A DEFENSE OF HORIZONTAL PRIVITY IN AMERICAN PROPERTY LAW

Norman P. Ho[*]

INTRODUCTION

Perhaps surprisingly, one doctrine in American property law, which has elicited considerable controversy over almost the past 100 years, is that of the innocuous-sounding "horizontal privity" doctrine—or more precisely and specifically, the horizontal privity doctrine in the law of real covenants. Horizontal privity in the law of real covenants also enjoys the distinct honor in property law of being the recipient of direct, published vituperation from legal scholars; one scholar, most notably, has vilified horizontal privity

[*] Professor of Law, Peking University School of Transnational Law; Affiliated Scholar, Transnational Legal History Group, Chinese University of Hong Kong (e-mail contact: NPH225@NYU.EDU)

as "pernicious."[1] Less dramatically, other scholars have described horizontal privity as "justified neither by history nor by policy,"[2] "obsolete,"[3] and "outliv[ing] any purpose it once served."[4] Another scholar has confidently and categorically asserted that horizontal privity has no support from any scholars working in the area of servitudes law.[5]

Examining and surveying the scholarship on horizontal privity and real covenants over the past 100 years or so, it does indeed appear that legal commentators and scholars "overwhelmingly favor the abolition . . . of horizontal privity,"[6] and none have

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[1] Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1242 (1982).

[2] CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND": INCLUDING LICENSES, EASEMENTS, PROFITS, EQUITABLE RESTRICTIONS AND RENTS 116 (2d ed. 1947). Charles E. Clark, who served as a judge on the United States Court of Appeals for the Second Circuit and who was a member of the committee that drafted the *Restatement (First) of Property* in 1944, became one of horizontal privity's greatest and most vocal critics. *See* Reichman, *supra* note 1, at 1222.

[3] Michael J.D. Sweeney, Note, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661, 675 (1995).

[4] *Id.*

[5] Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 935 (1988) (writing that the horizontal privity doctrine "has little support in modern case law and none among scholars of servitudes law") (footnote omitted).

[6] 9 MICHAEL ALLAN WOLF, POWELL ON REAL PROPERTY § 60.04, LEXIS (database updated 2021) (conveying that "[m]odern legal writers overwhelmingly favor the abolition of at least mutual and horizontal privity"). *See also* Michael Lewyn, *The Puzzling Persistence of Horizontal Privity*, PROB. & PROP., May-June 2013, at 32, 32, 35 (writing that there is a "scholarly consensus" against horizontal privity). The hostility from legal scholars toward the horizontal privity doctrine has been continuous since at least the mid-twentieth century up to the present. *See, e.g.*, CLARK, *supra* note 2, at 116 (arguing horizontal privity is "justified neither by history nor by policy"); Margot Rau, Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 150 (1978) (writing that Judge Charles E. Clark "properly criticized" the various rationales of horizontal privity); Reichman, *supra* note 1, at 1242 (labeling the horizontal privity doctrine as "pernicious" and advocating its abolition); French, *supra* note 5, at 935 (arguing for the elimination of the horizontal privity doctrine); Sweeney, *supra* note 3, at 675-76 (agreeing with "most legal scholars" that the horizontal privity doctrine is "obsolete"); A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 809 (1998) (arguing that the elimination of the horizontal privity requirement is "long overdue" and that "[t]here never was a rational case for the [horizontal privity] rule as a matter of doctrine or policy and there is no present reason for the rule if one accepts the utility of long-term servitude regimes").

explicitly and directly defended the horizontal privity doctrine.[7] The clearest manifestation of such unified hostility toward horizontal privity is the position taken by the reporters of the *Restatement (Third) of Property: Servitudes*, which claims that "[a]s a matter of common law, horizontal privity . . . is no longer required to create a servitude obligation" and which subsequently advocates for its abolition.[8]

The purpose of this Essay is simple. In contrast to the weight of the existing scholarly consensus which has attacked horizontal privity and which has sought its abolition, I wish to present a more balanced, nuanced view of horizontal privity and even attempt to defend the doctrine. I argue that horizontal privity is worth keeping for three major reasons: first, none of the objections against horizontal privity are fully persuasive and all generally lack nuance; second, the requirement of horizontal privity aligns with the whole concept and notion of real covenants in law; and third, more importantly, keeping horizontal privity can help protect against unfair and/or absurd running of covenants on land in certain situations. Indeed, despite the scholarly contempt of

