *supra* note 290, at 7.

³⁰⁹ *Krusch*, 34 F. Supp. 3d at 595.

³¹⁰ See Response in Opposition to TAMKO’s Motion, *supra* note 290, at 6.

made it enforceable.³¹¹ They delved into agency law to determine whether the homeowners' contractor had the authority to bind the homeowner to the alleged contract.³¹² However, at no point did they contemplate whether the terms molded into the shingles attempted to create a servitude on a chattel. Indeed, in none of the recent Tamko litigation has the plaintiff argued that Tamko was seeking to create an equitable servitude on its shingles.

And yet, it looks like Tamko is seeking to create an equitable servitude on its shingles. In *Krusch*, Tamko sought to enforce the terms molded into the product not against the first purchaser, the roofing supply company, or the second purchaser, the contractor, but against the homeowner.³¹³ To do this, they effectively cut the building supply company out of the analysis, then alleged that the builder was the homeowners' agent.³¹⁴ These facts are similar to those in *Hartman*, where the court said "[t]o call such a purchaser an 'agent' is to juggle with words" before explaining that the common law does not recognize servitudes on chattels.³¹⁵

Although it may seem remote to property doctrine, these agency questions are important because they facilitate the attachment of terms and conditions to chattels.³¹⁶ As the court in *Hartman* warned, if any party up the commercial chain can be an agent that binds the end user, these terms and conditions begin to look much more like servitudes that run with the chattel.³¹⁷ In the case of Tamko shingles, the shingles are passing through construction suppliers, roofing firms, and sometimes even developers before reaching a homeowner.³¹⁸ Agency may yet prove a fruitful path for firms to impose servitudes, since doctrines like ratification could be used to impose the consent of upstream purchasers on downstream purchasers. While the law is not there yet, the lack of analysis in the Tamko cases that turn on agency suggests that such

³¹¹ *Id.* at 7.

³¹² See *Krusch*, 34 F. Supp. 3d at 589.

³¹³ See *id.* at 586–87, 589.

³¹⁴ See *id.* at 589–90.

³¹⁵ *John D. Park & Sons Co. v. Hartman*, 153 F. 2d, 38–39 (6th Cir. 1907).

³¹⁶ See *Sugartown Pediatrics, LLC v. Merck Sharp & Dohme Corp. (In re Rotavirus Vaccines Antitrust Litig.)*, 30 F.4th 148, 159 (3d Cir. 2022) (holding that pediatricians who never signed and were unaware of any arbitration agreement with a vaccine manufacturer were nevertheless bound to arbitrate their competition claims against the company because they belonged to a physician buying group that had signed an arbitration clause with the manufacturer, even when the physicians purchased vaccines directly from the manufacturer).

³¹⁷ 153 F. at 39.

³¹⁸ *Am. Fam. Mut. Ins. Co. v. TAMKO Bldg. Prods., Inc.*, 178 F. Supp. 3d 1121, 1126 (D. Colo. 2016) (citing *Mullin v. Hyatt Residential Grp., Inc.*, 82 F. Supp. 3d 1248, 1258 (D. Colo. 2015); *Stortroen v. Beneficial Fin. Co. of Colo.*, 736 P.2d 391, 395–96 (Colo. 1987) (en banc) (finding the builder to be the agent of the homeowner and the roofer to be the subagent); *Melnick v. TAMKO Bldg. Prods. LLC*, No. 19-2630, 2022 U.S. Dist. LEXIS 170082, at *18 (D. Kan. Sept. 20, 2022) (finding a roofer to be the subagent of a contractor who the court found to be the agent of a condominium association that owned a roof).

innovations may not be far off. Although they rest at the boundary of the scope of modern agency doctrine, Tamko's agency arguments in these simpler cases are not wholly out of step with the foundations of agency law.

Similarly, in *Disher v. Tamko Building Products, Inc.*,³¹⁹ Tamko acknowledged that one of the plaintiffs was a subsequent purchaser of the home and used this fact to argue that the plaintiff was ineligible for compensation under the terms of the express warranty while also arguing that, under the terms of that same warranty, the plaintiff had waived any implied warranty claims.³²⁰ In Tamko's view, the contract it made with the first purchaser of the shingles in 2005 was binding on the family that later purchased the home in 2011.³²¹ That's not how contracts are supposed to work.

Tamko has been so aggressive in asserting that its arbitration clause is binding on downstream purchasers that it has even attempted to compel arbitration against two Kansas plaintiffs who purchased a home in a foreclosure sale.³²² In that case, the plaintiffs discovered that the relatively new Tamko roof needed to be replaced at a cost of nearly \$90,000.³²³ When they sought reimbursement from Tamko, Tamko sought to compel arbitration, alleging that the plaintiffs' claim arose out of a warranty contract to which they were bound by the prior owner as agent, which the plaintiffs denied.³²⁴ That case never reached the merits because Tamko failed to produce an authenticated copy of the agreement that it was trying to enforce against the plaintiffs.³²⁵ Still, attempting to reach through a foreclosure sale to enforce an unrecorded obligation on property is a move that ought give creditors of all stripes pause.

In some cases, courts appear to skip over the privity problems altogether when enforcing the contract. For example, in *One Belle Hall Property Owners Ass'n v. Trammell Crow Residential Co.*,³²⁶ the South Carolina Court of Appeals acknowledged that the shingles were installed on an upscale condominium building before the building was transferred to the condominium association and unit owners.³²⁷ The court never grappled with the question of whether there was any contract between the plaintiff and the defendant.³²⁸ The United States District Court for the Western District of Kentucky did something

³¹⁹ No. 14-cv-740, 2015 U.S. Dist. LEXIS 100453 (S.D. Ill. July 31, 2015).

³²⁰ *Id.* at *24, *27.

³²¹ *Id.* at *23–24.

³²² *Nelson v. Tamko Bldg. Prods., Inc.*, No. 15-1090, 2015 U.S. Dist. LEXIS 75597, at *1, *3 (D. Kan. June 11, 2015).

³²³ *Id.* at *2.

³²⁴ *Id.* at *2–3.

³²⁵ *Id.* at *4.

³²⁶ 791 S.E.2d 286 (S.C. Ct. App. 2016).

³²⁷ *Id.* at 289.

³²⁸ *See id.* at 294.

similar in *Overlook Terraces, Ltd. v. Tamko Building Products, Inc.*³²⁹ in a circular passage where it rejected the plaintiff's argument that there was no contract, explaining that:

Overlook is the owner of the apartment buildings upon which the allegedly defective shingles were placed. The limited warranty agreement applies between Tamko and the "owner," which the agreement defines to be "the owner of the building at the time the shingles were installed." Because Overlook acknowledges that it is the owner of the building upon which the shingles were installed in its complaint, the express provisions of the limited warranty agreement are binding upon Overlook as owner.³³⁰

The idea that a contract binds a party merely because they are named in a contract is bananas — it collapses contract formation into contract drafting, giving anybody with a pen the ability to impose legally enforceable obligations on others. The only time an agreement binds a party merely because they occupy the role of owner of a good is if the agreement is a servitude on that good.

Not every court has subscribed to this expansive vision of agency. Faced with similar facts, the Oklahoma Supreme Court reached the opposite conclusion.³³¹ Where the Eleventh Circuit had emphasized that the purported contract was clearly printed on the shingles' packaging, making the case even easier than software shrinkwrap cases where the consumer had to open the box to see the full terms,³³² the Oklahoma court looked at the "industry custom"³³³ and found that it would be unusual for a consumer to retain industrial packaging.³³⁴ Turning to agency law, the Oklahoma court held that "the scope of the contractor's authority did not include contracting away the Homeowners' constitutional right to a jury trial."³³⁵ Tamko argued that in seeking to enforce a warranty, the homeowners were attempting to benefit from the very contract that they disclaimed.³³⁶ But, in a paragraph that makes this law professor's heart sing, the Oklahoma Supreme Court rejected this argument, explaining that the plaintiffs were "not seeking to enforce their rights under the limited warranty contract. Their claims arise in tort law not contract law."³³⁷ In other words, the private law remains broadly robust even when one party alleges that there is a contract.

³²⁹ No. 14-CV-00241, 2015 U.S. Dist. LEXIS 119325 (W.D. Ky. May 21, 2015).

³³⁰ *Id.* at *10.

³³¹ *Williams v. Tamko Bldg. Prods., Inc.*, 451 P.3d 146, 154 (Okla. 2019).

³³² *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 683 (11th Cir. 2018).

³³³ *Williams*, 451 P.3d at 152.

³³⁴ *Id.* The Missouri Court of Appeals made a similar finding in *Hobbs v. Tamko Building Products, Inc.*, 479 S.W.3d 147 (Mo. Ct. App. 2015), even distinguishing the shrinkwrap on the shingles from shrinkwrap on a computer on the grounds that "the packaging for shingles is not an item typically kept by a consumer after the shingles are unbundled and used." *Id.* at 151.

³³⁵ *Williams*, 451 P.3d at 152.

³³⁶ *Id.* at 153.

³³⁷ *Id.*

It may be tempting to write off cases in which an arbitration clause appears to attach to a chattel as a quirk of the Federal Arbitration Act, but this is a mistake. Many of the published opinions on the enforceability of arbitration clauses speak only to the arbitration question because the strong presumption in favor of enforcing arbitration clauses sends all other issues to the arbitrator, where they cease to be fodder for the progress of the common law.³³⁸ In theory, an arbitrator could decide that the terms of service on Tamko shingles was an effort to make an equitable servitude on chattels, a form of property not recognized by the law.³³⁹ The substance of the clauses that Tamko seeks to enforce is irrelevant for our purposes. The real question is whether there is an enforceable contract at all.

A world in which every building supply manufacturer can print a reference to a terms of service on each part and that contract is binding on all future homeowners verges quickly into dystopia. Rather than being a discrete transaction with closure, purchasing a home would be opening a can of worms. Homebuyers would enter into long-term contractual relationships with hundreds or even thousands of product manufacturers. They may need the consent of dozens of firms to sell their home. This shift in the duration of the contractual relationship is significant. Where previously buyers could know what they were getting, enforcing terms of service on parts would force buyers to choose between considerable information and monitoring costs or, more likely, rationally ignoring the contracts and hoping for the best.³⁴⁰

Purchasers of so-called smart homes that run on software-driven products are already in this situation.³⁴¹ Over time, consumers may come to understand that they cannot truly own anything software touches, but to say the same of all chattels is to fundamentally disrupt ownership. Doing so would inject the pathologies of consumer contract — lopsided terms, opportunism, and consumer mistrust — into the built environment. Part III contemplates the impact of such a shift.

2. *Oscar Statuettes*. — One recent case out of California has explicitly dealt with equitable servitudes on chattels. David Ward was living above his means.³⁴² When his former housekeeper, Maira Duarte Juarez, won a judgment against him for back wages, it turned out that his primary asset was an Oscar statuette that he had won in conjunction

³³⁸ See Brian M. McCall, *Demystifying Unconscionability: A Historical and Empirical Analysis*, 65 VILL. L. REV. 773, 806–07 (2020) (explaining that arbitration clauses are the most commonly challenged clauses in unconscionability claims).

³³⁹ Cf., e.g., Robinson, *supra* note 9, at 1450–51 (surveying the history of legal attitudes toward equitable servitudes for personal property).

³⁴⁰ Ayres & Schwartz, *supra* note 207, at 575 n.74.

³⁴¹ Mulligan, *Licenses*, *supra* note 10, at 1083.

³⁴² Juarez v. Ward, 304 Cal. Rptr. 3d 811, 814 (Ct. App.), *review denied*, 2023 Cal. LEXIS 3380 (June 14, 2023).

with his work on the film *The Sting*.³⁴³ When she sought possession of the statuette to auction it to satisfy her judgment, the Academy of Motion Picture Arts and Sciences (AMPAS) intervened,³⁴⁴ alleging that the winners' agreement that Ward had previously executed blocked the sale. That agreement provides in relevant part:

I hereby acknowledge receipt from you of replica No. 1659 of your copyrighted statuette, commonly known as "Oscar," as an Award for Best Story and Screenplay — The Sting. I acknowledge that my receipt of said replica does not entitle me to any right whatever in your copyright of said statuette and that only the physical replica itself shall belong to me. In consideration of your delivering said replica to me, I agree to comply with your rules and regulations respecting its use and not to sell or otherwise dispose of it, nor permit it to be sold or disposed of by operation of law, without first offering to sell it to you for the sum of \$10.00. You shall have thirty days after any such offer is made to you within which to accept it. This agreement shall be binding not only on me, but also on my heirs, legatees, executors, administrators, Estate, successors and assigns. My legatees and heirs shall have the right to acquire said replica if it becomes part of my Estate, subject to this agreement.³⁴⁵

The intermediate appellate court found that this contractual right of first purchase was enforceable. The court found that turning the statuette over to Juarez was a conveyance under the terms of the agreement, thereby triggering AMPAS's right of first purchase for \$10.³⁴⁶ At that point, Juarez would have a lien on the \$10.³⁴⁷ Surprisingly, the court explained that "[e]ven if Juarez acquired the Oscar, it cannot be sold because of the equitable servitude."³⁴⁸

In finding that California does enforce equitable servitudes on chattels, the court looked back to *Nadell & Co. v. Grasso* — the fruit salad packaging case — which found that reasonable restrictions on personal property might be enforceable in equity against parties with notice of the restriction.³⁴⁹ Finding that Juarez had notice of the alleged servitude, the court went on to find that the "goal identified in *Nadell* for enforcing a reasonable restriction on alienation, in an unusual case, exists here,"³⁵⁰ namely that allowing the sale of the statuette would harm the "prestige" of the Oscar and diminish the value of all Oscars since the statuettes are "not available to the public nor intended 'to be treated as

³⁴³ *Id.*

³⁴⁴ As was the case in the Tamko cases, the two sides had unequal legal firepower: Juarez was represented by a solo practitioner while AMPAS was represented by four lawyers from Quinn Emanuel Urquhart & Sullivan. *Id.* at 813.

