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**Current Issues**  
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THE SUPER-VILLIAN OF THE PLANT  
KINGDOM: JAPANESE KNOTWEED  
AND ITS NEVER-ENDING SAGA.

Harshita Rathore

“When the German botanist Philipp von Siebold sent a variety of plant specimens to the Royal Botanical Gardens at Kew in August 1850, he had no idea what he was unleashing on the world.”<sup>1</sup>

## I. INTRODUCTION

Can the fear of a plant justify killing someone and then committing suicide? Kenneth McRae, a lab technician, lived with his wife Jane in Sandwell, England.<sup>2</sup> Kenneth was thinking of selling his home when he noticed the presence of Japanese Knotweed, a weed notoriously difficult to remove, growing over his boundary fence.<sup>3</sup> After numerous unsuccessful attempts to control its spread by cutting it regularly and reporting its presence to the Sandwell Council, Japanese Knotweed became the focus of Kenneth’s “growing madness.”<sup>4</sup> For Kenneth, the idea of Japanese Knotweed making his unmortgaged property unsaleable by undermining the structure of his property was so

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<sup>1</sup> Christopher Middleton, *Japanese Knotweed: The Invasive Plant That Eats the Value of Your Home*, NEWSWEEK (Aug. 5, 2014, 12:36 PM), <https://www.newsweek.com/japanese-knotweed-driving-men-murder-257257>.

<sup>2</sup> James Dunn, *Lab technician ‘battered wife to death with a perfume bottle then killed himself after being driven mad by invading Japanese Knotweed’*, DAILYMAIL U.K. (Oct. 14, 2015, 2:34 PM), <https://www.dailymail.co.uk/news/article-3271083/Lab-technician-battered-wife-death-perfume-bottle-killed-driven-mad-invading-Japanese-Knotweed-not-stopped.html>.

<sup>3</sup> *Id.*

<sup>4</sup> Rebecca Perring, *Man kills his wife then himself as he was so frightened of JAPANESE KNOTWEED*, EXPRESS NEWS UK (Oct. 13, 2005, 6:14 PM), <https://www.express.co.uk/news/uk/611843/Man-kills-wife-japanese-Knotweed>.

unbearable that he committed suicide after killing his wife.<sup>5</sup> According to his suicide note, Kenneth did not want to live his life fighting consequent unwinnable legal battles over the presence of Japanese Knotweed on his property.<sup>6</sup> His note also said, “I believe I was not an evil man until the balance of my mind was disturbed by the fact that there is a patch of Japanese Knotweed which has been growing over our boundary fence on the Rowley Regis Golf Course.”<sup>7</sup>

Though no plant can justify such an act, Kenneth’s fear is not completely unreasonable. Japanese Knotweed (*Fallopia japonica*) has been described as “thuggish, ferocious, invasive and an indestructible scourge” throughout horticultural literature.<sup>8</sup> It is considered one of the 100 worst invasive species identified by the International Union for Conservation of Nature,<sup>9</sup> and has costed approximately £166 million a year to control and clear in Europe.<sup>10</sup> The reason for such a huge number is its tenacity to eat up property values by undermining building structures and even public infrastructure, such as cracking through roads.<sup>11</sup> Further, its presence is not offset by any benefits to the ecosystem particularly because it is “deeply disgruntling to wildlife:

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<sup>5</sup> *Id.*

<sup>6</sup> Dunn, *supra* note 2.

<sup>7</sup> *Id.*

<sup>8</sup> Middleton, *supra* note 1.

<sup>9</sup> *Invasive Species Compendium: Fallopia Japonica (Japanese knotweed)*, CABI (Nov. 20, 2019) <https://www.cabi.org/isc/datasheet/23875>.

<sup>10</sup> Sally Williams, *Knotweed: The unstoppable scourge of British gardens*, THE TELEGRAPH UK (Sept. 17, 2016, 8:00 AM), <https://www.telegraph.co.uk/gardening/problem-solving/knotweed-the-unstoppable-scurge-of-british-gardens/>.

<sup>11</sup> *Id.*

insects cannot feed off it; [and] birds rarely build nests in it.”<sup>12</sup> The effects of Japanese Knotweed are so drastic that the disclosure of its presence is now mandatory on all sales of property in the U.K.<sup>13</sup> Further, in the U.K., if someone wants to obtain a mortgage on a property with Japanese Knotweed presence, “mortgage lenders require evidence of a professional treatment plan.”<sup>14</sup> In its letter to a British parliamentary committee, HSBC bank stated that its mortgage policy classifies any Japanese Knotweed “closer than seven metres to the property as unacceptable security.”<sup>15</sup> As a result, in some mortgage

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<sup>12</sup> *Id*; see also *NETN Species Spotlight: Japanese Knotweed*, NATIONAL PARK SERVICE, <https://www.nps.gov/articles/netn-species-spotlight-japanese-knotweed.htm> (“Knotweed is capable of completely smothering out all other plant life, launching a domino effect that leads to other native species, like insects and birds, to leave the area as well.”) [hereinafter NATIONAL PARK SERVICE].

<sup>13</sup> Georgian Laud, *Japanese Knotweed: How much can Japanese Knotweed knock off price of YOUR home?*, EXPRESS (Jan. 23, 2020, 7:29PM), <https://www.express.co.uk/life-style/property/1232593/Japanese-knotweed-UK-how-much-Japanese-knotweed-lower-house-price-mortgage-risk>. The presence of Japanese Knotweed on the property thus also impacts the value of the house. New research conducted by the tradespeople comparison site HaMuch.com concluded that Japanese Knotweed results in a loss of “10 percent, or £23,530, off the value of the average UK home.” *Id*. “The research shows five percent of UK homes equals 1,450,000 properties, which face £34.12bn taken away from their value.” *Id*. Another illustration of the monetary havoc that Japanese Knotweed has caused is highlighted by U.K.’s Royal Horticultural Society which highlighted that removing Japanese Knotweed from the London Olympic Games site cost 120 million U.S. dollars. Middleton, *supra* note 1.