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[7] Susan French asserts that Dean Oliver Rundell, a reporter for the First Restatement of Property in 1944, "was probably the last scholar to mount a serious defense" of horizontal privity. French, *supra* note 5, at 935 n.27. But Rundell made it clear that his defense of horizontal privity had nothing to do with "historical justifiability or its social desirability"—he believed horizontal privity should be included in the First Restatement of Property not necessarily because he normatively believed it was desirable, but rather the "amount" and "unanimity" of American case law showed horizontal privity should be reported as a requirement for the running of real covenants in the First Restatement of Property. Oliver S. Rundell, *Judge Clark on the American Law Institute's Law of Real Covenants: A Comment*, 53 YALE L.J. 312, 323 (1944). Unlike the Third Restatement of Property (Servitudes), the First Restatement of Property included the requirement of horizontal privity for a covenant to run with the land. *Compare* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 (AM. L. INST. 2000), *with* RESTATEMENT (FIRST) OF PROP. § 534 (AM. L. INST. 1944). James Winokur is the only modern scholar I could find who explicitly admitted that "a horizontal privity requirement can be reasonably defended"; although, he ultimately concurred with the scholarly consensus that the horizontal privity requirement should be abolished. James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 94-95 (1989).

[8] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. b (AM. L. INST. 2000).

horizontal privity, "post-2000 case law [has buttressed] the status quo," with no courts adopting the Third Restatement's view.[9]

This Essay proceeds as follows: Part I provides an overview of the doctrine of horizontal privity and its function in the law of real covenants, and Part II lays out the main scholarly objections to horizontal privity and sets out my responses and arguments as to why the objections are either unpersuasive or too simplistic. I then conclude.

I. THE HORIZONTAL PRIVITY REQUIREMENT IN THE LAW OF REAL COVENANTS

A. Overview of the Horizontal Privity Doctrine

A real covenant is a promise or agreement "intimately and inherently involved with the land and therefore binding subsequent owners and successor grantees indefinitely."[10] Conceptually speaking, real covenants are stronger than a simple personal contract because they have the power to bind subsequent owners and grantees who were not part of the original agreement between the original covenantor and covenantee.[11] Thus, real covenants are also called "covenants running with the land"—"running with the land" means that the burdens and/or benefits of the covenants between the original covenantor and covenantee may pass to the successors of the estates of the original covenantor and covenantee.[12]

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[9] Lewyn, *supra* note 6, at 32-35. Indeed, numerous bankruptcy decisions in 2020-2021 have continued the horizontal privity analysis and requirement, with no sign of advocating that horizontal privity is going the way of the dodo. *See, e.g.*, Extraction Oil & Gas, Inc. v. Elevation Midstream, LLC (*In re* Extraction Oil & Gas, Inc.), 627 B.R. 199, 222-28 (Bankr. D. Del. 2020) (applying Colorado's horizontal privity requirement); *In re* Chesapeake Energy Corp., 622 B.R. 274, 281, 284 (Bankr. S.D. Tex. 2020) (applying Texas horizontal privity doctrine).

[10] *Covenant Running with the Land*, BLACK'S LAW DICTIONARY (11th ed. 2019). I do not cover the historical development of real covenants in English and early American legal history in this Essay. See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. a (AM. L. INST. 2000), for a helpful overview of the relevant history.

[11] *See* HERBERT HOVENKAMP ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY § 10.2, at 285-86 (6th ed. 2014).