³⁴⁵ *Id.* at 813–14.

³⁴⁶ *Id.* at 814.

³⁴⁷ *Id.*

³⁴⁸ *Id.*

³⁴⁹ 346 P.2d 505, 512 (Cal. Dist. Ct. App. 1959).

³⁵⁰ *Juarez*, 304 Cal. Rptr. 3d at 818.

an article of trade.”³⁵¹ Although Juarez argued that enforcing AMPAS’s right would disrupt the usual rights of creditors, the court instead held that Juarez “had no greater rights than Ward” and was therefore “subject to the same restriction imposed by the Agreement and bylaws.”³⁵²

The idea that Juarez cannot receive a greater interest than Ward had is unsurprising and embodied in the ancient property maxim *nemo dat quod non habet*.³⁵³ Equally unsurprising is that the devil is in the details. Consider Uniform Commercial Code section 9-317(a)(2), which provides that an unperfected security interest is subordinate to the rights of someone who later becomes a lien creditor.³⁵⁴ To be sure, AMPAS’s interest is not styled as a security interest in the traditional sense, but it is economically the same thing: the right (but not obligation) to purchase the statuette at a potentially below-market value is an in rem priority claim against the statuette. Under the logic of the California District Court of Appeal, defeating a potential judgment creditor may be as simple as granting a right of first purchase to a friend, notifying the potential judgment creditor of the contract, and then arguing that allowing the judgment creditor to seize the collateral would hurt the “prestige” of whatever it is the judgment creditor might want to liquidate. If true, the foundational assumptions of section 9-317 are at risk.

Here, the framing matters. If AMPAS gave Ward something less than a fee simple interest in the statuette, it follows that his creditors cannot receive a fee simple interest in the statuette. This assumes that it’s possible to gift subinterests in personal property and implies that AMPAS would retain some liability to the extent that it purports to retain a sliver of title in all statuettes. On its face though, the agreement between Ward and AMPAS does not purport to create a co-ownership arrangement between Ward and AMPAS.³⁵⁵ The agreement looks like a contract restraining trade,³⁵⁶ which is squarely in the most problematic category of servitudes.

3. *Animals*. — Animal breeders and animal rescues alike also try to use servitudes to control animals after they sell them. Breeders sometimes require potential buyers (1) to promise not to breed the animal and (2) to require subsequent purchasers to do the same.³⁵⁷ These servitudes

³⁵¹ *Id.*

³⁵² *Id.* at 819.

³⁵³ *Legal Maxims*, BLACK’S LAW DICTIONARY (11th ed. 2019) (“No one gives what he does not have . . .”).

³⁵⁴ U.C.C. § 9-317(a)(2) (AM. L. INST. & UNIF. L. COMM’N 2017).

³⁵⁵ See *supra* note 345 and accompanying text.

³⁵⁶ See, e.g., *Juarez*, 304 Cal. Rptr. 3d at 818 (describing Juarez’s argument that “AMPAS’s right of first refusal is a presumptively void restraint on alienation”).

³⁵⁷ For example, Countryside Kennels in Colorado requires buyers to sign a nonbreeding agreement providing, “Buyer agrees that if the ownership of this puppy is transferred by the Buyer, the Non-Breeding Agreement contract remains in effect for the new Buyer.” COUNTRYSIDE KENNELS,

both protect the breeders' positions in the market and protect the brand from being diluted through careless breeding. Animal rescues use servitudes to promote their mission of protecting animals. Having carefully vetted potential adoptive families, they do not want their animals passed to an unvetted home. Despite the negative media coverage it entails, they do occasionally enforce these servitudes against downstream adoptive families.³⁵⁸

The control afforded by these would-be servitudes appears benevolent to the extent that they protect animals from abuse and protect people from poorly trained animals. But these servitudes seem less benevolent insofar as they limit competition and increase opportunities to collect fees on a single good.³⁵⁹ Breeders and rescues may also argue that the servitudes protect their reputations since a dog with an unsuitable owner is a danger to others. But reputation protection is a slippery argument because it so quickly bleeds into protection from competition. Some of the risks of offering a good for sale in the world are that owners may misuse that good or that unsavory owners might taint a brand with their own reputation.³⁶⁰ Servitudes, because they are not self-enforcing, control that risk poorly. And, as Part III will show, they come with significant third-party costs.

4. *The Pinkest Pink*. — Not all servitudes on chattels are corporate overreach. They may serve prosocial functions like limiting scalping on

LLC, PURCHASE AGREEMENT & HEALTH GUARANTEE, <https://countrysidekennelsco.com/wp-content/uploads/2023/07/Purchase-Agreement-Website.pdf> [<https://perma.cc/U68B-EEY5>]; see also *Sunrise Goldens Puppy Contract*, SUNRISE GOLDENS, <https://www.sunrisegoldens.com/puppy-contract> [<https://perma.cc/4L65-EWE8>]; *Purchase Agreement*, MOONLIGHT LABRADORS, <https://www.moonlightlabradors.com/contract> [<https://perma.cc/FMH4-RLVX>]; RIVERBEND GOLDENDOODLES, SPAY/NEUTER CONTRACT, <https://www.riverbendkennels.com/uploads/b/6aaca300-c893-11eb-b2ff-997cd2687aaf/Spay-NeuterContract-Penny.pdf> [<https://perma.cc/933L-KG9T>] (“If you decide to go ahead and give the puppy to someone without contacting RIVERBEND GOLDENDOODLES, this contract is still your responsibility to enforce in the puppy’s new home. Should we not receive conformation [sic] of the puppy’s spaying or neutering by the above listed age, as the original purchaser, you will then be liable for the dog’s full purchase breeding value, which is \$1,000 more than the pet price.”). The American Kennel Club, in an advice blog on their website, notes that spay and neuter provisions are commonplace. See Denise Flaim, *Everything You Need to Know About Breeder Contracts*, AM. KENNEL CLUB (May 25, 2023), <https://www.akc.org/expert-advice/dog-breeding/everything-you-need-to-know-about-breeder-contracts> [<https://perma.cc/J526-7L24>].

³⁵⁸ Cherie Travis, *Avoiding Adopter Roulette*, ANIMAL SHELTERING, Mar.–Apr. 2011, at 49, 50–51, <https://www.wellbeingintlstudiesrepository.org/cgi/viewcontent.cgi?article=1047&context=animshel> [<https://perma.cc/FP4U-DAZX>] (discussing the complexity of enforcing nontransfer contracts against third parties). In one notable example, a dog rescue repossessed a puppy that the comedian Ellen DeGeneres initially adopted but later rehomed to her hairdresser. *DeGeneres Doggie Drama Continues*, ABC NEWS (Feb. 18, 2009, 3:47 PM), <https://abcnews.go.com/GMA/story?id=3739999> [<https://perma.cc/J4ND-R7FQ>].

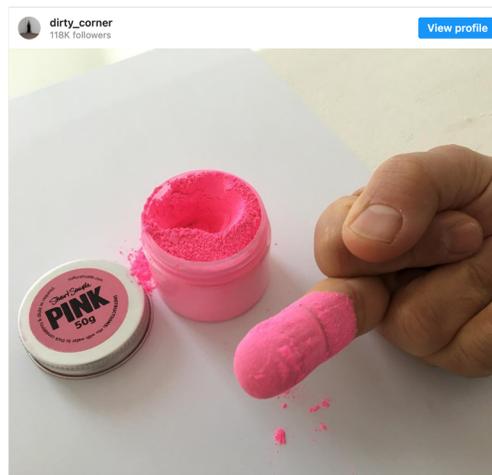
³⁵⁹ See, e.g., *Spay/Neuter Contract*, ALPINE BERNEDOODLES, <https://www.alpinebernedoodles.com/spay-neuter-contract> [<https://perma.cc/HZ83-9CQA>].

³⁶⁰ See, e.g., Priya Elan, *Fred Perry Withdraws Polo Shirt Adopted by Far-Right Proud Boys*, THE GUARDIAN (Sept. 29, 2020, 2:43 AM), <https://www.theguardian.com/world/2020/sep/28/fred-perry-withdraws-polo-shirt-adopted-by-far-right-proud-boys> [<https://perma.cc/4Q52-C4BM>].

in-demand goods³⁶¹ or enhancing equity in art markets. For example, in response to superstar artist Anish Kapoor contracting for exclusive rights to an exceptionally black coating called Vantablack, Stuart Semple created what is allegedly the pinkest pink.³⁶² Semple was so mad about Kapoor's exclusive license that he added this agreement to his online storefront:

By adding this product to your cart you confirm that you are not Anish Kapoor, you are in no way affiliated to Anish Kapoor, you are not purchasing this item on behalf of Anish Kapoor or an associate of Anish Kapoor. To the best of your knowledge, information and belief this paint will not make its way into the hands of Anish Kapoor.³⁶³

Naturally, Anish Kapoor responded by posting this image to his Instagram page with the comment “[u]p yours #pink”³⁶⁴:



If Kapoor, himself or through an agent, bought the pigment off Semple's website, then he violated the website's terms of service. That is a simple contract problem. But if a third party sent the pigment to

³⁶¹ See, e.g., Matthew J. Parlow, *The Law and Economics of Ticket Scalping*, 68 WAYNE L. REV. 345, 346 (2023); Sheree Rabe, *Ticket Scalping: Free Market Mirage*, 19 AM. J. CRIM. L. 57, 57 (1991) (asserting that some restrictions are “necessary to protect the public from extortion and control of the market by scalpers”); cf. Alexander P. Frawley, Comment, *Revoking the Revocable License Rule: A New Look at Resale Restrictions on Sports Tickets*, 165 U. PA. L. REV. 433, 438–40 (2017) (discussing the limitations placed on sports fans regarding ticket resales).

³⁶² Adam Rogers, *Art Fight! The Pinkest Pink Versus the Blackest Black*, WIRED (June 22, 2017, 7:00 AM), <https://www.wired.com/story/vantablack-anish-kapoor-stuart-semple> [<https://perma.cc/MZU5-ATD7>].

³⁶³ **The World's Pinkest Pink — Powdered Paint by Stuart Semple*, CULTURE HUSTLE USA, <https://www.culturehustleusa.com/products/pink-50g-powdered-paint-by-stuart-semple> [<https://perma.cc/MX3H-9Q8Y>].

³⁶⁴ Anish Kapoor (@dirty_corner), INSTAGRAM (Dec. 23, 2016), <https://www.instagram.com/p/BOWz73wgj7R> [<https://perma.cc/QYL4-QS5X>].

Kapoor, Semple would have to argue that something about that tub of pink prevented it from coming into Kapoor's ownership to prevent Kapoor from using his pink. This would be a hard lift precisely because property doctrine has not historically recognized servitudes on chattels. Here, an equitable servitude on the pigment may tend to Semple greater control over his work. Other artists may want to use servitudes to capture value on the secondary market.³⁶⁵ But there is no path to these autonomy-enhancing aspects of equitable servitudes without the costs.

* * *

Taken together, these examples show that there is demand for equitable servitudes on chattels. But demand alone is not sufficient to justify abandoning an ancient rule. Even when there are good reasons to allow servitudes, anticompetitive reasons are often close behind.³⁶⁶ And, if software offers any lesson, it is that for better or for worse, manufacturers want tools like servitudes to facilitate price discrimination.³⁶⁷ But this demand has always been present and the common law has nevertheless held firm against enforcing servitudes on chattels. To the extent that courts now are sometimes enforcing these servitudes, something has changed.

D. Complex Doctrine and the Limits of Lawyers

The ongoing litigation over the premature failure of Tamko roofing shingles offers a window into how lawyers are litigating cases in which a firm attempts to bind subsequent owners of a chattel to a shrinkwrap contract. The briefing in these cases reveals that plaintiffs' lawyers typically concede that the shrinkwrap agreements are contracts, and then they argue that their client either did not take the steps necessary for formation to occur or that enforcing the agreement against their client would be unconscionable. Given the low barriers to formation³⁶⁸ and confusion around unconscionability,³⁶⁹ especially in federal court,³⁷⁰ neither argument is a strong position. Indeed, recall that the Eleventh

³⁶⁵ Thanks to Adrienne Davis for raising this argument.

³⁶⁶ See Van Houweling, *supra* note 10, at 921–23.

³⁶⁷ See Mulligan, *Licenses*, *supra* note 10, at 1111.

³⁶⁸ See Tess Wilkinson-Ryan & David A. Hoffman, *The Common Sense of Contract Formation*, 67 STAN. L. REV. 1269, 1269 (2015) (“We find that the colloquial understanding of contract law is almost entirely focused on formalization rather than actual assent, though the modern doctrine of contract formation takes the opposite stance.”); see also Chunlin Leonhard, *The Unbearable Lightness of Consent in Contract Law*, 63 CASE W. RES. L. REV. 57, 60–62 (2012) (discussing the low thresholds for defining consent and how they are a breeding ground for coercion and manipulation).