<sup>14</sup> Laud, *supra* note 13.

<sup>15</sup> *Written evidence submitted by HSBC (JKW0034)* (Feb. 2019)

lending decisions this “seven-metre rule” has been often used as a blunt instrument.<sup>16</sup>

The Japanese Knotweed, originally indigenous to Japan, was shipped westward by Phillip von Siebold,<sup>17</sup> and first introduced in North America as an ornamental plant in the late 19<sup>th</sup> Century.<sup>18</sup> Today, Japanese Knotweed has spread throughout New Jersey’s physiographic provinces including, “Atlantic, Bergen, Burlington, Camden, Cape May, Gloucester, Mercer, Monmouth, Ocean, Somerset, Warren, Essex, Hudson, Hunterdon, Middlesex, Salem, Sussex, and Union counties.”<sup>19</sup>

The New Jersey Department of Environmental Protection describes Japanese Knotweed as extremely competitive and persistent.<sup>20</sup> The “crown or head” of Japanese Knotweed can be of a size comparable

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<http://data.parliament.uk/writtenevidence/committeeevidence.svc/evidencedocument/science-and-technology-committee/japanese-Knotweed-in-the-built-environment/written/97315.pdf>.

<sup>16</sup> HC SCI. & TECH. COMMITTEE, JAPANESE KNOTWEED AND THE BUILT ENVIRONMENT, 2018-19 (UK), <https://publications.parliament.uk/pa/cm201719/cmselect/cmsctech/1702/170202.htm> [hereinafter JAPANESE KNOTWEED AND THE BUILT ENVIRONMENT].

<sup>17</sup> Middleton, *supra* note 1.

<sup>18</sup> Katherine Stone, *Polygonum sachalinense*, *P. cuspidatum*, *P. × bohemicum*, FIRE EFFECTS INFORMATION SYSTEM (Oct. 7, 2019), <https://www.fs.fed.us/database/feis/plants/forb/polspp/all.html>.

<sup>19</sup> DAVID SNYDER & SYLVAN R. KAUFMAN, N.J. DEP’T. OF ENV’T PROTECTION, AN OVERVIEW OF NONINDIGENOUS PLANT SPECIES IN NEW JERSEY 87 (2004), <https://www.nj.gov/dep/njisc/InvasiveReport.pdf>.

<sup>20</sup> N.J. DEP’T OF ENV’T PROTECTION, NEW JERSEY NON-NATIVE PLANTS, JAPANESE KNOTWEED (Oct. 2008), [https://www.nj.gov/dep/njisc/Factsheets/j\\_knotweed.pdf](https://www.nj.gov/dep/njisc/Factsheets/j_knotweed.pdf).

to that of a bull's head and numerous strands of roots radiating from it.<sup>21</sup> Japanese Knotweed is also extremely hard to eradicate because it reproduces both by seeds and vegetative cuttings.<sup>22</sup> What makes Japanese Knotweed so tenacious is its ability to endure a remarkable range of soil types and climates including drought and high salinity,<sup>23</sup> giving it the potential to stay dominant all year long and spread much farther than other plant species.<sup>24</sup> Further, since it spreads through rhizomes, it can create quite strong pathways.<sup>25</sup> "Growing up to six and a half feet tall and sixty-five feet wide due to its tireless and unstoppable army of unseen roots, Japanese Knotweed spreads out underground and forces its way up through every crack imaginable, in patios, concrete paths, and even in walls and floors."<sup>26</sup> Its supernatural ability to grow is highlighted by the fact that in the late 90s it was found that DNA analysis of "2000 of 150 Japanese Knotweed samples across the U.K. showed them to be identical," or in other words, the clones of the same single plant that Siebold had sent 150 years prior.<sup>27</sup>

Currently, the only effective methods to control its spread are either repeatedly cutting its stems or mechanically rooting each plant from the soil.<sup>28</sup> If the stands are larger, pesticides are a viable option, but the majority of the pesticides that are effective are non-selective and

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<sup>21</sup> Middleton, *supra* note 1.

<sup>22</sup> N.J. DEP'T OF ENV'T PROTECTION, *supra* note 20.

<sup>23</sup> *Id.*

<sup>24</sup> *Id.*

<sup>25</sup> NATIONAL PARK SERVICE, *supra* note 12 (a network of rhizomes in NH was found to be spread out across 32,000 square feet)..

<sup>26</sup> Middleton, *supra* note 1.

<sup>27</sup> NATIONAL PARK SERVICE, *supra* note 12.

<sup>28</sup> N.J. DEP'T OF ENV'T PROTECTION, *supra* note 20.

may persist in the soil.<sup>29</sup> However, a recent U.K. government report highlighted the ineffectiveness of the pesticide method in completely eradicating the Japanese Knotweed.<sup>30</sup> This report indicated that Japanese Knotweed's ability to endure different conditions requires a multi-year excavation or treatment with herbicide as compared to other invasive plants.<sup>31</sup> Further, despite these multi-year successful control efforts, there is a very high risk that the plant is not necessarily dead.<sup>32</sup> The Japanese Knotweed grows through rhizomes and even the tiniest bit of fragment can regenerate the plant.<sup>33</sup> Thus, if there are any rhizomes left after excavation or have retained viability after the pesticide treatment, it will regrow even after three or four years of no signs of growth.<sup>34</sup> The expert questioned in the U.K. government's report stated that chemical control methods can only provide long-term sustainable control, but not eradication.<sup>35</sup>

It can be reasonably deduced from the above discussion that the presence of Japanese Knotweed can be cumbersome for a property owner, but its presence is particularly disconcerting to a property owner whose land is affected by this species from their neighbor's property. Further, in cases where the origin of Japanese Knotweed is unknown and it is affecting two adjoining properties, one property owner may try to abate the presence on his land, but may be unable to convince the

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<sup>29</sup> *Id.*

<sup>30</sup> JAPANESE KNOTWEED AND THE BUILT ENVIRONMENT, *supra* note 16, at 3.