[12] *Id.* § 10.2, at 286. Note that although we often speak of covenants running with the land, "the *benefit* and *burden* of a covenant are tested separately, and may run

Because real covenants could allow a person "to enforce a promise not made to him" or cause a person to "be bound by a promise he did not make,"[13] common law imposed a number of technical requirements to be satisfied for a covenant to run with the land and thereby bind successors. Generally speaking, under common law, for a covenant to run with the land: (1) the covenant must be in a writing which satisfies the Statute of Frauds; (2) the original covenanting parties must have possessed the intent to have the covenant run with the land; (3) the covenant must touch and concern the land, which essentially means that the covenant must "increase the use or utility of the land or to make it more valuable in the hands of the covenantee or to curtail the use or utility of the land or make it less valuable in the hands of the covenantor"; (4) "[t]here must be horizontal privity of estate"; and (5) "there must be vertical privity between the original [covenantor or covenantee], and successors in interest to that person."[14] The remedy sought by a party seeking to enforce a real covenant against another is usually monetary damages.[15]

At the broadest level, "'horizontal privity' refers to a relationship between the original parties to the covenant."[16] More specifically, at common law, horizontal privity can be generally understood as meaning the original parties (covenantor and covenantee) sharing simultaneous legal interests in the same land as covered by the covenant (also known as "simultaneous" or "mutual" privity) (e.g., a landlord-tenant relationship or a servient owner-dominant owner relationship[17]) or that the original parties

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independently of each other, or they can both run if all the requirements are satisfied." *Id.*

[13] Olin L. Browder, *Running Covenants and Public Policy*, 77 MICH. L. REV. 12, 12 (1978).

[14] HOVENKAMP ET AL., *supra* note 11, § 10.2, at 286-87 (emphasis omitted).

[15] CHRISTINE A. KLEIN, PROPERTY: CASES, PROBLEMS, AND SKILLS 550 (2016).

[16] DALE A. WHITMAN ET AL., THE LAW OF PROPERTY § 8.19, at 402 (4th ed. 2019).

[17] Early English cases had a very narrow view of horizontal privity—that is, the only way to establish horizontal privity in early English cases was to show that the original covenanting parties were "in a landlord-tenant relationship at the time [when] the promise was made" between these parties. KLEIN, *supra* note 15, at 549. U.S. courts expanded this view—early cases in Massachusetts, for example, "required that the [original] covenanting parties held simultaneous interests in the affected property at the time the covenant was made." *Id.* Simultaneous interests could include the traditional, narrow English view—landlord-tenant relationships—but could also be satisfied by the original covenanting parties being in an easement relationship (dominant and servient

(covenantor and covenantee) were grantor and grantee of the affected land with the covenant coming into effect at exactly the same time the affected land was granted or transferred (also known as "successive privity").[18] It is not necessary for there to be a continuing relationship to the land.[19]

A quick hypothetical (let's call it the "George-Brian Hypo") will help explain the horizontal privity doctrine in greater detail. Let's say that George owns a piece of land called Greenacre, and Brian owns a piece of land called Broadacre. Greenacre and Broadacre happen to be abutting pieces of property, so George and Brian are neighbors. George and Brian value peace and quiet, so they do not want each other (or any successor) using the properties for industrial purposes. To memorialize this desire, George and Brian decide to sign a written covenant which states that neither of them, nor any of their heirs, assigns, or successors, shall ever use the properties for industrial purposes. Later on, Brian sells Broadacre to Clint, who promptly builds a coal mining plant on Broadacre. George is upset and seeks to enforce the covenant against Clint. Has horizontal privity been satisfied? No. Focusing on the horizontal privity requirement, there was no horizontal privity between George and Brian, the two original covenanting parties. They did not share simultaneous legal interests in the land as covered by the covenant—each simply owned their own separate land. Nor did they have a grantor-grantee relationship with respect to the affected land.

Let's change the facts of the George-Brian Hypo. Let's say George owned a large piece of land called Greenacre. It is too big for him, so he decides to sell part of it to Brian. Still dedicated to peace and quiet, George includes a written provision in the deed of sale to Brian, where Brian promises that neither he, nor his assigns, heirs, or successors shall ever use the property for industrial purposes. Brian is, therefore, burdened by the covenant because what he can do with the land is limited. The sale is completed, and Brian takes possession of his newly purchased land. Later on, Brian sells his land to Clint, who promptly constructs a coal mining plant on the

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owners), in a present estate-future interest relationship ("holders of a present estate and future interest in the same land"), or in a cotenant relationship. *Id.*

[18] *Id.*

[19] 9 WOLF, *supra* note 6, § 60.04.

property. George wants to enforce the covenant against Clint. Has horizontal privity been satisfied? Here, the answer is yes because there was horizontal privity between George and Brian, the two original covenanting parties. They satisfy "successive privity"—George was grantor and Brian was grantee of the affected land with the covenant coming into effect at exactly the same time the affected land was granted or transferred, as the covenant was contained in the deed of sale.