³⁶⁹ See Jacob Hale Russell, *Unconscionability's Greatly Exaggerated Death*, 53 U.C. DAVIS L. REV. 965, 1001 (2019) (stating that “[b]ecause unconscionability has been poorly explained, scholars and courts have often expressed confusion” about how the doctrine relates to other areas of contract law).

³⁷⁰ See generally Issacharoff & Marotta-Wurgler, *supra* note 243.

Circuit mocked the plaintiffs in *Dye* for arguing that actually lacking notice of a contract was a barrier to formation.³⁷¹

Lawyer quality is not an obvious explanation for the outcome in these cases. On the one hand, Tamko has relied on some of the nation's largest firms for its defense. For example in *Hoekman v. Tamko Building Products, Inc.*,³⁷² Skadden, Arps, Slate, Meagher & Flom LLP — a multinational firm with around 1,700 lawyers³⁷³ — represented Tamko alongside local counsel.³⁷⁴ In *Krusch*, McGuireWoods³⁷⁵ appeared for Tamko.³⁷⁶ But on the other hand, with a few exceptions, the consumers in the Tamko cases have mostly been represented by attorneys at regional firms.³⁷⁷ Well-established plaintiffs' firms appeared in *Hoekman*³⁷⁸ and *Dye*,³⁷⁹ which were styled as class actions.³⁸⁰ Once an insurer steps in for the plaintiff, the dispute then features two parties with significant litigation experience.³⁸¹ Public Justice,³⁸² a leading public interest nonprofit, represented the homeowners in their appeal in the Eleventh Circuit in *Dye*.³⁸³ Nevertheless, plaintiffs pursue litigation strategies that run squarely into extremely unfavorable arbitration precedent.

This raises the following question: Why is it that litigants are not trying to approach some of these terms of service cases as servitudes cases? While there is no guarantee that courts would be receptive to

³⁷¹ See *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 682–83 (11th Cir. 2018).

³⁷² No. 14-cv-01581, 2015 U.S. Dist. LEXIS 113414 (E.D. Cal. Aug. 24, 2015).

³⁷³ *Contact Us*, SKADDEN, ARPS, SLATE, MEAGHER & FLOM LLP & AFFILIATES, <https://www.skadden.com/contact-us> [<https://perma.cc/4RSY-26QP>].

³⁷⁴ *Hoekman*, 2015 U.S. Dist. LEXIS 113414, at *1.

³⁷⁵ See *About Us*, MCGUIREWOODS, <https://www.mcguirewoods.com/about-us> [<https://perma.cc/7RY6-NGJS>] (explaining that it is “a full-service firm providing legal and public affairs solutions to corporate, individual and nonprofit clients worldwide for more than 200 years collectively” and has over twenty offices worldwide).

³⁷⁶ *Krusch v. TAMKO Bldg. Prods., Inc.*, 34 F. Supp. 3d 584, 586 (M.D.N.C. 2014).

³⁷⁷ In *Krusch*, two regional firms, Tuggle Duggins P.A. and Moore & Van Allen PLLC, represented the plaintiff. Tuggle Duggins P.A. is located primarily in North Carolina. See *Contact Us*, TUGGLE DUGGINS, <https://www.tuggleduggins.com/contact-us> [<https://perma.cc/BB6Z-9YL7>]. Moore & Van Allen PLLC is a larger, albeit regional, firm throughout the Southeast, comprised of over four hundred attorneys. See *About: Fast Facts*, MOORE & VAN ALLEN, <https://www.mvalaw.com/about-fast-facts> [<https://perma.cc/M8MW-3K37>].

³⁷⁸ *Hoekman*, 2015 U.S. Dist. LEXIS 113414, at *1.

³⁷⁹ *Dye v. Tamko Bldg. Prods. Inc.*, 908 F.3d 675, 677 (11th Cir. 2018).

³⁸⁰ *Id.* at 679; see also *Hoekman*, 2015 U.S. Dist. LEXIS 113414, at *3.

³⁸¹ See Charles Silver & Kent Syverud, *The Professional Responsibilities of Insurance Defense Lawyers*, 45 DUKE L.J. 255, 258 (1995) (discussing how “liability insurance explains a great deal of what happens in litigation, including the decision to bring a lawsuit, the decision to plead certain theories of recovery and to omit others, the decision to try a lawsuit instead of settling it, and the decision to settle on particular terms”); E.W. Sawyer, *The Function of Insurance Lawyers*, 20 IND. L.J. 197, 197 (1945).

³⁸² PUB. JUST., <https://www.publicjustice.net> [<https://perma.cc/T386-5382>] (“We take on the biggest systemic threats to justice of our time — abusive corporate power and predatory practices, the assault on civil rights and liberties, and the destruction of the earth’s sustainability.”).

³⁸³ *Dye*, 908 F.3d at 677.

arguments based on arcane property doctrine, given the ease of pleading in the alternative, it is surprising that the issue is so uniformly missing. From the outside, it looks like the familiar fights over the enforceability of arbitration clauses are consuming the lawyers' and courts' attention, leading them away from other potentially fruitful arguments. Indeed Public Justice's *raison d'être* is fighting arbitration overreach,³⁸⁴ so it is unsurprising that they adopted an arbitration strategy particularly where the chain between the person who opened the shrinkwrap and the homeowner was short. Still, the servitudes argument is particularly compelling in cases where the shingles would change ownership with the sale of the home and a new homeowner may attempt to assert a products liability claim against Tamko.

It is unsurprising that in an adversarial system, courts would look to the litigants to situate the legal issues in a case in appropriate doctrine.³⁸⁵ Especially when courts are busy, they are relying on the litigants to raise relevant law to their attention.³⁸⁶ The corollary to this is that the lawyers are as responsible for making the law as the judges. And, if litigators narrow their framework for understanding relationships between firms and consumers to one governed first and foremost by contract, it follows that courts may inadvertently run contract law's reach beyond its historical boundaries.

At least one court has shown itself to be open to servitudes arguments when litigants raise them. In *Juarez v. Ward*,³⁸⁷ the Oscar statuette case, the solo practitioner representing Juarez explicitly argued that the agreement purporting to limit the sale of the statuette was an equitable servitude³⁸⁸ and in turn, the appellate court thoroughly considered that possibility.³⁸⁹ Without access to briefing in trial-level state courts, it is impossible to say how frequently frontline lawyers make — and

³⁸⁴ See *40 Years 40 Cases*, PUB. JUST., <https://www.publicjustice.net/40-years-40-cases> [<https://perma.cc/28TK-GJY9>].

³⁸⁵ See Robert P. Lawry, *The Central Moral Tradition of Lawyering*, 19 HOFSTRA L. REV. 311, 340 n.193 (1990) (“[T]he role of the lawyer as a partisan advocate appears not as a regrettable necessity, but as an indispensable part of a larger ordering of affairs. The institution of advocacy is not a concession to the frailties of human nature, but an expression of human insight in the design of a social framework within which man’s capacity for impartial judgment can attain its fullest realization.” (alteration in original) (quoting Lon L. Fuller & John D. Randall, *Professional Responsibility: Report of the Joint Conference*, 44 A.B.A. 1159, 1161 (1958))).

³⁸⁶ See Charles W. Joiner, *Our System of Justice and the Trial Advocate*, 24 U. S.F. L. REV. 1, 7 (1989) (discussing how the increase in caseload requires an advocate “to be well-informed and competent, but it requires them to be aware of the ‘big picture’ and their duties to the justice system and society as a whole. An advocate must be more than just a hired gun for his or her client; rather, the advocate must serve the system and the client at the same time”).

³⁸⁷ 304 Cal. Rptr. 3d 811 (Ct. App. 2023).

³⁸⁸ Appellant’s Reply Brief at 7, *Juarez*, 304 Cal. Rptr. 3d 811 (No. B313272).

³⁸⁹ *Juarez*, 304 Cal. Rptr. 3d at 816–19.

therefore preserve for appeal — servitudes arguments.³⁹⁰ That so few modern opinions mention servitudes suggests that the line of argument is still live for exploring in court.

Of course, judges could raise servitudes issues *sua sponte*. To be sure, there is a longstanding “norm in favor of ‘party presentation,’” which is sometimes also described as a norm “against ‘judicial issue creation’” or “*sua sponte* decisionmaking.”³⁹¹ Under this norm, the litigants control how they frame their case, and judges are not supposed to raise claims that the parties miss because doing so may disrupt the parties’ expectations and violate their autonomy.³⁹² But taken too far, this norm corners judges into issuing inaccurate or incomplete descriptions of the doctrine. So while it may be fair for a judge to enforce a contract creating an equitable servitude against a third party who never raises a defense based in servitudes law, the judge should take care that the court’s opinion not support the proposition that equitable servitudes on chattels are enforceable against third parties. Leaving an opinion unpublished or even declining to issue an opinion may not be enough, especially when the same facts are being litigated nationwide and a disposition in any one case will be brought into the records of other cases. This is not to say that judges should write opinions deciding unbriefed issues, but rather it is a plea to include some cabining language in opinions to make clear that the court is not opining about servitudes.

This narrowing of the arguments that lawyers and judges use to solve problems raises questions about the status of the common law, especially its remote corners. Are forgotten doctrines still part of the law? Do courts prune these doctrines *sub rosa* when they solve their target problems using other doctrines? In a civil law system, this ambiguity might be less extreme since the disfavored doctrines would be on the books ready for judicial deployment.

III. REVISITING THE COSTS OF SERVITUDES ON CHATTELS

Having shown that contract’s growing role in the private law system has created an opening for equitable servitudes on chattels to emerge as an enforceable interest, it is worth reconsidering why the law has long refused to recognize these interests. After all, the private law otherwise mostly assumes that the parties are in the best position to set the terms of their voluntary obligations. If the doctrine is going to make some desired configurations off limits, it ought to have a good reason for doing

³⁹⁰ It is possible that trial-level attorneys do successfully make servitudes arguments in state court that either lead to a settlement or a decision from the bench not memorialized in an opinion. Nevertheless, if attorneys made servitudes arguments as frequently as they make unconscionability arguments in these cases, we could expect them to percolate up into the occasional opinion.

³⁹¹ Amanda Frost, *The Limits of Advocacy*, 59 DUKE L.J. 447, 455 (2009).

³⁹² *Id.* at 455–59.

so.³⁹³ In the case of equitable servitudes on chattels, those good reasons are plentiful.

A. Information Costs

Information costs have long been the primary justification for courts' refusal to recognize equitable servitudes on chattels except in very limited circumstances. The basic argument is that if courts recognize any equitable servitudes on chattels, everyone must worry about equitable servitudes on chattels. Because a servitude imposes a duty on everyone to comply with its mandates, it can impose costs on everyone.³⁹⁴ Even when there is no servitude present — and therefore no one deriving any benefit from the servitude — everyone incurs the cost of investigating for servitudes.

The problem of notice is one of both fairness and information costs. Because servitudes can run with the property, be it real or personal, there is always a chance that a subsequent purchaser will not have actual notice of the restriction.³⁹⁵ Courts are then faced with an unfortunate choice: they can either enforce the covenant against an unwitting party and potentially frustrate that party's expectations, or they can decline to enforce the covenant and frustrate the expectations of the party seeking to enforce it. Either way, one party will be unhappy. For this reason, the problem of notice was one of the historical justifications for judicial suspicion of servitudes on real property, and it remains a barrier to enforcing servitudes even today, despite the fact that they are a long-recognized interest in land.³⁹⁶

Servitudes as secret interests are particularly troublesome because they increase the risk of opportunism that property doctrine has sought to limit elsewhere. In general, courts do not enforce secret interests against parties that run afoul of those interests. Indeed, property doctrine is replete with rules designed to reveal secret interests. Imagine that *O* sells Blackacre in fee simple to *A* at T_1 , and *A* does not record. At T_2 , *O* sells Blackacre in fee simple to *B*, who has no knowledge of *A*'s purchase, and *B* promptly records. Under all three forms of

³⁹³ See Ben W.F. Depoorter & Francesco Parisi, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes*, GLOB. JURIST FRONTIERS, Jan. 2003, art. 2, at 1, 18 (“The restrictions on the free creation of servitudes become more intelligible when one appreciates that servitudes do not merely bring exchange benefits but also present lurking dangers for societal benefits.”).

³⁹⁴ See Merrill & Smith, *supra* note 154, at 54–55; Mulligan, *Personal Property Servitudes on the Internet of Things*, *supra* note 10, at 1127 & n.23; Van Houweling, *supra* note 10, at 932–35; Rudden, *supra* note 40, at 253.

³⁹⁵ See Molly Shaffer Van Houweling, *Cultural Environmentalism and Constructed Commons*, LAW & CONTEMP. PROBS., Spring 2007, at 23, 41 (explaining how even the Supreme Court used to be skeptical that individuals would read and understand notices affixed to chattels).

³⁹⁶ *But see* Susan F. French, *Design Proposal for the New Restatement of the Law of Property — Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1225 (1988) (arguing that modern recording technology and title search procedures have significantly reduced notice concerns in servitudes law).

recording acts currently in use, *B* would be the rightful owner of Blackacre. On these facts, *A* bears the loss from *O*'s fraud because between *A* and *B*, *A* was in the best position to prevent the loss. By not recording, *A* kept their interest a secret, and secret property interests are not typically enforceable against those who run afoul of them.

Likewise, secret liens are typically unenforceable against bona fide purchasers for value³⁹⁷ except in limited circumstances.³⁹⁸ But the name is somewhat misleading since the public may have no notice of a particular lien but have notice of the laws that can create statutory liens.