<sup>31</sup> *Id.*

<sup>32</sup> *Id.*

<sup>33</sup> *Id.* at 11.

<sup>34</sup> *Id.*

<sup>35</sup> *Id.*

adjoining neighbor to take the same control steps to curb the growth.<sup>36</sup> In such a case, if the Japanese Knotweed is not controlled on the adjoining property it will continue to affect both properties given its ability to grow and survive adverse conditions. This has been a major area of dispute among neighbors in the U.K., since the property owner may be subjected to the “seven-metre rule” and yet its elimination is not within their control.<sup>37</sup> The “seven-metre rule” is not applicable in New Jersey, but, given the tenacious nature of the plant and its ability to cause physical damage, it is vital to understand the resources a property owner has in such a scenario.

This paper argues that Japanese Knotweed poses a grave threat to the environment for which there is insufficient government action and, thus, a new regulatory structure is needed to address the threat. Part I of this note provides the background of the current framework of statutory and regulatory laws that are available to property owners in New Jersey who are trying to protect their land from the invasion of Japanese Knotweed from their neighbor’s property, or are trying to abate its presence when the origin is unknown and the neighbor refuses

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<sup>36</sup> JAPANESE KNOTWEED AND THE BUILT ENVIRONMENT, *supra* note 16, at 31. The report recounts a similar case in which two adjoining property owners had Japanese Knotweed growing on their properties, but the experts weren’t able to determine the source of origin. The steepness of the gardens made excavation of the Japanese Knotweed impossible without causing serious damage to the properties. One of the property owners treated the Japanese Knotweed on her property with herbicide and offered to do the same to the neighbor’s property. However, the neighbor refused to the herbicide-treatment because she was concerned about the herbicide impact on her grandson’s health. Thus, the property owner with the herbicide-treated property has been unable to sell her house because she can’t guaranty the treatment until the neighbor also treats the Japanese Knotweed on her side of the property. *Id.*

<sup>37</sup> *Id.*



to take control measures. Part I also highlights the limitations of these laws in leaving the essential aspects of the Japanese Knotweed problems unaddressed, and thus the need for alternate remedies. Part II presents a comparative study of the three solutions rooted in property law to deal with the problem of Japanese Knotweed; nuisance law, trespass and restrictive covenant. This section brings together the results of the literature relating to the success or failure of these causes of actions in various avenues of invasive species and applies them to the specific situation of the Japanese Knotweed control. Part III is a modest attempt to provide the most effective solution to private property owners in preventing future introduction of Japanese Knotweed on neighbor's property and remedial actions for removal of Japanese Knotweed on the neighbor's property when the source of origin is unknown. This solution strives to provide the efficacy of each of these causes of action when applied to different stages of a town settlement. This section especially highlights that Legal identification of the problem in the positive law would help in generating the necessary professional and public awareness which is required to deal with this problem effectively.

## II. PART I

The environmental assessment reported provided by the U.S. Department of Agriculture holds that the difficulty with which Japanese Knotweeds are killed and the inaccessibility of some of the infestations suggests that "complete eradication of Knotweeds within the United States is unlikely" despite several states having control measures against

Japanese Knotweeds.<sup>38</sup> Presently, there are no federal regulations governing Japanese Knotweed prevention.

However, one recent development on the federal scale is the United States Department of Agriculture's (USDA) plan to release the Knotweed psyllid (*Aphalara itadori*) to biologically control Japanese, Giant, and Bohemian Knotweeds (*Fallopia japonica*, *F. sachalinensis*, and *F. x bohemica*).<sup>39</sup> The environmental assessment report seeking public reviews and comments holds that according to a preliminary determination conducted by the USDA, human environment would not be significantly impacted by the release of *Aphalara itadori*.<sup>40</sup> The success of the release plan depends upon *Aphalara itadori* increasing in abundance until it suppresses or is effective in the suppression of Japanese Knotweed.<sup>41</sup> The suppression of Japanese Knotweed results in the decrease of *Aphalara itadori* due to starvation.<sup>42</sup>

Biological control of weeds can be an important and effective tool in controlling the spread of Japanese Knotweed, but this solution presents three problems. The first is that the implementation of the plan will happen in stages starting with limited release to ensure that there is

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<sup>38</sup> Animal and Plant Health Inspection Service, *Environmental Assessments; Availability, etc.: Release of *Aphalara Itadori* for the Biological Control of Japanese, Giant, and Bohemian Knotweeds*, REGULATIONS.GOV (May 28, 2019), <https://www.regulations.gov/document?D=APHIS-2019-0002-0001>.

<sup>39</sup> *Id.*

<sup>40</sup> *Id.*

<sup>41</sup> FRITZI S. GREVSTAD, ET AL., *BIOLOGY AND BIOLOGICAL CONTROL OF KNOTWEEDS* 8 (2nd ed. 2020), [https://www.fs.fed.us/foresthealth/technology/pdfs/FHTET-2017-03\\_Biocontrol\\_Knotweeds.pdf](https://www.fs.fed.us/foresthealth/technology/pdfs/FHTET-2017-03_Biocontrol_Knotweeds.pdf) [hereinafter GREVSTAD, ET AL.].