A final permutation of the facts of the George-Brian Hypo is needed just to illustrate the "mutual privity" form of horizontal privity. Let's say George owns Greenacre, and he decides to lease it to Brian for five years. In the written lease, Brian promises that neither he, nor his heirs, assigns, or successors shall ever use the premises for industrial purposes. Brian is again burdened in the sense that what he can do on the land is limited by the covenant. George decides to move to London and sells Greenacre to Harry (who also takes over as Brian's new landlord). Brian then builds a coal mining plant on Greenacre. Harry wants to enforce the covenant against Brian. Has horizontal privity been satisfied? The answer is yes, under "mutual privity," since the original covenanting parties—George as the landlord and Brian as the tenant—had mutual, simultaneous legal interests in the same land as covered by the covenant.

Many states continue to require horizontal privity, despite the Third Restatement's exhortations; some states include Arizona, Connecticut, Iowa, Kentucky, Montana, Nebraska, New Hampshire, North Carolina, Oregon, South Carolina, Texas, Vermont, Virginia, Washington, Wisconsin, and Wyoming.[20]

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[20] *See id.* § 60.04 n.128. Note that Wolf's list leaves out Virginia, which is a significant omission given the number of recent cases involving horizontal privity in that state. *See, e.g.*, Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 579-80 (Va. 1999) (clearly setting out that "[t]o enforce a real covenant in Virginia, a party must prove . . . privity between the original parties to the covenant (horizontal privity)" and that horizontal privity is satisfied when "the covenant [is made to be] part of a transaction that also includes the transfer of an interest in land that is either benefited or burdened by the covenant"). Therefore, I have added Virginia to the list above.

B. The Traditional Rationales and Justifications for the Horizontal Privity Doctrine

Why did the common law require horizontal privity for the running of a covenant? Despite some scholars who have perhaps hyperbolically claimed there is absolutely no possible rationale or justification,[21] we can identify two main traditional justifications and rationales for the horizontal privity doctrine: first, that horizontal privity helps to protect against encumbrances on land (we can call this the "anti-encumbrance justification," for short); and second, that horizontal privity helps provide notice by ensuring that covenants intended to run with the land are set out in written conveyances, which successors would be able to see (we can call this the "record and notice justification," for short).

First, recall that real covenants have the power to bind successors to promises they did not make with the original covenanting parties, thereby encumbering and burdening successors regarding the use and enjoyment of their land.[22] Thus, one justification for horizontal privity is that such encumbrances should be disfavored as a matter of policy, and therefore, the common law "impose[d] tighter restrictions" on covenants which run with the land and burden successors.[23] Horizontal privity thus served as another hoop, so to speak, to jump through for covenants to run with the land.[24] In other words, it could serve as a check on undesirable encumbrances on land.

The second traditional rationale for horizontal privity is that it provides fair "notice of the potential burden to successors" by ensuring that any "covenant will be contained in a [writing] that is . . . recordable."[25] One scholar has asserted that this is "the only possible function of the horizontal privity requirement,"[26] and the Third Restatement also has similarly stated that "[i]n American law, the horizontal-privity requirement serves *no function* beyond

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[21] *See, e.g.*, Tarlock, *supra* note 6, at 809 (arguing that "[t]here never was a rational case for the [horizontal privity] rule as a matter of doctrine or policy"); CLARK, *supra* note 2, at 116 (arguing that horizontal privity is "justified neither by history nor by policy").

[22] *See supra* notes 10-13 and accompanying text.

[23] WHITMAN ET AL., *supra* note 16, § 8.19, at 402.

[24] *See id.*; Sweeney, *supra* note 3, at 675.

[25] WHITMAN ET AL., *supra* note 16, § 8.19, at 402.