To strike the right balance, the law sometimes favors use over formal notice. Here, apparent exceptions can help clarify the rule. For example, adverse possession can create interests in property that ripen into interests in fee simple that are enforceable against subsequent purchasers of the property, even though interests created by adverse possession are typically not recorded.³⁹⁹ Courts and commentators alike have struggled with how to square these interests with not only the mandates of the recording system but also the general policy against enforcing secret interests in property.⁴⁰⁰ The elements of adverse possession provide some reprieve in that the party seeking to gain title by adverse possession must occupy the property "openly and notoriously."⁴⁰¹ Visible occupation or possession of the property provides inspection notice to would-be purchasers that someone other than the record owner holds an interest in the property.⁴⁰²

Similar notice occurs when a seller conveys property subject to a lease agreement and does not disclose the lease to the buyer. If there is a tenant in possession of the property, the would-be buyer is on notice that the property is subject to a lease and, therefore, would be bound by the terms of the lease.⁴⁰³ This rule protects tenants by preventing landlords from invalidating inconvenient leases through sales.

³⁹⁷ See *Bay State Yacht Sales, Inc. v. Squantum Engine & Serv. Co.* (*In re Bay State Yacht Sales, Inc.*), 117 B.R. 16, 18–19 (Bankr. D. Mass. 1990) (explaining that the prevention of secret liens is one of bankruptcy law's animating policies). For an explanation of how RFID and geolocation technologies can alleviate inefficiencies in the Article 9 system and the risk of secret liens, see generally Christopher G. Bradley, *Disrupting Secured Transactions*, 56 HOUS. L. REV. 965, 986–1002 (2019).

³⁹⁸ See, e.g., *In re Sheldahl, Inc.*, 298 B.R. 874, 877 (Bankr. D. Minn. 2003) (allowing enforcement of a secret lien when the legislature has specifically allowed enforcement of such liens).

³⁹⁹ See, e.g., Jeffrey Evans Stake, *The Uneasy Case for Adverse Possession*, 89 GEO. L.J. 2419, 2452 (2001) (referring to successful adverse possessors as "true owners that are not record owners").

⁴⁰⁰ See, e.g., Monica Kivel Kalo, *The Doctrine of Color of Title in North Carolina*, 13 N.C. CENT. L.J. 123, 146–47 (1982) (discussing a series of cases dealing with the tension between unregistered deeds and recorded instruments).

⁴⁰¹ See Stake, *supra* note 399, at 2423.

⁴⁰² *Id.* ("For possession to be 'open and notorious,' [an adverse possessor's] actions must be visible to others, either the neighbors or a diligent owner.")

⁴⁰³ See *Snyder v. Sperry & Hutchinson Co.*, 333 N.E.2d 421, 425 (Mass. 1975) ("[T]he buyer can adequately protect himself against a right to possession for less than seven years by consulting the

Equitable servitudes on chattels threaten this balance because there is no foolproof way to give the world notice of the servitude short of printing it on the item itself. Labeling objects with notice of a servitude may be sufficient for enforcement purposes in the near term if the terms are findable. In the longer term, dead links,⁴⁰⁴ changed mailing addresses, and even rebranding could all make it practically impossible to find the terms. This problem is different than the problem of notice in real estate.⁴⁰⁵ There, the applicable covenants are all supposed to be recorded in the property records.⁴⁰⁶ Those records may be difficult and expensive to use, and there will be mistakes, but that situation is very different from terms that could be anywhere. Moreover, even if a firm does print a servitude on an object at the time of sale, that print may no longer be legible at a later time. For example, a designer could print a servitude onto a tag in a garment and even include the exhortation that the tag cannot be removed. And yet, a purchaser is fully capable of cutting the tag out. The only way for a buyer on the secondary market to know about this servitude is for them to have knowledge from some third-party source that the garment should have had a tag inside that contained terms of use.

Contracts alone cannot solve the third-party notice problem because they are not self-enforcing. Contracts can and do include language requiring purchasers to notify downstream purchasers of certain restrictions.⁴⁰⁷ They can even require that buyers close a new contract carrying forward particular restrictions with any downstream buyer.⁴⁰⁸ But if a buyer breaches these terms, the remedy has to be a claim for damages against the buyer. Any remedy against downstream buyers would hold them to terms to which they did not agree.⁴⁰⁹

B. Waste

In this context, waste means that the tangible goods that occupy our space and time are shackled by contracts and can become unusable —

seller and the present lessee to ascertain the contents of any outstanding unrecorded lease agreement.” (citing *Cunningham v. Pattee*, 99 Mass. 248, 252 (1868); *Toupin v. Peabody*, 39 N.E. 280, 281 (Mass. 1895); GEORGE P. DAVIS, MASSACHUSETTS CONVEYANCERS’ HANDBOOK, WITH FORMS § 22 (2d ed. 1967)).

⁴⁰⁴ Consider that over eighty percent of research guides, which are created by library professionals for the purpose of facilitating access to knowledge, contain at least one dead link. Rebecca Jackson & Kristine K. Stacy-Bates, *The Enduring Landscape of Online Subject Research Guides*, 55 REFERENCE & USER SERVS. Q. 219, 226 (2016).

⁴⁰⁵ See Hansmann & Kraakman, *supra* note 156, at S407 (explaining that the recording system is one reason why it is easier to establish partial rights in real estate than in chattels).

⁴⁰⁶ See William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 894–95 (1977) (“[T]hat instrument will be recorded earlier than the time the covenantor acquired the burdened parcel.”).

⁴⁰⁷ See Chafee, *supra* note 6, at 951.

⁴⁰⁸ See *supra* notes 66–70 and accompanying text.

⁴⁰⁹ See Chafee, *supra* note 6, at 952.

not by any malfunctioning of their own, but through the workings of the contract. Should a contract on a thing at T_1 be able to turn that thing into trash at T_2 ? Put differently, is the law concerned about the creation of trash?⁴¹⁰ In property doctrine, the answer is yes.

One of the justifications for permitting the abandonment of personal property but not real property is that, as Professor Lior Strahilevitz explains, “permitting the abandonment of positive-value resources is welfare enhancing and freedom promoting.”⁴¹¹ Pervasive servitudes on chattels could mean that artists, inventors, and other people who would like to use these goods in ways other than the manufacturer contemplated would not be able to use those materials legally.⁴¹² A skeptic might say that only complex goods are subject to such contracts; accordingly, the law generally should not concern itself with true raw materials for inventors and artists.⁴¹³ But as the case of Tamko shingles shows, restrictions on building materials are already here.⁴¹⁴

Professors Julia Mahoney and Molly Van Houweling consider the issue of waste as “the [p]roblem of the [f]uture,”⁴¹⁵ which Van Houweling defines as the “excessive control by one generation over the freedom and flexibility of the next.”⁴¹⁶ This control creates both philosophical and practical problems. By allowing the present generation to consolidate and control the material resources of future generations, the law risks “recreat[ing] feudal incidents.”⁴¹⁷ However well-intentioned present owners may be, they are unlikely to guess perfectly and then respect properly the needs of the future.⁴¹⁸ In real property, the doctrine of changed conditions allows for a narrow hope that present owners might

⁴¹⁰ See JOEL FEINBERG, *The Rights of Animals and Unborn Generations*, in RIGHTS, JUSTICE, AND THE BOUNDS OF LIBERTY: ESSAYS IN SOCIAL PHILOSOPHY 159, 180–81 (2014) (“Surely we owe it to future generations to pass on a world that is not a used up garbage heap. Our remote descendants are not yet present to claim a livable world as their right . . .”).

⁴¹¹ Lior Jacob Strahilevitz, *The Right to Abandon*, 158 U. PA. L. REV. 355, 414 (2010).

⁴¹² This problem already exists in the technology space, where manufacturers like Apple “brick” old devices. Bricking devices can serve important privacy and antitheft goals, but it also hinders the secondary market for goods and in doing so creates large amounts of trash. See Matthew Gault, *Perfectly Good MacBooks from 2020 Are Being Sold for Scrap Because of Activation Lock*, VICE (Jan. 24, 2023, 9:00 AM), <https://www.vice.com/en/article/xgybq7/apple-macbook-activation-lock-right-to-repair> [<https://perma.cc/CR8Y-32LE>].

⁴¹³ See Chafee, *supra* note 6, at 1013 (“[T]he complexities and variety of modern business may eventually present opportunities for restrictions on personality which are free from the disadvantages of restraint of trade . . .”).

⁴¹⁴ See *supra* notes 1–5 and accompanying text.

⁴¹⁵ Mahoney, *supra* note 17, at 739; Van Houweling, *supra* note 10, at 900 (adopting Mahoney’s use of the phrase).

⁴¹⁶ Van Houweling, *supra* note 10, at 900.

⁴¹⁷ *Id.*

⁴¹⁸ The problem of present bias — weighing near-term gains over long-term obligations — is well established in behavioral economics. See, e.g., Yael R. Lifshitz et al., *The Future of Property*, 44 CARDOZO L. REV. 1443, 1462–63 (2023).

free themselves from obsolete servitudes.⁴¹⁹ No such doctrine exists yet for servitudes on personal property, and given courts' focus on transactional reliance when interpreting modern contracts, it is difficult to see such a doctrine evolving. For this reason, equitable servitudes risk creating a whole lot of trash and, with that, problems of space and ecological destruction. And to what end? To honor the legal rights of an entity that may no longer exist? This possibility contravenes one of the long-standing goals of property, which is to be a "fundamentally reconfigurable" system, able to meet changing patterns of use.⁴²⁰

The doctrine of waste offers some answers. Courts sometimes turn to waste as a justification for not enforcing property arrangements that would otherwise be enforceable. The paradigmatic case here is *Eyerman v. Mercantile Trust Co.*,⁴²¹ in which the Missouri Court of Appeals enjoined the executors of Louise Woodruff Johnston's estate from burning down her house as she specified in her will.⁴²² Although her home was — and today still is — in one of Saint Louis's most exclusive neighborhoods, the court, when granting neighbors' request that the burning be enjoined, recognized that destroying housing harms the whole community.⁴²³ As Strahilevitz observes, courts do permit the intentional wasting of property in many circumstances, but buildings appear to be different.⁴²⁴

As society grapples with climate catastrophe, it is inaccurate to think of personal property resources as unlimited. Every new object produced extracts a toll from the environment via energy, water, and raw materials costs to the space that that object will occupy if and when it finishes its useful life. While space in a landfill is not approaching the same level of scarcity as space for desirable housing, it is not infinite.⁴²⁵ And indeed, landfill space is in competition with housing space in many regions.⁴²⁶ In this way, waste in the personal property context implicates many of the same concerns as waste in the real property context does.

⁴¹⁹ Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 898–99 (1988).

⁴²⁰ Lee Anne Fennell, *Property as Service Streams*, in HANDBOOK ON PROPERTY LAW & THEORY (Chris Bevan ed., forthcoming) (manuscript at 2–3), https://chicagounbound.uchicago.edu/cgi/viewcontent.cgi?article=11116&context=law_and_economics_wp [https://perma.cc/RT7X-WXT9]

⁴²¹ 524 S.W.2d 210 (Mo. Ct. App. 1975); see also Fennell, *supra* note 420 (manuscript at 2–3).

⁴²² *Eyerman*, 524 S.W.2d at 211, 217; Fennell, *supra* note 420 (manuscript at 2–3).

⁴²³ See *Eyerman*, 524 S.W.2d at 217; Fennell, *supra* note 420 (manuscript at 2–3).

⁴²⁴ Lior Jacob Strahilevitz, *The Right to Destroy*, 114 YALE L.J. 781, 796–800, 807–08 (2005).

⁴²⁵ See Ryan Deer, *Landfills: We're Running Out of Space*, ROADRUNNER (Mar. 4, 2021), <https://www.roadrunnerwm.com/blog/landfills-were-running-out-of-space> [https://perma.cc/LE46-4P3J].

⁴²⁶ See, e.g., Deborah Linton, *New Homes Could Be Built on Landfill Sites to Ease Housing Shortage*, MANCHESTER EVENING NEWS (Mar. 18, 2014, 4:19 PM), <https://www.manchestereveningnews.co.uk/news/greater-manchester-news/new-homes-could-built-landfill-6846415> [https://perma.cc/32LB-FVK5].

Indeed, land fragmentation imposes both externalities on one's current neighbors and costs on future generations.⁴²⁷

A more troublesome iteration of the waste problem is the issue best described as orphan servitudes. Orphan servitudes are servitudes that protect beneficiaries that are indeterminable, uncontactable, or no longer in existence. This definition mirrors orphan works in copyright.⁴²⁸ In copyright, the visual arts pose great challenges to identifying the artist, tracing rights, and tracking down parties with authority to resolve rights issues.⁴²⁹ With physical objects, there may not be enough information on or accompanying the object itself to determine what it is or who the rights holders were at the time of manufacture. And even if those holding rights in an object can be identified, it may be impossible to trace the successors to those rights, particularly when those successors are nonpublic companies whose deals are not systematically made public.⁴³⁰

As Jerry Brito and Bridget Dooling identify, there are three main costs to orphan works in copyright: "the pass-through of a risk premium to consumers, a diminished public domain, and harm to the preservation of cultural heritage."⁴³¹ Versions of these same risks would apply in a system that broadly enforced equitable servitudes on chattels. In addition to these risks, orphan servitudes could create waste in our material world and materially reduce the wealth of people who cannot easily trade out goods they no longer need for goods that they do need.