<sup>42</sup> *Id.*

no permanent impact. If the plan is modelled after its success in the U.K., it can be reasonably inferred that a broad implementation of such biological control measure may take years.<sup>43</sup> The USDA Forest Service, Forest Health Assessment and Applied Sciences Team report holds that after release, it may take one to three years to confirm the establishment of biological control agents at a site.<sup>44</sup> Additionally, it may take multiple years before the impact is even noticeable; to reach its weed management potential, five to thirty years may be needed.<sup>45</sup> The biological control of Japanese Knotweed is in its infancy and it may involve several more years before significant impacts are observed.<sup>46</sup> Thus, in cases where the weed needs to be removed quickly, like in the

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<sup>43</sup> *Progress with Weed Biocontrol Projects*, CABI (Nov. 2017), <https://www.cabi.org/Uploads/CABI/about-us/CABI%20centres/WFD%20report.pdf>. The CABI report provides the road map of *Aphalara itadori* introduction in the U.K. as a control agent for Japanese Knotweed. The initial stages of the project focused on safety to ensure that the psyllid had no negative impacts on native flora and fauna. *Id.* The limited first mass releases of the psyllid in 2010-2013 failed to establish large populations, but there was no observable negative impact on native flora and fauna. *Id.* A new license was then issued which allowed the psyllids to be released around river ways likely to offer better conditions for establishment, which resulted in early establishment without any impact on the recipient environment. *Id.* During 2016, the CABI team found adult psyllids at all sites but in low numbers with lower abundances towards the end of the season. *Id.* Spring 2017 surveys confirmed survivals only on the sites where the new stock psyllid was used. *Id.*

<sup>44</sup> GREVSTAD, ET AL., *supra* note 41, at 9.

<sup>45</sup> *Id.*

<sup>46</sup> *Id.*

redevelopment or sale of a property, this biological control weed method may prove ineffective.

The second drawback is entangled with the biological control population characteristic being less effective in areas where other control methods are employed.<sup>47</sup> Biological control methods are usually incompatible with other eradication methods such as mechanical rooting out or herbicide-treated sites.<sup>48</sup> Thus, it is highly likely that the initial releases would be concentrated in areas where the Japanese Knotweed invasion is extreme and where the biological control population can be left alone for several years.<sup>49</sup> This means that the individual property owners who are unable to leave their property undisturbed will be very low on the list of priorities according to which such biological control measures are conducted. This leaves individual property owners almost defenseless against the spread of Japanese Knotweed on their properties.

Furthermore, biological control measures can be effective in reducing the vigor and abundance of a “large infestation of the target weed to an acceptance level,” but they cannot completely eradicate the target weed.<sup>50</sup> This third drawback then leaves hand digging or herbicide methods followed by systematic monitoring for re-treatment or re-growth as the most effective fit to eradicate Japanese Knotweed.<sup>51</sup>

History also provides caution against such measures. The cane toad, which was released in Australia to control a type of beetle that were destroying sugar cane crops, provides the infamous example of

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<sup>47</sup> *Id.*

<sup>48</sup> *Id.*

<sup>49</sup> *Id.*

<sup>50</sup> GREVSTAD, ET AL., *supra* note 41, at 9.

<sup>51</sup> *Id.*

biocontrol-gone-wrong.<sup>52</sup> The toads unfortunately ate everything except the beetles and “are now considered one of the worst invasive species problems on the planet.”<sup>53</sup> The above drawbacks highlight the ineffectiveness of biological control measures for individual property owners which are then left to vade their property against Japanese Knotweed through mechanical or herbicide treatment methods.

**a. NEW JERSEY**

Presently, New Jersey does not have any regulation controlling the spread or distribution of Japanese Knotweed. There was a bill introduced in 2017 which would have made it a crime to plant, propagate or distribute Japanese Knotweed.<sup>54</sup> Any violation of the statute would have subjected the violator to a civil penalty of up to \$100 for the first offense, up to \$200 for a second offense, and up to \$500 for a third or subsequent offense.<sup>55</sup> The statute would have also allowed the New Jersey Department of Agriculture to institute a civil action for injunctive relief to prevent or prohibit the violation of the act.<sup>56</sup> Further, the Department of Agriculture would have been permitted to compromise and settle any claim for a penalty in its discretion so that the penalty may be appropriate or equitable.<sup>57</sup> This bill however was never approved and became dead after being referred to the Senate Economic Growth Committee.<sup>58</sup>

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<sup>52</sup> NATIONAL PARK SERVICE, *supra* note 12.

<sup>53</sup> *Id.*

<sup>54</sup> S.B. 3404, 217 Leg., Prior Sess. (N.J. 2017).

<sup>55</sup> *Id.*

<sup>56</sup> *Id.*

<sup>57</sup> *Id.*

<sup>58</sup> *Id.*

Though the statute never came into effect, it is important to understand that even if it is implemented in the future, in its present form, it will be an ineffective tool for property owners. The drawback of the proposed New Jersey statute is that it is reactive, i.e. it imposes penalty only after a person has violated the act, i.e., either they have already propagated or planted the Japanese Knotweed. Plus, as is already evident by the USDA and other reports, once established Japanese Knotweed spreads at a fast rate and is nearly impossible to eradicate. Further, the statute only allows the Department of Agriculture to bring a cause of violation or injunction. Thus, it provides no recourse for individual property owners directly.

Consequently, property owners residing in New Jersey presently have no federal or state recourse against Japanese Knotweed invasion coming from their neighbor's property. Further, even in cases where the source of origin is unknown, neither the federal nor the state regulation give property owners effective tools at hand to convince their neighbor to take the same effective control measures on their property to curb the invasion.

### **III. PART II**

If the federal and state law provides no recourse, it is important to look towards other avenues that can provide relief to a property owner in his struggle with Japanese Knotweed problem. This section is a modest attempt to explore other causes of actions specifically rooted in property law that might be effective in this fight with Japanese Knotweed.