[26] French, *supra* note 5, at 934.

insuring that most covenants intended to run with the land will be created in conveyances," which will "assure that [covenants] will be recorded."[27]

As we will see in the next Part, all scholars have essentially criticized these rationales and the doctrine of horizontal privity.

II. OBJECTIONS TO HORIZONTAL PRIVITY AND MY RESPONSES AND DEFENSES

This Part will present the principal scholarly objections to horizontal privity, followed by my responses.

A. First Objection to Horizontal Privity—Scholars Objecting to the "Anti-Encumbrance Justification"

The first scholarly objection rejects the "anti-encumbrance justification" for horizontal privity. Scholars have argued that this justification "is unsatisfactory [because] it does not explain why the presence or absence of horizontal privity serves to distinguish 'useful' burdens that should run from 'objectionable' ones that should not." [28] However, no further elaboration is provided by detractors.

My response is simple—contrary to the objection above, as U.S. legal history and modern case law show, there have been important instances where horizontal privity has played a significant role in preventing the unfair or absurd running of covenants in certain situations. In other words, the presence of horizontal privity has indeed served to challenge objectionable burdens from running with the land or, at the very least, had the potential to challenge objectionable burdens from running with the land.

The best example of this—which, for some reason, the scholarly objectors of horizontal privity seem to have missed—is horizontal privity's important role in limiting perhaps the most objectionable real covenants in American legal history—that is, racially restrictive covenants. In U.S. legal history, horizontal privity was a real, "genuine if [often] unspoken threat" to a

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[27] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. b (AM. L. INST. 2000) (emphasis added).

[28] WHITMAN ET AL., *supra* note 16, § 8.19, at 402.

widespread type of racially restrictive covenant after the 1920s.[29] This type of covenant was not created by real estate developers, but rather by neighbors who signed agreements with each other many years following the initial purchases of their respective properties.[30] Two or more neighbors, for example, would sign agreements promising not to sell or allow members of a certain race (e.g., African-Americans) from succeeding to the land. [31] However, legally, such covenants would be ineligible to run with the land because the neighbors lacked horizontal privity—they could satisfy neither mutual privity nor successive privity.[32] Civil rights lawyers focused their attentions on horizontal privity "and other technical problems" to battle covenant enforcement.[33]

Unfortunately, courts did not pay much attention to horizontal privity issues, but if they had, many racially restrictive covenants in the early to mid-twentieth century would have been declared legally void for lack of horizontal privity.[34] However, the fact that courts during that time did not pay attention to horizontal privity does not mean that the doctrine was or is useless. It could still serve as an important and useful bulwark and possible check against abusive covenants.

An instructive case here is *Mays v. Burgess*,[35] particularly the influential dissent by Associate Justice Edgerton, which looked to horizontal privity as one means to void a racially restrictive covenant.[36] The case involved a racially restrictive covenant signed among neighbors in a D.C. neighborhood, initially in 1925, which provided, inter alia, that land in the neighborhood shall never be "sold, conveyed, leased, rented[,] or given" to African-American persons. [37] In 1944, Ms. Mays (an African-American woman) purchased property in the neighborhood (and presumably covered

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[29] RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 79 (2013).

[30] *Id.*

[31] *Id.* at 80.

[32] *Id.* at 79-80.

[33] *Id.* at 81-83.

[34] *See id.* at 86-87.

[35] 147 F.2d 869 (D.C. Cir. 1945). I thank BROOKS & ROSE, *supra* note 29, at 137, for guiding me to this case.

[36] *See Mays*, 147 F.2d at 876 n.11 (Edgerton, J., dissenting).

[37] *Id.* at 869-70 (majority opinion).

under the 1925 covenant) from Jane Cook (a white woman), "described as a 'straw' party, who [herself] had purchased it from . . . Consolidated Properties, Inc., . . . for reconveyance to Mays."[38] Ms. Mays knew of the racial restrictions on the property.[39] The plaintiffs—white homeowners in the neighborhood—sued to enforce the 1925 covenant and to enjoin Ms. Mays from using or occupying the property.[40] The plaintiffs won in the district court, and Ms. Mays appealed to the D.C. Circuit Court of Appeals.[41] She argued that the lower court's judgment should be reversed, in part, because the 1925 covenant "is not binding on the appellants, who are the successors in interest of the original covenantors, because of lack of privity."[42] In other words, there was no horizontal privity among the original parties to the 1925 covenant.