As in the orphan-works context in copyright, the threat of an injunction creates the most significant risks when using a license-burdened object. When the U.S. Copyright Office studied orphan works, filmmakers and publishers commented that it was the fear of an untimely injunction, after the work was done and the money spent, that often caused them to avoid creating derivative works based on orphan works.⁴³² For visual artists and inventors, untimely injunctions pose a similar risk if courts vigorously enforce equitable servitudes on chattels. Because a safer path for them would be to use only unencumbered materials, many objects would not be repurposed and recycled. Indeed, all recycling is threatened if broad servitudes and the threat of injunctions make scrap operations riskier than they are profitable.

⁴²⁷ Michael A. Heller, *The Boundaries of Private Property*, 108 YALE L.J. 1163, 1173 (1999).

⁴²⁸ See U.S. COPYRIGHT OFF., REPORT ON ORPHAN WORKS 15 (2006), <https://www.copyright.gov/orphan/orphan-report-full.pdf> [<https://perma.cc/C9CQ-REWW>].

⁴²⁹ See Christian L. Castle & Amy E. Mitchell, *Unhand that Orphan: Evolving Orphan Works Solutions Require New Analysis*, ENT. & SPORTS LAW., Spring 2009, at 1, 21–22 (comparing the problem of orphan works in visual arts to that of orphan works in the performing arts).

⁴³⁰ Here, the privacy functions of corporate ownership could work against anyone attempting to determine who the beneficiary of an equitable servitude on a chattel is.

⁴³¹ Jerry Brito & Bridget Dooling, *An Orphan Works Affirmative Defense to Copyright Infringement Actions*, 12 MICH. TELECOMMS. & TECH. L. REV. 75, 84 (2005).

⁴³² U.S. COPYRIGHT OFF., *supra* note 428, at 13.

Beyond the problem of trash, the problem of waste also concerns time, money, and intangible resources. If equitable servitudes on chattels litter the built world, everyone has to spend time researching those terms, attempting to secure the rights that they need, or coping with the risk they bring upon themselves when they, perhaps rationally, decide to ignore the terms and just live their lives.⁴³³ We can express this time as increased transaction costs, but that framing does not fully capture what it means to consume this ultimately nonrenewable resource.

C. *Autonomy, Dignity, and the Self*

In addition to imposing costs on third parties, equitable servitudes on chattels have costs to owners. Restrictions on freedom to contract that address these costs are more controversial than those that address costs to third parties because these costs are part of the bargain that the owner struck.⁴³⁴ If there is demand for servitude-free configurations, we might expect the market to provide them, albeit at a price that reflects whatever value firms receive when they choose to include a servitude. On these facts, many consumers might prefer lower-cost but restricted goods.⁴³⁵ But we should be skeptical that the ability to choose among terms, especially nonsalient terms, is valuable to consumers at all.⁴³⁶ More choices do not ensure more autonomy,⁴³⁷ especially when none of the choices are good.⁴³⁸ Moreover, it can be difficult to argue that sellers have a duty to sell a good in a particular configuration when they, in fact, have no duty to sell that good at all. Nevertheless, it is worth spending a moment on costs to owners themselves because flourishing is, as Professor Eduardo M. Peñalver puts it, “an unavoidably cooperative endeavor.”⁴³⁹ Autonomy may demand that individuals have room to make suboptimal choices. But it does not follow that society must be indifferent to the universe of choices because the well-being of society is comprised of the well-being of individuals within that society.

⁴³³ See Heller, *supra* note 427, at 1173 (explaining that it may be expensive to reassemble rights fragmented over numerous parties).

⁴³⁴ Cf. Nathan B. Oman, Essay, *Reconsidering Contractual Consent: Why We Shouldn't Worry Too Much About Boilerplate and Other Puzzles*, 83 BROOK. L. REV. 215, 235 (2017) (describing critiques to restrictions on the freedom of contract as paternalistic).

⁴³⁵ There are ample examples of consumers preferring lower-cost goods when price discrimination is possible. One example is Tesla buyers choosing vehicles with software that limits the range of the battery over higher-priced vehicles that lack the range-blocking software. See Robert H. Frank, *Tesla's Tiered Pricing Is a Hurdle, But a Fair One*, N.Y. TIMES (Oct. 27, 2017), <https://www.nytimes.com/2017/10/27/business/teslas-pricing-hurdle-not-hindrance.html> [<https://perma.cc/L6WK-CPDK>]. To be sure, these same consumers would probably prefer to pay the lower price and avoid the range-blocking software, but without that option, price may be a more important consideration.

⁴³⁶ Cf. Oman, *supra* note 434, at 217 (arguing that meaningful consent to contract terms is not necessary to justify contract enforcement).

⁴³⁷ See Cass R. Sunstein, *Choosing Not to Choose*, 64 DUKE L.J. 1, 40 (2014).

⁴³⁸ Hoffman, *supra* note 205, at 1424.

⁴³⁹ Eduardo M. Peñalver, *Land Virtues*, 94 CORNELL L. REV. 821, 869 (2009).

Equitable servitudes on chattels complicate individual autonomy. The fee simple absolute, property's most basic form, is the epitome of autonomy. Fee simple, as it is commonly called, is a potentially indefinite interest that bestows on the owner the right to exclude, possess, use, consume, improve, sell, and devise.⁴⁴⁰ It is the "the largest possible aggregate of rights, privileges, powers and immunities with respect to the land."⁴⁴¹ This strong form of ownership is what commentators like Blackstone had in mind when they spoke of ideals like owners' "despotic dominion" over their property.⁴⁴²

Autonomy requires a threshold level of wealth that makes choices possible. Greater wealth enables a greater range of choices. The default form of ownership, the fee simple absolute, bestows on holders both the downside risk that the asset may lose value and the upside risk that the asset will increase in value — it is the latter, of course, that enables wealth creation.⁴⁴³ Likewise, if an owner decides to abandon their interest in property and someone else claims it, thereby acquiring title to the property, the new owner then holds the upside risk. If that asset appreciates in the future, the former owner cannot demand a share of that increase from the new owner, because the default rule is that upside risk follows title. Asset holders who want to grant others access to their assets but retain the upside risk should use licenses to grant that access and avoid selling it, since a sale typically transfers upside risk to the new owner.

Thinking about fee ownership of chattels can seem trivial given the low average value of most consumers' possessions. Still, each thing is an asset — or a liability if it proves expensive to dispose of. For many people, the ability to sell their things is an important source of income during tough times. Without ownership in fee, consumers would pay money to acquire things, but may not be able to recoup these costs when those things are no longer useful or when the value stored in those things must be deployed elsewhere.

Autonomy over one's thing is the right to choose whether to share, strengthen relationships, and build community with that thing. Consider, for example, what commentators have called inclusion and dispossession.⁴⁴⁴ In this context, inclusion encompasses what is broadly called the sharing economy, even though microtransactions between

⁴⁴⁰ See RESTATEMENT (FOURTH) OF PROP. § 2.2 (AM. L. INST., Tentative Draft No. 3, 2022).

⁴⁴¹ ROGER A. CUNNINGHAM, WILLIAM B. STOEBUCK & DALE A. WHITMAN, *THE LAW OF PROPERTY* 29 (2d ed. 1993).

⁴⁴² 2 WILLIAM BLACKSTONE, *COMMENTARIES* *2.

⁴⁴³ See *Carruth v. Easterling*, 150 So. 2d 852, 855 (Miss. 1963) (explaining the rule of increase as allocating the benefit of an increasing herd to the owner).

⁴⁴⁴ See, e.g., Jill Fraley, *The Meaning of Dispossession*, 50 IND. L. REV. 517, 518 (2017); Dave Fagundes, *Why Less Property Is More: Inclusion, Dispossession, & Subjective Well-Being*, 103 IOWA L. REV. 1361, 1365 (2018).

peers are not quite the same as altruistic sharing.⁴⁴⁵ We might think of inclusion as the ability to give others access to property that we own. Dispossession, according to commentators such as Professor Dave Fagundes, can refer to voluntary disposition of donating property.⁴⁴⁶ Fagundes looks to recent advancements in the study of happiness — hedonics — to explain why giving away one’s property, whether through charitable contributions or gifts in kind, is more happiness-inducing than acquisition.⁴⁴⁷ Prioritizing dispossession over acquisition effectively turns the focus of property doctrine on its head.⁴⁴⁸ The ability to choose to use one’s things in the service of another is an argument in favor of policies that favor alienation. Donating is but one form of alienation, although it is a particularly expressive form in that the donor chooses their beneficiary and, in so doing, expresses their values. This is somewhat different from selling an asset at market in a commercial transaction. Indeed, we might think of choosing to donate unwanted goods rather than throwing them away as an expressive choice in its own right.

Equitable servitudes can also pose a direct threat to expression. For example, a shrinkwrap contract could attempt to limit how owners display or discuss products. Nondisparagement clauses were already common in other consumer contracts before Congress stepped in to protect the right to leave bad reviews.⁴⁴⁹ Firms would undoubtedly welcome the opportunity to tether the restriction to the thing instead of just its first user. Because these nondisparagement clauses remove information from the market and otherwise impinge on free expression values, many jurisdictions have limited their enforceability,⁴⁵⁰ even if some commentators defend them as essential for businesses in today’s online environment.⁴⁵¹ Copyright licenses already sometimes include nondisparagement clauses, which has the effect of tying the clause to the item bearing the copyright.⁴⁵² Whether doctrine such as abuse of copyright might prevent the enforcement of these terms, however, is not well

⁴⁴⁵ Fagundes, *supra* note 444, at 1380 & n.93.

⁴⁴⁶ *See id.* at 1394, 1403; *cf.* Fraley, *supra* note 444, at 518 (conceiving of dispossession as loss of property unvoluntarily).

⁴⁴⁷ Fagundes, *supra* note 444, at 1394–97.

⁴⁴⁸ Fraley, *supra* note 444, at 518.

⁴⁴⁹ *See* Consumer Review Fairness Act of 2016 (CRFA), Pub. L. No. 114-258, § 2(b), 130 Stat. 1355, 1355–56 (codified at 15 U.S.C. § 45b(b)); *see also* Wayne R. Barnes, *The Good, The Bad, and the Ugly of Online Reviews: The Trouble with Trolls and a Role for Contract Law After the Consumer Review Fairness Act*, 53 GA. L. REV. 549, 576–82 (2019) (discussing the state of affairs before the CRFA); Eric Goldman, *Understanding the Consumer Review Fairness Act of 2016*, 24 MICH. TELECOMMS. & TECH. L. REV. 1, 2–5 (2017) (tracing the background of the CRFA and its goals).

⁴⁵⁰ For example, the CRFA limits firms’ abilities to retaliate against customers who leave poor reviews. *See* 15 U.S.C. § 45b(b).

⁴⁵¹ *See, e.g.*, Lori A. Roberts, *Brawling with the Consumer Review Site Bully*, 84 U. CIN. L. REV. 633, 638 (2016).

⁴⁵² *E.g.*, *Video Pipeline, Inc. v. Buena Vista Home Ent., Inc.*, 342 F.3d 191, 203 (3d Cir. 2003).

developed.⁴⁵³ For example, in *Video Pipeline, Inc. v. Buena Vista Home Entertainment, Inc.*,⁴⁵⁴ Disney’s licenses granting websites permission to use its film trailers mandated that the website “not be derogatory to or critical of the entertainment industry or of [Disney]”; otherwise the license would be rendered “null and void” and the licensee would “be liable to all parties concerned for defamation and copyright infringement, as well as breach of contract.”⁴⁵⁵ Video Pipeline argued that “such licensing agreements seek to use copyright law to suppress criticism and, in so doing, misuse those laws, triggering the copyright misuse doctrine,”⁴⁵⁶ which would give them a defense to an infringement action by Disney. The Third Circuit ultimately rejected Video Pipeline’s argument.⁴⁵⁷ Other courts have allowed a misuse of copyright defense when, among other things, the rights holder is attempting to restrict access to materials not protected by copyright.⁴⁵⁸ Regardless of which path courts ultimately choose, the mere presence of these restrictions might chill free expression. These same concerns would apply beyond the intellectual property context to equitable servitudes more generally. While any non-disparagement agreement presents these concerns, equitable servitudes, because they may bind more people over a longer period of time than a simple contract would, might have a deeper impact on expression.

Autonomy and self-expression intersect again in the right to tinker and create. Those who view themselves as handy people or artists need access to raw materials with which to create. While some people use commercial products specifically designed for tinkerers and artists — the kinds of things for sale at Home Depot and Blick — there is an even stronger custom of creative people using found objects, repurposing what they have, and putting old materials to novel uses. Equitable servitudes that restrict how property might be repurposed would thwart this custom.

It is a mistake to underestimate the significance of the loss of the right to tinker and create. Many exciting and essential products that help increase the standard of living over time have been created by people playing with things they have in their proverbial garage. Consider the Corsi-Rosenthal Box, the DIY air purifier used to cheaply supplement HVAC systems that were not designed with airborne respiratory illnesses like COVID-19 in mind. Made of a box fan, four square MERV-13 filters, tape, and cardboard, this filter has proven itself to be

⁴⁵³ See 4 MELVILLE B. NIMMER & DAVID NIMMER, NIMMER ON COPYRIGHT § 13.09[A][3][d] (2023).

⁴⁵⁴ 342 F.3d 191.

⁴⁵⁵ *Id.* at 203 (alteration in original).

⁴⁵⁶ *Id.*

⁴⁵⁷ See *id.* at 206.