#### **a. Nuisance Law**

A private nuisance can be a cause of action when the injury inflicted affects the property values, causes annoyance or material disturbance, or continually interferes with the control or power of the

property.<sup>59</sup> One of the earliest cases of Japanese Knotweed in the U.S. was *Inman v. Scarsdale Shopping Ctr. Assocs. LLC*.<sup>60</sup> The plaintiffs, Cynthia and Alan Inman, sued their neighboring shopping center on the theory of private nuisance.<sup>61</sup> The plaintiffs claimed that defendants were negligent in allowing the spread of Japanese Knotweed from the shopping center to the plaintiff's premises resulting in damages to their grounds and residence.<sup>62</sup> The appellate court affirmed the jury award of \$535,000 in damages.<sup>63</sup> The distinguishing feature that makes this case particularly relevant is that the court did not find any evidence indicating when and how Japanese Knotweed first appeared on the defendant's property; in fact the court held that it was undisputed that the defendant has not planted the Japanese Knotweed.<sup>64</sup> This is mainly relevant in cases where the property owner wants to hold the neighbor liable for Japanese Knotweed invasion even when the source of origin is unknown. Further the jury in the *Inman* case awarded \$535,000 in monetary damages, such an amount can be quite helpful to the affected property owner.<sup>65</sup>

Similar result was reached in a landmark case in U.K. where the court held that if the development or improvement of the property would

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<sup>59</sup> G. Nelson Smith, *Nuisance and Trespass Claims in Environmental Litigation: Legislative Inaction and Common Law Confusion*, 36 SANTA CLARA L. REV. 39, 50 (1995).

<sup>60</sup> *Inman v. Scarsdale Shopping Ctr. Assocs. LLC*, 2016 N.Y. Misc. LEXIS 5110 (Sup. Ct. July 27, 2016).

<sup>61</sup> *Id.* at \*1–2.

<sup>62</sup> *Id.*

<sup>63</sup> *Id.* at \*2.

<sup>64</sup> *Id.* at \*1, \*4.

<sup>65</sup> *Id.* at \*2.

require treatment of the contaminated land or the removal of the Japanese Knotweed, then nuisance can be a cause of action in such an encroachment of Japanese Knotweed.<sup>66</sup> In *Network Rail Infrastructure Ltd v. Williams and Waistell*, the plaintiff owned bungalows next to an access path leading up to the railway embankment and Japanese Knotweed was growing on the embankment for 50 years but was contained until the start of litigation.<sup>67</sup> The case was specifically distinguishable for two reasons. First, the defendant was held liable even though it had not introduced Japanese Knotweed on its land; the court held that the defendant can be held liable for nuisance that it did not originally cause because it had control over the nuisance and failed to take steps to abate it.<sup>68</sup> Secondly, the defendant was liable even though there was no damage to the property itself because the “mere presence of an undesirable element in close proximity to the claimants property constituted actionable harm.”<sup>69</sup> The “seven-metre rule” had affected the plaintiff’s prospects of selling the property at full market value.<sup>70</sup>

The U.K. Court of Appeals reached a similar decision in *Smith v. Line*, concerning an application for injunctive relief.<sup>71</sup> The defendant in this case sold a property to the plaintiff while retaining an adjoining

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<sup>66</sup> Lynda M. Warren, *Is Japanese Knotweed inherently damaging? Network Rail Infrastructure Ltd v. Williams and Waistell [2018] EWCA Civ 1514*, 21 ENV’T L. REV. 226, 226 (2019).

<sup>67</sup> Mark Wilde, *Japanese Knotweed and Economic Loss in Nuisance: Framing Environment Harm in Tort*, 31 J. ENV’T L. 343, 344 (July 1, 2019).

<sup>68</sup> *Id.*

<sup>69</sup> *Id.*

<sup>70</sup> Warren, *supra* note 66, at 227–28.

<sup>71</sup> Wilde, *supra* note 67, at 345.



strip.<sup>72</sup> During the sale, Japanese Knotweed was present on both parcels but plaintiff had taken subsequent steps to eradicate the Japanese Knotweed presence.<sup>73</sup> However, the defendant failed to follow suit in adapting similar control measures and the Japanese Knotweed again invaded the plaintiff's property from the adjoining strip.<sup>74</sup>

The above two cases are indications of the steps a property owner can take when the neighbor fails to curb the invasion of Japanese Knotweed on their property which subsequently is affecting the value of the innocent owner's property, or even in cases where no harm to the property has yet been resulted but the prospect of plaintiff's property values are affected. The above cases also support the inference that nuisance law is a great tool for property owners seeking relief from the invasion of Japanese Knotweed from the neighbor's property, even in cases where economic loss is not a cause of action and the actionable grounds are "a material interference with a property right."<sup>75</sup> However, the very nature of nuisance law makes it an ineffective device to address the problem of introduction of this invasive species. Nuisance law can only be applied retroactively, mostly in cases where plaintiff can prove that he has suffered harm.<sup>76</sup> This posteriori nature of the nuisance law proves futile in preventing the harm. Additionally, if the court finds that the neighbor has fulfilled his duty as a landowner and taken reasonable

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<sup>72</sup> *Id.*

<sup>73</sup> *Id.*

<sup>74</sup> *Id.*

<sup>75</sup> *Id.*

<sup>76</sup> Justin Pidot, *Note: The Applicability Of Nuisance Law To Invasive Plants: Can Common Law Liability Inspire Government Action?*, 24 VA. ENVTL. L.J. 183, 206 (2005).

steps, then the neighbor is not held liable for the spread of the species on other's property.<sup>77</sup>