Looking at the facts of the case, it is true there was no horizontal privity. The facts are akin to the first hypothetical offered earlier in this Essay—that is, this was simply a covenant made among neighbors in the neighborhood, without any of them sharing mutual interests in the affected land or in a grantor-grantee relationship with respect to the affected land. However, the majority decision rejected Mays's argument on horizontal privity, reasoning that under the settled law of D.C., covenants against African-American ownership or possession of land can be enforced at equity, which does not require horizontal privity, but rather is binding in equity when a purchaser (like Ms. Mays) received notice of the covenant.[43]

In his cogent dissent, Justice Edgerton disagreed with the majority decision and its reasoning on the horizontal privity issue.[44] He admitted that D.C. law did allow certain covenants between neighbors to run and bind successors in equity "despite the absence of 'privity,'" but he observed that such covenants only regulated the use of land and did not seek to restrain alienation.[45] In the current case, Edgerton pointed out that the 1925 covenant did more than

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[38] *Id.* at 870.
[39] *Id.*
[40] *See id.* at 869-70.
[41] *See id.*
[42] *Id.* at 870.
[43] *See id.* at 872.
[44] *Id.* at 873, 876 n.11 (Edgerton, J., dissenting).
[45] *Id.* at 876 n.11.

simply regulate the use of land; it imposed restraints on alienation, forbidding the transfer to African-Americans.[46] As such, Justice Edgerton believed that the horizontal privity requirement should apply to the case, and therefore, the 1925 covenant should be held invalid.[47]

One counterargument to my above presentation of the *Mays* case might go something along the following lines: "The dissent lost! Doesn't the *Mays* case show the infirmity of the horizontal privity doctrine?" If you believe that the court was ultimately influenced by discriminatory attitudes toward African-Americans, then you could still conclude that horizontal privity provides some utility and has the *potential* to function as a defense against the running of bad and unfair covenants, especially when discriminatory attitudes are involved.

Another counterargument to my use of the *Mays* case in this Essay probably would go something like this: "Well, *Mays* was made obsolete. All of this discussion of *Mays* and horizontal privity is moot because the U.S. Supreme Court in *Shelley v. Kraemer*[48] ruled that under the Fourteenth Amendment, racially restrictive covenants were unconstitutional and unenforceable,[49] and because they were later fully outlawed by the Fair Housing Act,[50] thereby sounding the death knell to racially restrictive covenants." However, we know that even after *Shelley*, racially restrictive covenants "continued to be [included in] title documents."[51] And, even after the passage of the Fair Housing Act and up to today, racially restrictive covenants "still [are] in the record books" and "appear[] in title searches."[52] Why not keep horizontal privity intact as both a potential bulwark and a reminder to us about the history of racially restrictive covenants? What is the exact harm in doing so? It seems the scholarly consensus, which has excoriated horizontal privity, has not considered or answered these questions.

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[46] *Id.*

[47] *See id.*

[48] 334 U.S. 1 (1948).

[49] *Id.* at 20-21.

[50] Pub. L. No. 90-284, §§ 801-19, 82 Stat. 73, 81-89 (1968) (codified as amended at 42 U.S.C. §§ 3601-19).

[51] BROOKS & ROSE, *supra* note 29, at 3.

[52] *Id.*

B. Second Objection to Horizontal Privity—Scholars Objecting to the "Record and Notice Justification"

The second scholarly objection rejects the "record and notice justification" for horizontal privity. Scholars have argued that this justification is unsatisfactory because the functions of horizontal privity to ensure the covenants are in writing and therefore to provide notice with prospective purchasers are already "served by the Statute of Frauds and the recording acts."[53] Thus, horizontal privity's objectors argue that it "is no longer needed."[54]

But is the Statute of Frauds the bulwark and perfect replacement for horizontal privity as the detractors claim? The answer is: not necessarily. There have been cases involving covenants running with the land where the Statute of Frauds has been satisfied, but where horizontal privity has stepped in to prevent the running of absurd and/or unfair covenants in certain situations.