⁴⁵⁸ See, e.g., *Shloss v. Sweeney*, 515 F. Supp. 2d 1068, 1080–81 (N.D. Cal. 2007).

effective and economical.⁴⁵⁹ The Corsi-Rosenthal Box is emblematic of how people put goods to novel uses to solve problems: the filters were originally designed for HVAC systems, box fans have been around for decades, and the fan's own packaging has proven to be a good source of just the right cardboard for the job.⁴⁶⁰ The Corsi-Rosenthal box is just one example of the DIY efforts deployed by desperate people around the world to keep their loved ones safe from harm.⁴⁶¹ We might look back at the intense DIY phase of the pandemic cynically, but these efforts were an expression of love and community in an emergency. They were, and still are, profoundly human.

Now imagine that the air filters came with a shrinkwrap contract claiming that owners and their successors can only use the filters in the HVAC systems for which they were intended. If this contract were truly binding and firms could get courts to grant relief against anyone misusing the filter, this innovation may never have occurred, and if it did, publicizing it would have invited legal risk.⁴⁶² Anyone who benefits from cheap air filtration would be worse off if only because of the uncertainty of getting sued by the air filter manufacturer. Although reputational concerns about blocking air filtration technology in a global pandemic might have kept enforcement actions at bay, the innovation environment likely would have been chilled.

Less urgent perhaps — but no less human or profound — is making art. Whether as a hobby, profession, or something in between, visual artists take raw materials and transform them into something new. Some of these supplies already come tangled up with intellectual property–related restrictions that prevent the artists from fully owning their creations. For example, bolts of fabric printed with sports logos are often labeled: “This fabric is for individual consumption only. Any unauthorized use of this fabric is prohibited and illegal.”⁴⁶³ Online advice for crafters warns that the “individual use” language prohibits crafters from giving away their creations for free.⁴⁶⁴

⁴⁵⁹ Rachael Dal Porto et al., *Characterizing the Performance of a Do-It-Yourself (DIY) Box Fan Air Filter*, 56 AEROSOL SCI. & TECH. 564, 564 (2022).

⁴⁶⁰ Lena H. Sun, *After Three Years of Covering Covid, I Built My Own Air Filter*, WASH. POST (Jan. 13, 2023, 6:00 AM), <https://www.washingtonpost.com/health/2023/01/13/air-filter-diy-covid/> [<https://perma.cc/29QH-USTG>].

⁴⁶¹ See Adam Rogers, *Could a Janky, Jury-Rigged Air Purifier Help Fight Covid-19?*, WIRED (Aug. 6, 2020, 7:00 AM), <https://www.wired.com/story/could-a-janky-jury-rigged-air-purifier-help-fight-covid-19/> [<https://perma.cc/EH3U-75ML>].

⁴⁶² While filter makers would have little incentive to enforce their rights against anyone whose creation stands to increase demand for filters, if the filter maker is owned by a firm that produces rebuilt air filtration systems, these incentives may shift.

⁴⁶³ *Fabric Traditions New England Patriots Fleece Fabric Logo*, JOANN, <https://www.joann.com/new-england-patriots-nfl-fleece-fabric/7410277.html> [<https://perma.cc/QLV5-FLH4>].

⁴⁶⁴ Jessica Suotmaa, *Intellectual Property Infringement: Can I Sell Handmade Creations from Licensed Fabric?*, LUM L. GRP. (Jan. 11, 2019), <https://www.lumlawgroup.com/can-i-sell-handmade-items-made-of-licensed-brand-fabric/> [<https://perma.cc/8T45-3ATE>].

While these IP-related restrictions may have a solid footing in trademark law, the boundaries between real IP concerns and mere servitudes on chattels are eroding. For example, bolts of calico fabric that home quilters relied on to build the United States's rich tradition of needlecrafts can now also be labeled as being for individual use only.⁴⁶⁵ Here, however, the analogy requires some nuance. The creators of fabrics are artists to the same extent as the quilters and deserve to be compensated for their work. Likewise, if the fabrics incorporate trademarks, those rights need to be cleared. These intellectual property rights problems mirror equitable servitudes on chattels, but they are the predictable outcome of the intellectual property laws rather than the unexpected offspring of adhesion contracts. In this context, the more problematic equitable servitudes occur when the licensing norms that follow IP-laden fabrics begin appearing on more generic fabric bolts as well. After all, it is very easy to print "for individual use only" on a bolt, even if the fabric on that bolt is the commodity-grade cotton muslin that quilters for centuries have used as their canvas. When this license creep happens, more of, if not all of, the supply of materials appears to be locked up. Quilters might hesitate to sell work that they incorrectly believe to be made with restricted fabric. Worse still, they may stop creating altogether if they cannot recover the costs of their hobby through sales.

The introduction of IP-like licenses into supplies adds a layer of transaction costs and risk to artists' work. And, where artists cannot secure the rights they need, their expression is constrained. The constraint already occurs when artists cannot clear the intellectual property rights that they need to create new works with old material, even when the rights holder is nowhere to be found.⁴⁶⁶ To be sure, quilters could make their own fabric from scratch — raising the cotton, spinning the thread, weaving the fabric, and dyeing it — all before they start quilting. But if vertical integration is the only path to full ownership, that is a big change in the structure of economy and in where power lies in society.

Although restrictions on materials may sound fanciful, increasingly they are not. For example, many complex consumer goods are now impossible to repair because they come wrapped in a license that permits repair only by professionals authorized by the manufacturer.⁴⁶⁷ This is

⁴⁶⁵ See Gabrielle Davenport, *What Is Calico? Take a Look at the History of the Fabric*, HOUSE BEAUTIFUL (Aug. 27, 2020), <https://www.housebeautiful.com/design-inspiration/a33823024/what-is-calico> [<https://perma.cc/LAU7-7XJM>].

⁴⁶⁶ See Castle & Mitchell, *supra* note 429, at 1 (explaining how projects are abandoned when rights cannot be traced and resolved); U.S. COPYRIGHT OFF., *supra* note 428, at 1 (explaining that it is not in the public interest for artists to abandon projects when they cannot find the rights holders they need to complete their projects).

⁴⁶⁷ See generally AARON PERZANOWSKI, *THE RIGHT TO REPAIR: RECLAIMING THE THINGS WE OWN* (2022); Aaron Perzanowski, *Consumer Perceptions of the Right to Repair*, 96 IND. L.J. 361 (2021).

the so-called right to repair debate, in which consumers and their advocates have lobbied governments to limit the enforceability of such restrictions.⁴⁶⁸ Their arguments against these restrictions are two-fold: they create waste when products are no longer repairable because companies would prefer that you purchase new goods,⁴⁶⁹ and they increase the cost of repair because people who can perform the repairs themselves are not permitted to do so.⁴⁷⁰ Firms, of course, counter that restrictions on the right to repair are essential: not only do they help maintain the quality and safety of the products, but they are also simply included as part of the pricing plan.⁴⁷¹ While it may be true that consumers would happily trade their right to repair for a significant reduction in upfront costs, to date there is little evidence of such price reductions occurring.⁴⁷² Moreover, because things persist in space over time, the bargain that the first consumer would make is not the only relevant concern. Property design must consider the needs of the people who will occupy the same space in the future.

The right to repair, make art, and tinker are all things that consumers could pay for if firms made that option available. But there is no reason to assume that firms do or should have the power to use contract to limit these rights, especially by imposing limitations on the material environment itself. Indeed, one of the benefits of the traditional prohibition against equitable servitudes on chattels is that it prevents firms from reaching too deep into the material environment to clamp down on novel uses of their products. Equitable servitudes on chattels stand to push us further away from a society of makers toward a society of consumers. Servitudes could transform our material environment into an even more single-use space in which only professionals have the materials to create new things. Such a shift would be a large-scale de-skilling. Beyond the practical implications, these restrictions deny individuals one source of meaningful accomplishment.

These shifts in how the creative economy works and in how individuals relate to their material environment are so significant that if they are going to occur, they ought not happen accidentally. Yet that is what is happening. Half-lawyered individual contracts cases are remodeling the architecture of property rights without anyone raising these implications to courts or legislatures.

D. Administrability and Legitimacy

The beauty of a bright-line prohibition on equitable servitudes on chattels is that such a prohibition is easy to enforce. There will be some

⁴⁶⁸ See Perzanowski, *supra* note 467, at 377.

⁴⁶⁹ See PERZANOWSKI, *supra* note 467, at 16–17.

⁴⁷⁰ See *id.* at 23.

⁴⁷¹ *Id.* at 207.

⁴⁷² *But cf. id.* at 205.

difficult cases, such as trade disputes like those Chafee identifies as slipping past the prohibition.⁴⁷³ There will also be times when courts must decide if a novel argument about agency or tortious interference is a ploy to circumvent the ban. But courts will not be called on to determine whether some feature of an alleged servitude on a chattel causes it to violate public policy.

While it is theoretically possible that consumers — and the many businesses who find themselves with no more bargaining power than consumers⁴⁷⁴ — may be able to challenge overreaching servitudes, the costs and other burdens of litigation guarantee that few servitudes that might be invalidated actually will be invalidated. Any legitimization of equitable servitudes on chattels is likely to lead to the same ubiquitous and onerous terms that predominate software licenses.⁴⁷⁵

One of the triumphs of the law until the middle of the twentieth century was the development of doctrines that better align with consumers as they actually exist.⁴⁷⁶ Where doctrines like *caveat emptor* placed significant information costs on consumers, innovations in common law imposed obligations to disclose on those parties that are in a better position to generate accurate information. Courts have explained that increasingly complex technology justified imposing obligations on landlords and consumer-products manufacturers alike.⁴⁷⁷ This shift was not a perfect move toward behavioral science-informed law, but it was an important step in that direction. Subjecting consumers to new fact-intensive tests to determine whether an equitable servitude on a chattel is enforceable would be a discouraging step backward.

The low likelihood that consumers could reliably invalidate overreaching equitable servitudes on chattels suggests that allowing them to stand could further undermine the legitimacy of the adversarial system and the private law. Consumers would not be wrong to feel like the deck is stacked against them.

IV. SECOND-BEST RULES

The foregoing Parts have made the case that the best path forward is for courts to continue rejecting servitudes on chattels. The reasons for rejecting equitable servitudes on chattels remain as vital today as they were a century ago.⁴⁷⁸ But if there are legitimate needs for

⁴⁷³ See Chafee, *supra* note 6, at 1007–13.

⁴⁷⁴ See, e.g., W. Kuan Hon et al., *Negotiated Contracts for Cloud Services*, in CLOUD COMPUTING LAW 73, 78–79 (Christopher Millard ed., 2d. ed. 2021) (explaining that even large firms that would be “trophy” clients for most vendors lack bargaining power against cloud storage firms).

⁴⁷⁵ See *supra* section I.C, pp. 1072–75.

⁴⁷⁶ See Robert B. Reich, *Toward a New Consumer Protection*, 128 U. PA. L. REV. 1, 5–8 (1979).

⁴⁷⁷ See *MacPherson v. Buick Motor Co.*, 111 N.E. 1050, 1053–55 (N.Y. 1916).

⁴⁷⁸ See *supra* section I.B, pp. 1067–72.

servitudes on chattels, *numerus clausus* stipulates that legislatures ought to recognize this novel form of property, not courts.⁴⁷⁹

Still, it is indisputable that there is demand for equitable servitudes on chattels. In a world in which courts do routinely enforce software-enabled servitudes, it is arguably anomalous to declare all nonsoftware servitudes unenforceable. Firms may respond to the anomaly by inserting software into chattels that do not otherwise need it, thereby spreading the costs of software, which include threats to information privacy, difficult repairs, and premature obsolescence.⁴⁸⁰ The best solution is for courts and legislatures alike to heed the warnings of commentators since the late 1990s going forward to dial back the extent to which software licenses can create servitudes and to allow them only where firms have ongoing software maintenance obligations, if even there. Such a move would be a welcome recommitment to preserving copyright's "delicate balance" between user rights and publisher rights.⁴⁸¹

The examples in section II.C suggest that at least some courts are eager to allow adhesion contracts to run with chattels. For this reason, it is worthwhile to think about what equitable servitudes on chattels might look like if they must exist. This Part explores a second-best doctrine if a wholesale rejection of equitable servitudes on chattels is off the table. It attempts to propose a coherent and conservative doctrine for their use. Where possible, this proposal attempts to preserve symmetry between real and personal property, but the two diverge to the extent that they are different.⁴⁸² Finally, this proposal is small-c conservative in that it attempts to preserve the existing common law to the greatest extent possible. All of that said, nothing about this second-best solution is good, but it is better than the path courts appear to be on.

In tracking the doctrines governing servitudes on real property, this second-best solution asks that courts engage in a kind of *ex post* substantive review that does not occur in a typical contracts case. Contracts scholars have long advocated for courts to shift their focus from the formation to the substance of contracts when determining their enforceability.⁴⁸³ The failure of those efforts suggests that there is reason to be skeptical that this proposal will prevail. Still, it is too early to give up

⁴⁷⁹ RESTATEMENT (FOURTH) OF PROP. § 4.2 cmt. b (AM. L. INST., Tentative Draft No. 3, 2022).

⁴⁸⁰ See *supra* section I.C, pp. 1072–75.

⁴⁸¹ Nimmer, Brown & Frischling, *supra* note 116, at 22 n.9.

⁴⁸² For our purposes, the key difference is that there is no recording system in place to provide notice of nonpossessory interests in personal property outside of the Article 9 system, which only covers security interests. Strahilevitz, *supra* note 411, at 412 (explaining the differences between real and personal property as movability, destructibility, and the presence of a sophisticated recording system).