The Supreme Court of South Dakota reached a similar decision in *Collins v. Barker*.<sup>78</sup> *Collins* involved a private nuisance action for property damage sustained when weeds from defendant's property blew onto plaintiff's property. The weeds covered plaintiff's property in such large quantities that they completely filled the fences and tree rows and accumulated over the plaintiff water supply.<sup>79</sup> The fermentation and decay of weeds made the water unfit and, as a result, plaintiff had to "haul water for all their needs."<sup>80</sup> The evidence however pointed that the defendant had taken all the reasonable steps to curb the spread, but was unsuccessful.<sup>81</sup> The court held that the South Dakota Weed Act, like the common law, placed no duty on a property owner to "destroy noxious weeds on his land which are the natural outgrowth of the soil," except to control designated "noxious weed."<sup>82</sup> However, once the landowner has attempted to remedy such a problem, he can be liable for negligence unless he exercises ordinary care.<sup>83</sup>

Though Japanese Knotweed does not spread through air, if the above case law is any indication, a court might not hold liable any property owner who has taken steps to minimize the spread of Japanese Knotweed. Further, common law imposes a duty to take reasonable steps only when a landowner has attempted to rectify the problem. This means that if a neighboring landowner with Japanese Knotweed

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<sup>77</sup> *Collins v. Barker*, 668 N.W.2d 548 (2003).

<sup>78</sup> *Id.*

<sup>79</sup> *Id.* at 550.

<sup>80</sup> *Id.*

<sup>81</sup> *Id.* at 551.

<sup>82</sup> *Id.*

<sup>83</sup> *Collins v. Barker*, 668 N.W.2d 548, 551 (2003).

infestation does not take steps to curb the problem, he cannot be held liable under common law. This problem gets compounded in case of vacant lands infected with Japanese Knotweed. The vacant plot owner, unaware of the Japanese Knotweed problem, will not take steps to curb its spread. If negligence is the basis of theory of liability, the neighboring property holder will be left with no recourse in such cases.

This ex post facto application of nuisance law necessitates the establishment of preventive measures. Preventive measures are principally important in the case of Japanese Knotweed since once established, it is nearly impossible to root out or treat. Further, the USDA Forest Service, Forest Health Assessment and Applied Sciences Team report holds that “The Invasion Curve” indicates prevention is a more cost-effective solution than eradication because eradication of invasive species becomes expensive and difficult as the species spread over time.<sup>84</sup>

One alternative is obtaining injunctions against intentional introductions through public nuisance suits before the Japanese Knotweed is introduced. “Public nuisance law provides a cause of action to compensate plaintiffs and abate unreasonable interferences with public rights.”<sup>85</sup> One of the avenues where this has been made possible is in case of certain GMO crops.<sup>86</sup> An injunction claim against planting GMOs can be brought when it is a threat to public interest or

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<sup>84</sup> GREVSTAD, ET AL., *supra* note 41.

<sup>85</sup> Matthew Shannon, *From Zebra Mussels to Coqui Frogs: Public Nuisance Liability as a Method to Combat the Introduction of Invasive Species*, 32 ENVIRONS ENV'T. L. & POL'Y J. 37, 55 (2008).

<sup>86</sup> *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d 828 (N.D. Ill. 2002).

when there is a “known threat of commingling.”<sup>87</sup> In *in re Starlink Corn Products Liability Litigation*, corn farmers were allowed to bring a private and public nuisance claim against the manufacturer of a genetically modified corn.<sup>88</sup> The basis for the nuisance claim was that the dissemination of the genetically modified corn seeds will contaminate the general food corn supply.<sup>89</sup> This case represents the court’s recognition of public right in health issues. However, at present there are no cases recognizing the same right in a maintaining a healthy ecosystem.<sup>90</sup> Thus alternative avenues are needed until prohibitions against introduction of Japanese Knotweed can be brought within the purview of the nuisance doctrine.

### **b. Trespass**

The law of Trespass can also be a very effective tool to property owners in combating the Japanese Knotweed problem in both the scenarios – where the neighbor has intentionally planted the Japanese Knotweed and even when the source of origin is unknown but the neighbor refuses to curb the growth.

In *Rickel v. Komaromi*, the plaintiff sued his adjoining property owner for trespass when a type of invasive bamboo (*Phyllostachys Aureosulcata*), planted by the defendant along the shared property line and not contained by any barrier, encroached plaintiff’s property.<sup>91</sup> In 2005, the plaintiff tried to eradicate it from his property by hiring a

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<sup>87</sup> Lori H. Peoples, *Recent Development: A Call for Uniform Regulation of Intentional Introductions of Non-Indigenous Species: The Suminoe Oyster*, 81 N.C.L. REV. 2433, 2447 (2003).

<sup>88</sup> *In re Starlink Corn Prods. Liab. Litig.*, 212 F. Supp. 2d at 833.

<sup>89</sup> *Id.*

<sup>90</sup> Peoples, *supra* note 87, at 2447.

<sup>91</sup> *Rickel v. Komaromi*, 73 A.3d 851, 854–55 (Conn. App. Ct. 2013).

landscaper who used a dump truck and backhoe to remove it.<sup>92</sup> In order to protect the plaintiff's property the landscaper even installed steel sheathing along the shared property line.<sup>93</sup> However, the bamboo re-entered the plaintiff's property in 2010 despite the steel sheathing and the plaintiff commenced the action against defendant for trespass alleging that the bamboo repeatedly encroached his property and continued to do so presently.<sup>94</sup> The plaintiff further alleged that the defendant made no attempts to contain the massive infestation of the invasive bamboo and allowed it to freely encroach upon plaintiff's property.<sup>95</sup> The court held that plaintiff's evidence was sufficient to support her claim that the "defendant's conduct in planting the bamboo and then failing to control its growth resulted in . . . a continuing trespass."<sup>96</sup>

However, the law of Trespass suffers the same drawback as the Nuisance law. The ex post facto application of the law of Trespass makes it equally ineffective when applied to Japanese Knotweed, given that it's almost impossible to remove Japanese Knotweed once introduced. But, there is one important characteristic of Trespass law that makes it even more inapt in dealing with the Japanese Knotweed issue. One of the main drawbacks of Trespass law in curbing the Japanese Knotweed problem is the requirement of an intentional act. In the cases discussed below the courts have refused to hold the neighbor liable without evidence of some intentional act on their part.