Take, for example, the Virginia case *Simmons v. On Faith, L.L.C.* [55] This case involved a situation where a landowner covenanted with himself—an absurd situation, but one which still satisfied the Statute of Frauds requirement.[56] James Long—the landowner and developer—"executed a deed of trust in 1972, which granted a lien on [his own] property." [57] In 1973, he created restrictive covenants, which included a restriction on commercial development.[58] The 1972 deed of trust "was foreclosed in 1975, and . . . the property . . . was [then] conveyed to [a bank] by the foreclosure trustee." [59] A church eventually took the property, "trac[ing] its chain of title to the foreclosure trustee"; the trustee "never [agreed] to the creation of [the] restrictive covenants."[60] The dispute in the case was between the complainant owners—who sought to enforce the 1973 restrictive covenant prohibiting commercial development—against the church and its property.[61]

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[53] French, *supra* note 5, at 934-35.
[54] RESTATEMENT (THIRD) OF PROP.: SERVITUDES §2.4 cmt. b (AM. L. INST. 2000).
[55] 69 Va. Cir. 355 (2005).
[56] *See* Lewyn, *supra* note 6, at 35.
[57] *Simmons*, 69 Va. Cir. at 356.
[58] *Id.* at 355-56.
[59] *Id.* at 356.
[60] *Id.*
[61] *Id.* at 355.

The Virginia court ultimately ruled that the covenants were unenforceable against the church.[62] The court first set out the standard for the enforceability of a covenant: "[a] restrictive covenant is enforceable if a landowner establishes: (1) horizontal privity; (2) vertical privity; (3) intent for the restriction to run with the land; (4) that the restriction touches and concerns the land; and (5) that the covenant is in writing."[63] The 1973 restrictive covenant satisfied element 5, as it was writing, and thus, it satisfied the Statute of Frauds.[64] However, the court decided that the restrictive covenant did not satisfy horizontal privity because James Long was "the sole signatory of the [1972] deed" and he was also the only one who created the 1973 restrictive covenant.[65] There was no way, therefore, that the restrictive covenant could satisfy the Virginia standard for horizontal privity, which requires that "the covenant must be part of a transaction that also includes the transfer of . . . land that is either benefited or burdened by the covenant."[66]

This case thus serves as an example where an absurd covenant—one created by a landowner on his own land—was prevented from running not because of the bulwark of the Statute of Frauds, but because of horizontal privity. Thus, at the very least, the categorical and absolutist stance of the objectors that horizontal privity "is no longer needed"[67] because of the Statute of Frauds is a far too simplistic and incomplete characterization.

C. Third Objection to Horizontal Privity—Horizontal Privity Should Be Abolished Because It Raises Transaction Costs

The third objection against horizontal privity is that it raises transaction costs because parties can get around the requirement by using straw transfers.[68] Let's say Neighbor A and Neighbor B wanted to create a restrictive covenant running with the land—Neighbor A could convey the land to Neighbor B, and Neighbor B

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[62] *Id.* at 356.

[63] *Id.* (alteration in original) (quoting Barner v. Chappell, 585 S.E.2d 590, 594 (Va. 2003)).

[64] *See id.* at 356-57.

[65] *Id.* at 357.

[66] *Id.* (quoting Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 580 (Va. 1999)).

[67] RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. b (AM. L. INST. 2000).

[68] Sweeney, *supra* note 3, at 676. *See also* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. b (AM. L. INST. 2000).

would then transfer that land back to Neighbor A, including the restrictive covenant in the written deed of the transfer.[69] This would create a grantor-grantee relationship between the two neighbors and therefore satisfy successive horizontal privity.[70]

My first response to this objection is relatively simple: the horizontal privity objectors do not provide any concrete evidence that such straw transactions are actually occurring on a significant scale. Nor do they provide evidence of how such transactions—assuming they occur in the real world—raise transaction costs. The detractors also do not consider the transaction costs that might be imposed if real covenant jurisprudence was fundamentally changed in many jurisdictions to abolish horizontal privity.