⁴⁸³ Wilkinson-Ryan, *supra* note 210, at 166.

entirely,⁴⁸⁴ hence this proposal for a second-best path. This path takes privity slightly more seriously than current contracting norms do and resists the watering down of agency doctrine espoused by the Eleventh Circuit.

A. *Unlabeled Chattels*

The primary problem with equitable servitudes on chattels is notice. With chattels, there is not, nor can there be, a central system that could provide record notice to downstream purchasers.⁴⁸⁵ Emerging technologies may create digital analogs to registries, but the sheer number of chattels that individuals encounter daily makes a registry system impracticable. This category of unlabeled chattels includes every object that is not durably labeled with the servitude. Shrinkwrap labels would be ineffective for this purpose because they are typically discarded before they can confer notice on downstream purchasers. Under present norms, downstream consumers could have notice of a purported servitude if that servitude were indicated on the chattel itself, either in full or by reference to another source containing the terms.⁴⁸⁶

Looking to real property reveals some of the difficulties in promulgating a doctrine for unlabeled chattels. In real property, the baseline rule is that purchasers who have no notice of a servitude are not bound by it. But this rule is not quite as protective of purchasers as it may seem. While purchasers are deemed to have notice of servitudes properly recorded in the land records, there are many cases in which courts deem purchasers to have notice of a servitude even when it is not perfectly recorded. For example, they have notice if the servitude is recorded anywhere in their chain of title, even if their own deed is silent,⁴⁸⁷ or if they should infer from the neighborhood's characteristics that there is a common plan.⁴⁸⁸ In the cases challenging these servitudes, there is often no dispute that the purchaser lacked actual knowledge of the servitude. Still, courts tend to emphasize that the buyers could have known about the servitude with just a bit more care and that the servitude benefits the buyers — just as it benefits the

⁴⁸⁴ Courts like the Oklahoma Supreme Court fuel this tentative optimism. See *supra* p. 1102. With respect to federal courts, their wholesale eschewing of privity means that even this much optimism is too much. See, e.g., *Overlook Terraces, Ltd. v. Tamko Bldg. Prods.*, No. 14-CV-00241, 2015 U.S. Dist. LEXIS 119325, at *10 (W.D. Ky. May 21, 2015).

⁴⁸⁵ See Van Houweling, *supra* note 10, at 907.

⁴⁸⁶ Commentators have rightly criticized notice-by-reference regimes for providing consumers with notice of terms when it is too late for them to make a different choice and otherwise concealing the terms of the contract. See RADIN, *supra* note 20, at 10, 12. The timeline of agreeing to be bound before one receives the terms of a contract is now so ingrained in the law that this proposal does not attempt to undo it.

⁴⁸⁷ E.g., *French v. White Star Refin. Co.*, 201 N.W. 444, 445 (Mich. 1924); *Collins v. Rodgers*, 938 So. 2d 379, 391–92 (Ala. 2006) (quoting *Swanson v. Green*, 572 So. 2d 1246, 1248 (Ala. 1990)).

⁴⁸⁸ E.g., *Sanborn v. McLean*, 206 N.W. 496, 498 (Mich. 1925).

encumbered property.⁴⁸⁹ Courts are less concerned with any individual buyer's investment-backed expectations than with upholding the general agreement struck among buyers when the property was first developed.⁴⁹⁰ In some cases, courts explicitly acknowledge that geography or changed circumstances mean that some owners will not receive the true benefit of the aesthetic or price impacts of a servitude, while nonetheless making clear that those owners remain bound by the servitude to protect the original bargain.⁴⁹¹

Where buyers of real property have a duty to inspect both the land records and the property itself and are on notice for whatever they may find there, buyers of chattels have not traditionally faced similar expectations. Indeed, language that appears to alter those expectations is part of what makes the Eleventh Circuit's opinion in favor of Tamko's motion to compel arbitration so radical.⁴⁹² The scale of the undertaking may justify the obligations to inspect imposed in real property law. Most purchases of personal property are too small to warrant imposing equivalent duties to inspect on purchasers. And even if consumers did have a duty to conduct in-depth inspections for servitudes, it may well be rational for them not to do so, much in the same way that not reading the contracts that purport to impose the servitudes is often rational.⁴⁹³

Dye notwithstanding, it is presently difficult to see how a purchaser of a chattel could be deemed to have notice of a servitude on that chattel. There is no duty for the purchaser of a chattel to do any research to see what, if any, restrictions come with that chattel. Information costs alone suggest that this norm is an efficient one.

If consumers had a duty to search beyond the chattel itself for servitudes on that chattel, risk-averse consumers may rationally assume that all chattels have restrictive servitudes, thereby spreading the costs of such servitudes even where manufacturers and sellers are receiving no benefit from the servitudes.⁴⁹⁴ Because of this risk, all chattels that are not durably labeled with the servitude should be deemed to be unlabeled for the purposes of enforcing any alleged servitude.

A more balanced doctrine for unlabeled chattels would look something like Table 1.

⁴⁸⁹ *E.g., id.*

⁴⁹⁰ *See, e.g.,* Scheuer v. Britt, 118 So. 658, 660 (Ala. 1928).

⁴⁹¹ *See, e.g.,* Bolotin v. Rindge, 41 Cal. Rptr. 376, 378 (Ct. App. 1964).

⁴⁹² *Dye v. Tamko Bldg. Prods., Inc.*, 908 F.3d 675, 682–83 (11th Cir. 2018) (“[T]hat big-box items come with purchase terms and conditions should hardly come as a surprise to modern consumers. Post-purchase, acceptance-by-retention warranties are ubiquitous today — think furniture, home appliances, sporting goods, etc. It’s not only objectively reasonable to assume that such items come with terms and conditions, it’s also eminently reasonable to assume that by opening and retaining those items a consumer necessarily accepts the accompanying terms and conditions.” (citing *Kolodziej v. Mason*, 774 F.3d 736, 742 (11th Cir. 2014))).

⁴⁹³ *See* Ayres & Schwartz, *supra* note 207, at 546–48, 605 (explaining the tension between contract law’s duty-to-read doctrine and consumers’ decisions not to read contracts).

⁴⁹⁴ *See* Mulligan, *Licenses*, *supra* note 10, at 1092.

Table 1: Framework for Servitude Enforceability on Unlabeled Chattels

PURCHASER	RESTRAINT ON ALIENATION	RESTRAINT ON USE
Purchasers with notice, not through a clearinghouse	Unenforceable ⁴⁹⁵ / Reasonability ⁴⁹⁶	Enforceable unless irrational, ⁴⁹⁷ unconscionable, ⁴⁹⁸ or unreasonably restrictive of trade or competition ⁴⁹⁹
Second and later through a clearinghouse	Unenforceable	Unenforceable
Any without notice	Unenforceable	Unenforceable

This framework treats restraints on alienation and restraints on use differently, both because they are subject to different rules when applied to real property and because absolute restraints on alienation may impose higher costs and fewer benefits than restraints on use. As the Iowa Supreme Court explained, “the right of alienation has been considered an inseparable incident to an estate in fee, and it is repugnant to the estate conveyed and against the policy of the law to allow restraints to be imposed on the alienation of such an estate.”⁵⁰⁰

Landowners have long tried to avoid this rule with provisions in wills, deeds, and covenants, but courts have read through the letter of these attempts to the substance. For example, in *Estate of Cawiezell v. Coronelli*,⁵⁰¹ the decedent attempted to bequeath real property under what the executor dubbed a “limited fee” that “did not include the right for the [beneficiaries] to sell or transfer the property outside their immediate family for twenty years.”⁵⁰² The executor argued that there was no restraint on alienation, because the beneficiaries never received the right to alienate in the first place.⁵⁰³ The Supreme Court of Iowa rejected this argument, holding that bequeathing an interest in fee necessarily includes the right to alienate, thereby rejecting the concept of a “limited fee” that lacked this right.⁵⁰⁴ In the context of chattels, absolute

⁴⁹⁵ See *Est. of Cawiezell v. Coronelli*, 958 N.W.2d 842, 847 (Iowa 2021) (rejecting the *Third Restatement of Property*'s reasonability test for restraints on alienation).

⁴⁹⁶ See RESTATEMENT (THIRD) OF PROP. § 3.4 (AM. L. INST. 1998).

⁴⁹⁷ See *id.* § 3.5.

⁴⁹⁸ See *id.* § 3.7.

⁴⁹⁹ See *id.* § 3.6.

⁵⁰⁰ *Crececius v. Smith*, 125 N.W.2d 786, 789 (Iowa 1964) (quoting 31 C.J.S. *Estates* § 8).

⁵⁰¹ 958 N.W.2d 842 (Iowa 2021).

⁵⁰² *Id.* at 845.

⁵⁰³ *Id.*

⁵⁰⁴ *Id.* at 845–46.

restraints on alienation create trash. Unusable real property may at least have conservation value. Unusable chattels are headed for a landfill.

The first row of this framework attempts to mirror the law of real property servitudes for initial purchasers and those who take with notice of the servitude. Skeptics of equitable servitudes will prefer the doctrines of states that continue to hold that direct restraints on alienation are unenforceable, while other jurisdictions may rely on the *Restatement's* reasonability test. Both approaches balance concerns about externalities with honoring private ordering and preventing windfalls to parties who are freed from obligations to which they agreed.

One significant benefit of aligning personal property law with real property law is that it guarantees that there is a deep well of case law for litigants, courts, and, importantly, arbitrators to draw upon when disputes arise. To the extent that questions of legitimacy demand that the law track citizens' expectations of the law, aligning personal and real property law also makes sense, since it is not clear that people hold different conceptions of what it means to own real property and personal property.⁵⁰⁵

The main innovation in this framework is the addition of the idea of a clearinghouse that could sell encumbered chattels free and clear of servitudes. The archetypical clearinghouse is the resale shop or scrapyard: any place that is regularly in the business of reselling used goods from various sources. Places like charity resale shops receive goods as donations, which means that they are not good faith purchasers for value. Their charitable missions would be seriously hindered if they were required to investigate whether their donations were subject to equitable servitudes. Moreover, their own markets would be limited if potential purchasers who knew about servitudes — for example, collectors — could not buy certain goods free and clear but less sophisticated purchasers could. Likewise, scrapyards may have notice of servitudes if they are expert buyers of specific materials. Still, they play an essential role in the recycling of raw materials beyond competing with the manufacturers of new goods. Accordingly, they may warrant different treatment. This clearinghouse category acts as a safe harbor that strips servitudes off unlabeled chattels even when parties in the chain of ownership may have knowledge of the servitude.

For-profit resale shops, such as antique stores or Plato's Closet, and apps, such as thredUP, complicate the clearinghouse category.⁵⁰⁶ Individual employees at these firms perhaps would have the subject matter expertise to sometimes know which unlabeled chattels were covered by servitudes, but it would be difficult for them to avoid buying

⁵⁰⁵ See generally HELLER & SALZMAN, *supra* note 14.

⁵⁰⁶ This category does not include resale platforms where sales occur peer to peer, such as eBay, Facebook Marketplace, and Poshmark.

encumbered goods without adding so much process to their business model as to render their business impracticable. Including them in the clearinghouse category balances the benefits of a deep secondary market for goods with the relative ease of durably labeling chattels.

Adding the clearinghouse category is not without costs. It reflects a value judgment that it is more important to avoid even well-intentioned equitable servitudes on chattels because enforcing any of them raises the costs for everyone. Rendering equitable servitudes on chattels unenforceable against parties who take without notice of the servitude creates the risk that first purchasers will opportunistically sell the good in violation of the servitude. Servitude beneficiaries, usually manufacturers, would be unable to enjoin the subsequent purchaser or undo the sale in a suit against the subsequent purchaser. Critically, however, they could still have a remedy against the first purchaser for damages. A suit for damages may not fully protect the bargain struck by the manufacturer, but the inadequacy of a damages remedy in this context is no greater than the inadequacy of damages in many contracts cases.⁵⁰⁷ Moreover, manufacturers who wish to preserve their servitudes could mitigate the risk posed by clearinghouses by making it efficient for owners of their goods to return those goods to them.

One criticism of the clearinghouse category is that it may favor the scalpers who have come to plague all kinds of markets beyond concert ticket sales.⁵⁰⁸ In this framework, manufacturers may set purchase limits on products, but their remedies would be limited to actions against the first purchasers who resell in violation of the limitation. Given the unpopularity of scalping, manufacturers might find strict enforcement of some servitudes to be reputation enhancing.⁵⁰⁹ Furthermore, they could, of course, choose to label the chattel itself if they wanted an easier path to enforcement.

Even in the context of unlabeled chattels, use restrictions remain enforceable in limited cases. As Robinson observes, there is a small

⁵⁰⁷ See, e.g., George M. Cohen, *The Fault Lines in Contract Damages*, 80 VA. L. REV. 1225, 1310–11 (1994) (discussing the undercompensatory nature of contracts damages).