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<sup>92</sup> *Id.* at 854.

<sup>93</sup> *Id.* at 855.

<sup>94</sup> *Id.*

<sup>95</sup> *Id.* at 856.

<sup>96</sup> *Id.* at 861.

In *Rababy v. Metter*, the plaintiff and the defendant were neighbors and plaintiff's driveway touched defendant's property in certain places.<sup>97</sup> Trees at the edge of defendant's property dropped sap, needles, leaves and branches on the plaintiff's home and car.<sup>98</sup> Moreover, the trees caused mold on plaintiff's roof by casting shadows on his property and the roots damaged plaintiff's driveway and encroached on the property by destroying the property's foundation.<sup>99</sup> The plaintiff claimed that the trees constituted an ongoing trespass, however the court opined that the trespass action was not actionable.<sup>100</sup> The court's reasoning was based on the fact that an unauthorized and intentional act was an element of a successful trespass claim and in this case there was no intentional act involved by the defendant in the detritus falling from trees on his property.<sup>101</sup>

If the same criteria is applied to other invasive species like Japanese Knotweed, it can be inferred that the court will refuse to hold a neighbor liable if they didn't intentionally cause the Japanese Knotweed to infect the adjoining property. This can be a major problem for property owners whose boundary abut a vacant lot with Japanese Knotweed presence. In this case, there would have been no intentional act on part of the property owner and thus no liability.

The above drawbacks of nuisance and trespass highlight the importance of searching for a cause of action that is not only effective in curbing the Japanese Knotweed problem once introduced, but also in preventing its introduction. The law of restrictive covenant can provide such an action.

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<sup>97</sup> *Rababy v. Metter*, 30 N.E.3d 1018, 1020–1021 (Ohio Ct. App. 2015).

<sup>98</sup> *Id.*

<sup>99</sup> *Id.*

<sup>100</sup> *Id.* at 1025.

<sup>101</sup> *Id.*

### c. Equitable Servitude

*Tulk v. Moxhay* was the first case to recognize equitable servitudes.<sup>102</sup> Equitable servitudes are covenants running with the land that are enforced with equitable remedies (such as injunctions).<sup>103</sup> In order to show that the covenant runs with the land, one must show that (1) the grantor and grantee intended that the covenant will be; (2) the covenant ‘touch and concerns’ the land, i.e., the covenant affects the value, use and enjoyment of the property; and (3) there was privity.<sup>104</sup> Intent can also be determined by "existence of a general development plan to determine whether the successors were intended to benefit from servitudes."<sup>105</sup> Similarly, the notice element does not require actual notice and can be satisfied by constructive notice, such as, by way of public records.<sup>106</sup> While there is no case on point, there is a broad range of subject matter where equitable servitudes have been enforced.

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<sup>102</sup> Darren A. Prum & Robert J. Aalberts, *Professional Article: Our Own Private Sustainable Community: Are Green Covenants, Conditions, and Restrictions a Viable Alternative to a More Environmentally Sustainable Future for Homeowners?*, 43 N.M.L. REV. 157, 171 (2013) (citing Robert Kratovil, *Declaration of Restrictions, Easements, Liens, and Covenants: An Overview of an Important Document*, 22 J. MARSHALL L. REV. 69, 69–71 (1988)) [hereinafter Prum & Aalberts].

<sup>103</sup> Jessica Owley, *Property Constructs and Nature's Challenge to Perpetuity*, in ENVIRONMENTAL LAW AND CONTRASTING IDEAS OF NATURE: A CONSTRUCTIVIST APPROACH 64, 76 (Keith H. Hirokawa ed., 2014).

<sup>104</sup> W.E. Shipley, Comment Note, *Affirmative Covenants as Running with the Land*, 68 A.L.R.2d 1022, \*2, \*4 (1959).

<sup>105</sup> Prum & Aalberts, *supra* note 102, at 172.

<sup>106</sup> *Id.*

In *Villa De Las Palmas Homeowners Ass'n v. Terifaj*, the California Supreme Court upheld an equitable servitude against pets.<sup>107</sup> Villa De Las Palmas was a small condominium development, which was not used as primary residence but mostly periodically and seasonally.<sup>108</sup> The condominium units were conveyed with recorded grant deeds containing the covenant, “to observe, perform and abide by any and all lawful by-laws, rules, regulations and conditions with respect to the use and occupancy of said premises which may from time to time be adopted or prescribed by the Board of Governors constituted in said Management Agreement.”<sup>109</sup> It further provided, “failure to abide by any covenant or restriction in the Declaration could result in forfeiture” and “any owner or occupant of any apartment upon said premises may bring legal action for injunction and/or damages against said defaulting owner ....”<sup>110</sup> The said Declaration also provided that “[t]he benefits and obligations of this deed shall inure to and be binding upon the heirs . . . and assigns of the respective parties hereto.”<sup>111</sup>

The Association, pursuant to the authority granted in the declaration, adopted a rule prohibiting pets stating, “Pets of any kind are forbidden to be kept in the apartment building or on the grounds at any time.”<sup>112</sup> Plaintiff was a veterinarian who purchased the unit with the knowledge that there was a no-pet rule, but she did not receive any written copy of the rule prohibiting pets and the deal was not recorded

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<sup>107</sup> *Villa De Las Palmas Homeowners Ass'n v. Terifaj*, 90 P.3d 1223, 1225 (Cal. 2004).