Furthermore, raising transaction costs may in some situations be desirable, as it can further prevent unfair or absurd covenants from running. Take, for example, two neighbors who each own abutting land. They want to encumber their land with a restrictive covenant which disallows any pregnant woman from ever possessing or owning the land. They memorialize the encumbrance in a written agreement between themselves. With the horizontal privity doctrine, we know that this covenant cannot be enforced as a running covenant and therefore will not bind any successors because there is neither mutual privity nor successive privity. The neighbors have three choices, assuming they know of the horizontal privity requirement: (1) abandon the idea; (2) go with the current arrangement, knowing the covenant would not be enforceable; or (3) a straw man transaction. But the straw man transaction would incur costs—e.g., perhaps hiring legal counsel to prepare the deeds and formalities, or recording the deeds and land sales. This may discourage the neighbors from choosing this option, and therefore, they are forced into option one or two, neither of which can ultimately save the covenant. Thus, this hypothetical presents an example of where horizontal privity can prevent the running of unfair covenants.

One counterargument that might be raised here is that horizontal privity still would not be required because objectionable real covenants would be invalidated as being contrary to public

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[69] Lewyn, *supra* note 6, at 33.

[70] *Id.*

policy. My general response is that hanging one's hat on public policy concerns as the guiding rationale by any court is a dangerous and risky proposition. We should not forget that, for decades, courts across the United States saw no conflict between racially restrictive covenants and public policy. It is, thus, far better to rely on a clearer and more dispassionate technical requirement, such as horizontal privity, than the ambiguities and vagaries of "public policy."[71]

CONCLUSION

The scholarly consensus has not been kind to the horizontal privity doctrine. In absolutist and categorical terms, it has dismissed horizontal privity. This Essay has attempted to provide a more nuanced, balanced view of the horizontal privity doctrine, to point out problems in the reasoning of horizontal privity's detractors, and to mount a defense of horizontal privity. Horizontal privity is worth keeping, and there is also no clear sign that courts are rushing to embrace the Third Restatement's exhortation for abolishing it.

To conclude with an analogy, detractors of horizontal privity have compared it to training wheels on a bicycle. To them, horizontal privity—like training wheels when learning to first ride a bike—may have seemed like a good idea to deal with concerns about running covenants. But to them, keeping the training wheels—like keeping horizontal privity—would hinder the rider and create a safety hazard. Thus, in their view, courts should

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[71] It should be noted here that one recent case where a court invalidated a restrictive covenant because it violated public policy—despite fulfilling the horizontal privity requirement—was the *Taylor v. Northam* case in Virginia. No. CL 20-3339, 2020 Va. Cir. LEXIS 443 (Oct. 27, 2020). The case involved Richmond's statue of Confederate General Robert E. Lee, which is on state-owned land. *Id.* at *1-4. The defendant—represented by the Virginia Attorney General's office—ordered the statue to be removed, but a group of Richmond residents sued to stop the removal. *Id.* at *1, *4. Eventually, the Virginia circuit court ruled that the 1887 and 1890 covenants, which required that Virginia protect the statue forever, were unenforceable because these covenants were "in violation of the current public policy of the Commonwealth of Virginia." *Id.* at *1-4, *16-17. *See also* Laura Vozzella, *Northam Can Remove Lee Statue in Richmond, Judge Rules*, WASH. POST (Oct. 27, 2020), https://www.washingtonpost.com/local/virginia-politics/richmond-judge-lee-statue-removal/2020/10/27/6fe87166-1893-11eb-82db-60b15c874105_story.html [https://perma.cc/VZA5-3J4E].

remove horizontal privity—just like removing the training wheels would lead to better bike-riding.[72]

But why should we completely get rid of the "training wheels" of horizontal privity if they have some usefulness and can keep us (and the law of real covenants) safe from harm or abuse? I prefer to think of horizontal privity as an important medicine. We hope we will not get sick and have to take that medication, but we feel some comfort knowing it is there in case we need it. Surely, it would be more salubrious to keep that medication in the cabinet if and when we need it, rather than simply throwing it away forever.

[72] WHITMAN ET AL., *supra* note 16, § 8.19, at 404 n.332. *See also* Sweeney, *supra* note 3, at 675.