⁵⁰⁸ For a few very recent examples, consider the competitive resale markets for stainless-steel Rolexes, lululemon Everywhere Belt Bags, and Sony PlayStation 5s — not to mention toilet paper at the outset of the pandemic. See Ariel Adams, *How Scalpers & Speculators Are Ruining the Watch Purchasing Experience for Many Consumers*, ABLOGTOWATCH (Oct. 7, 2018), <https://www.ablogtowatch.com/how-scalpers-speculators-are-ruining-the-watch-purchasing-experience-for-many-consumers> [<https://perma.cc/EC7K-4N3W>]; Carolin Lehmann, *The Viral Lululemon Everywhere Belt Bag Is Back in Stock. Is It Worth the Hype?*, CBS NEWS (Apr. 21, 2023, 9:19 AM), <https://www.cbsnews.com/essentials/the-viral-lululemon-everywhere-belt-bag-is-finally-back-in-stock-is-it-worth-the-hype> [<https://perma.cc/F3UK-MUSU>]; Roshan Fernandez, *Sony Says Its PlayStation 5 Shortage Is Finally Over, But It's Still Hard to Buy*, NPR (Jan. 5, 2023, 3:41 PM), <https://www.npr.org/2023/01/05/1147157065/sony-playstation-5-shortage-over> [<https://perma.cc/3SPH-VFTF>]; Michael Corkery & Sapna Maheshwari, *Is There Really a Toilet Paper Shortage?*, N.Y. TIMES (Mar. 13, 2020), <https://www.nytimes.com/2020/03/13/business/toilet-paper-shortage.html> [<https://perma.cc/J57Q-MX2W>].

⁵⁰⁹ See, e.g., Adams, *supra* note 508.

universe of cases in which courts already enforce equitable servitudes on chattels as such, notably around preservation of a brand's goodwill, such as through packaging requirements.⁵¹⁰ What is important is that these cases are the exception rather than the rule. Still, these cases may be better litigated as claims sounding in tortious interference⁵¹¹ and unfair competition. And since these doctrines may tend to become entangled with equitable servitudes at the margin,⁵¹² any policy against recognizing modern servitudes ought to take care not to undermine them except where they attempt to create de facto servitudes.

B. Labeled Chattels

Labeling chattels does not eliminate many of the concerns about equitable servitudes on chattels,⁵¹³ but it does ease some of the concerns about secret obligations. Moreover, since our contracts regime now operates primarily on notice, it may be unreasonable to think that requiring notice, despite its shortcomings, would be irrelevant to courts. This category deals only with chattels that are labeled in a way that would give notice to a reasonable consumer. To be sure, it is possible for a notice to be printed on a chattel and for that notice to nevertheless be inaccessible to the person in possession of that chattel. This was one of the issues in *Krusch v. TAMKO*, where the manufacturer molded notice of terms and conditions onto shingles that the eventual owners of those shingles did not inspect before they were nailed to the roof and unable to be returned to the manufacturer.⁵¹⁴ One can imagine an even more extreme case involving medical devices that are literally inside their owner and therefore impossible to inspect for terms and conditions. Chattels with indecipherable labels ought to be analyzed as unlabeled chattels, if only to incentivize better labeling.

Compared to unlabeled chattels, labeled chattels pose easier evidentiary questions: more people are on notice of a servitude that is printed on a chattel,⁵¹⁵ thereby sparing them the information costs that otherwise militate against enforcing equitable servitudes. This state of affairs is likely true for a short while but would quickly give rise to the orphan servitudes problem. In other words, the label is not a panacea.

The conditions for enforcing servitudes on labeled chattels should track those for enforcing servitudes on unlabeled chattels against

⁵¹⁰ See Robinson, *supra* note 9, at 1455–58.

⁵¹¹ See *id.* at 1458. The fourth case evaluated by Robinson was actually resolved as a tortious interference case, but Robinson notes its “effect was the same as enforcing the contract as an equitable servitude.” *Id.*

⁵¹² See, e.g., *id.*

⁵¹³ Cf. Merrill & Smith, *supra* note 154, at 43–45.

⁵¹⁴ See Response in Opposition to TAMKO's Motion, *supra* note 290, at 2.

⁵¹⁵ Labeling does not provide notice for many groups including the blind and people who cannot read or are not fluent in English. Any doctrinal regime that gives preferential treatment to labeled goods would tend to discriminate against these groups.

purchasers with knowledge of the servitude. Some states may prefer bright-line prohibitions against restraints on alienation, while others will prefer tests for reasonability. Restrictions on use could be evaluated for irrationality, unconscionability, and restraints on trade. These considerations are influenced by contract but could be customized for the unique considerations of chattels, much as they are customized for the unique considerations of real property.⁵¹⁶ In particular, courts could be sensitive to concerns about waste.

It may be tempting to think of labeled chattels as not implicating servitudes at all because the label puts every owner into contractual privity with the firm. Consider the arbitration clause that McDonald's noticed on its french fry carton in *James v. McDonald's Corp.*⁵¹⁷ McDonald's could style the contract as forming anew every time someone plucks a fry out of the carton: a small serving containing forty-two opportunities to contract and a large containing eighty-six.⁵¹⁸ Firms would certainly prefer this to be the state of the world so that all french fry eaters, not just the purchaser, would be bound by their terms.⁵¹⁹ Modern shrinkwrap doctrine would appear to favor McDonald's view here. But stopping the analysis at the presence of the contract ignores the property doctrine that has equal claim to the transaction. Outside of cases where the first purchaser is the agent of the subsequent owner of a good, any contract that attempts to bind subsequent owners is an equitable servitude.

C. Intangible Frontiers

Intangible property creates a new set of challenges not seen with other chattels. Intangibles have long frustrated property commentators because, historically, property is concerned with real estate and things. Indeed, the idea of *numerus clausus* is that property rarely recognizes new forms and only does so after great consideration.⁵²⁰ But real estate and things are only part of the story. Today, value is as likely to be stored in forms that cannot be held as it is to be stored in a place or a

⁵¹⁶ See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.7 cmt. a (AM. L. INST. 2000) (explaining the influence of the Uniform Commercial Code when courts analyze servitudes on real property for unconscionability).

⁵¹⁷ 417 F.3d 672, 675, 678, 681 (7th Cir. 2005) (enforcing an arbitration agreement that was included in the "Official Rules" of a promotion that was referenced on a carton of french fries and expressing that it would be "unreasonable and unworkable" to have customers sign the fourteen pages of rules for the promotion).

⁵¹⁸ See Katrina Chilver, *We Tested the Difference Between McDonald's Fries' Portion Sizes at 2 Leicester Restaurants*, LEICESTERSHIRELIVE (July 13, 2019, 10:31 AM), <https://www.leicesterm Mercury.co.uk/news/leicester-news/tested-difference-between-mcdonalds-fries-3085872> [<https://perma.cc/U568-MZAU>] (noting the number of fries in sample small and large servings).

⁵¹⁹ Here, we can imagine anyone passing a french fry to be the agent of the diner coveting the french fry.

⁵²⁰ See Lee Anne Fennell, *Fee Simple Obsolete*, 91 N.Y.U. L. REV. 1457, 1509-10 (2016) (explaining how *numerus clausus* can accommodate new forms of ownership).

thing. This section uses the term intangible to describe these new value stores because that term is widely adopted in the literature. As I have argued elsewhere, much of what courts and scholars call intangible is not literally intangible.⁵²¹ Rather, many new forms of value have mediated tangibility, meaning that they can only be held with the assistance of some other chattel. At common law, tangibility is more of an open concept than a description of how value exists in space and time.⁵²² To call an asset an “intangible” means only that it is not a place or a directly portable thing.

Because intangibles cannot be directly carried, at least not without great difficulty, they often require some interface with a service or other technology to be useful. The addition of this intermediary creates an opportunity for contract to creep into the relationship. Now, even if the party holding rights in the intangible and the intermediary did not explicitly enter into a contract, a court is likely to imply a contract between the two parties. Still, given the ease of contracting even over large numbers of people, it is reasonable to expect that most of these relationships are governed by explicit contracts. Indeed, many of these agreements will be standard form contracts between firms and consumers that are likely either to take the form of clickwrap contracts or to be merely noticed at the bottom of the webpage that acts as the intermediary through which the consumer accesses the intangible. The presence of a contract may, in fact, overshadow the fact that many of these intangibles could be conceived of as property. Instead, the contract makes the relationship seem like a pure service relationship.

This is not a new problem. Courts have long struggled with the question of where and how to locate intermediated intangibles in property.⁵²³ This difficulty arises because intangibles resist traditional conceptions of possession, a prerequisite for falling under the aegis of property.⁵²⁴

This disconnect between the law of intangibles and popular understandings of property is a well-documented source of consumer confusion.⁵²⁵ Video games and eBooks are low-stakes examples.⁵²⁶ Cryptocurrency, especially its goofiest form, the non-fungible token

⁵²¹ D’Onfro, *supra* note 172, at 121.

⁵²² For example, in *Adams v. Cleveland-Cliffs Iron Co.*, 602 N.W.2d 215 (Mich. Ct. App. 1999), the court described industrial dust as intangible although the plaintiffs’ complaint hung on the physical burdens that the dust was imposing on their space. *Id.* at 223.

⁵²³ See, e.g., *Moore v. Regents of the Univ. of Cal.*, 793 P.2d 479, 481–82, 489, 493 (Cal. 1990) (refusing to recognize a patient’s alleged tangible property interest in his own cells, which were used to patent a cell line).

⁵²⁴ See João Marinotti, *Possessing Intangibles*, 116 NW. U. L. REV. 1227, 1227–29 (2022) (quoting *Pierson v. Post*, 3 Cai. 175, 177 (N.Y. Sup. Ct. 1805)).

⁵²⁵ See, e.g., Perzanowski & Hoofnagle, *supra* note 115, at 375.

⁵²⁶ See *supra* section I.C, pp. 1072–75.

(NFT), offers a higher-stakes example.⁵²⁷ Sorting out whether these neo-assets fall under the law of property or the law of contract will bring greater certainty both to holders of these assets and to the law more generally.

Integrating these new technologies into existing private law doctrine opens new paths in the conversation about equitable servitudes on chattels. Insofar as blockchain technology creates a durable registry and, accordingly, assets with chattel-like characteristics,⁵²⁸ concerns about notice and transaction costs may evolve over time. And while it might be facetious to expect homeowners buying roofing shingles to root around for terms and conditions, consumers of digital assets may be different. Indeed, it may be more consistent with consumer expectations for digital assets to conform to the norms of software licensing rather than those of chattels, even when there are no software licenses at stake. This is an empirical question that needs to be studied and restudied as these digital markets grow.

CONCLUSION

This Article has demonstrated that the question of whether equitable servitudes can and do attach to chattels remains as fraught today as it was when scholars took it up nearly a century ago. In the intervening years, questions about the enforceability of equitable servitudes on chattels have become more difficult as the functional equivalents of servitudes on chattels have grown with the help of federal intellectual property law. At the same time, the privity-eliding contracting norms that developed around intellectual property, and especially software licensing, are now flowing back into the law of low-tech chattels, bringing new urgency to these questions.

Changes like these reinforce the necessity of robust private law education for future lawyers and judges. To be sure, it is not feasible to teach every law student everything there is to know about contracts, property, and torts, but it is possible to teach them too little. Or perhaps worse, it is possible to teach them that these fields are full of unimportant

⁵²⁷ João Marinotti, *Can You Truly Own Anything in the Metaverse? Blockchains and NFTs Don't Protect Virtual Property*, CRYPTONEWS (Apr. 24, 2022, 6:00 AM), <https://cryptonews.com/exclusives/can-you-truly-own-anything-metaverse-blockchains-nfts-dont-protect-virtual-property.htm> [https://perma.cc/E2PR-RGSS].

⁵²⁸ The Uniform Law Commission is developing a new Article of the Uniform Commercial Code concerning "Controllable Electronic Records" that purports to bring some of these technologies into existing commercial law frameworks. See *UCC, 2022 Amendments to*, UNIF. L. COMM'N, <https://www.uniformlaws.org/committees/community-home?CommunityKey=1457c422-ddb7-40b0-8c76-39a1991651ac> [https://perma.cc/7A66-X9ZS].

novelties⁵²⁹ that can and should be simplified⁵³⁰ or made to yield to contract. It is also possible to put contract on a false pillar, acknowledging its faults but suggesting that no path beyond private ordering is possible in this political climate. If we inadvertently teach law students that the private law beyond contract is archaic, or worse, interventionist, we should not be surprised when these students grow into judges who continue to thin out noncontract private law doctrines. This is especially true when those judges face heavy dockets of cases that present more immediate emergencies than untangling servitudes doctrine.

Cleaning doctrine of disused concepts is a noble task.⁵³¹ However, when it is taken too far it risks eliminating both tools and protections that future lawyers need. In a world in which common law courts are disinclined to use their powers to promulgate truly new doctrine, pruning the common law means reducing it. The more we tame the chaos of the common law with statutes — and, arguably, restatements⁵³² — the less common law there will be to solve future problems. If lawyers and judges are made to feel embarrassed for scouring the crusty corners of the common law for tools, the common law faces narrowing forces on both ends. For better or for worse, contract will fill that empty space.

⁵²⁹ See Shyamkrishna Balganesh, *Relying on Restatements*, 122 COLUM. L. REV. 2119, 2119, 2125 (2022) (discussing *Restatements*' "unique place in the American legal system," *id.* at 2119, and analogizing the "Comments and Reporter's Notes" in *Restatements* to "the oddity of interpretive guidance contained within the enacted language of a statute," *id.* at 2125).

⁵³⁰ Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1416 (1982) ("However, we must remember that the confusing doctrines . . . developed in response to actual circumstances relating to the use of property. Any attempt to unify the concept of servitudes must recognize that these circumstances still exist, so that the pressures for slightly different rules may reappear in a new context.").

⁵³¹ One of the virtues of the *Draft Fourth Restatement of Property* is that it makes explicit the guiding principles for simplifying property. See RESTATEMENT (FOURTH) OF PROP. § 4 (AM. L. INST., Tentative Draft No. 3, 2022).

⁵³² See Balganesh, *supra* note 529, at 2184 (criticizing how courts use the *Restatements* as statutes).