<sup>108</sup> *Id.*

<sup>109</sup> *Id.*

<sup>110</sup> *Id.*

<sup>111</sup> *Id.*

<sup>112</sup> *Id.*



when the unit was acquired.<sup>113</sup> Despite the restriction, the plaintiff brought a dog to the property and unsuccessfully attempted to have the association amend the no-pet rule.<sup>114</sup> After repeatedly warning plaintiff that she was violating the rule, the association brought an action against her seeking preliminary injunction on the theory of equitable servitude.<sup>115</sup>

This decision is important for two reasons. First, the California Supreme Court upheld the restriction even though the restriction contained in the amended declaration was not adopted and recorded before the homeowner acquired her property interest.<sup>116</sup> The court held that universal enforcement of burdens or benefits of interest is a very important requirement for upholding covenants and restrictions in common interest development; thus, it would make little sense if the applicability of an amendment is restricted to subsequent purchases.<sup>117</sup> Second, the court also held that the equitable servitude will be enforceable where reasonable, and prohibiting pets is “rationally related to health, sanitation and noise concerns” and the restriction prohibiting pets was therefore reasonable as a matter of law.<sup>118</sup>

In *Mock v. Shulman*, the plaintiff and defendant were adjacent property owners and the plaintiff brought an action to restrain defendant from maintaining a line of trees which were blocking plaintiff’s view

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<sup>113</sup> *Villa De Las Palmas Homeowners Ass’n v. Terifaj*, 90 P.3d 1223, 1225, 28 (Cal. 2004).

<sup>114</sup> *Id.* at 1225.

<sup>115</sup> *Id.*

<sup>116</sup> *Id.* at 1228.

<sup>117</sup> *Id.*

<sup>118</sup> *Id.* at 1234.

from his property.<sup>119</sup> When the plaintiff had purchased the property, the defendant's lot was vacant and thus plaintiff had a panorama view of Santa Monica, the beach cities, Palos Verdes, and Long Beach.<sup>120</sup> The defendant hired an architect who planned to build the property as a "setting of residence in a park-like area with a maximum of privacy."<sup>121</sup> Thus, six to eight feet tall trees were planted which grew after a few years and became a problem for the plaintiff's property by blocking the light, air, and his view.<sup>122</sup> There were existing equitable servitudes on the property which stated:

"No fence, wall or hedge over six feet in height shall be erected or grown or permitted to exist on any lot or lots in said tract within fifteen feet of any boundary line of any lot; provided, however, that the restrictions set forth in this paragraph 4 may be waived or modified as to any lot or lots in said tract by a written instrument duly executed by the Architectural Supervising Committee."<sup>123</sup>

The court upheld the equitable servitude because there was no modification or waiver executed by the Architectural Committee and thus permitting the tress to grow beyond the stated six feet was a violation of the equitable servitude.<sup>124</sup>

The above cases indicate that the courts have upheld equitable servitudes when the elements are satisfied and when they are not

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<sup>119</sup> *Mock v. Shulman*, 226 Cal. App. 2d 263, 265 (1964).

<sup>120</sup> *Id.*

<sup>121</sup> *Id.*

<sup>122</sup> *Id.*

<sup>123</sup> *Id.* at 265–66.

<sup>124</sup> *Id.*

unreasonable. Further, if equitable servitudes can be enforced for cases where they include a no-pet policy or for preventing blocking the views, then it is reasonable to infer that the courts will enforce such servitudes in the case of Japanese Knotweed as there is no countervailing benefit that offsets against its restraint. In this way, equitable servitude clearly emerges as an effective solution in the situations where nuisance or trespass law fall behind. Equitable servitude can prevent the very introduction of Japanese Knotweed and thus eliminating the hassle associated with its eradication or removal.

*Villa De Las Palmas Homeowners Ass'n* also indicates a very important aspect of the solution to Japanese Knotweed problem. The California Supreme Court not only upheld an amendment to the equitable servitude that was adopted and recorded after the condominium units were brought, but also upheld it to the same standard as the original equitable servitude deed.<sup>125</sup> This can be key for settlements where the Japanese Knotweed problem has not emerged and which maintain equitable servitudes restrictions with clause for later amendment. In these cases, the law of universal enforcement of burdens or benefits of interest required for upholding covenants and restrictions will apply to subsequent bought units as well as the units that were bought prior to the amendment. This will ensure that on a settlement where there is no presence of Japanese Knotweed, the introduction will also be prohibited.

However, there is one aspect of equitable servitude that does not eliminate the problem of Japanese Knotweed. In situations where the source of Japanese is unknown, there is no violator to enforce the

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<sup>125</sup> *Villa De Las Palmas Homeowners Ass'n*, 90 P.3d at 1225.

equitable servitude against. Thus, even equitable servitude alone may not be an effective tool.

#### IV. PART III

The above discussion illustrates the need for a solution which incorporates all these property actions to effectively deal with the Japanese Knotweed problem.

##### a. A New Town/ Community Settlement

I propose in this section that one of the most effective way to deal with Japanese Knotweed problem in a new town or community settlement is through equitable servitudes. One of the best examples that will illustrate this is the private governance structure exhibited in Condominiums and Common-Interest Communities (“CIC”). Condominiums and CIC’s have a board of directors for the community association that enacts rules and covenants and the residents agree to obligations that run with the land that are recorded with the local land records.<sup>126</sup> These rules, which can be amended from time to time to add new regulations or modify the prior ones, function as the private law for the community.<sup>127</sup> Buyers of the land or homes in these CIC and Condominiums agree to be bound by them and the courts often enforce them by granting specific performance or injunction when the rule or regulation is being violated.<sup>128</sup>

One of the important characteristics of the CIC is that courts view the rules and regulations as voluntarily bounding contractual obligations and thus give judicial deference to the freedom of

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<sup>126</sup> See Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL’Y 767, 768 (2014).

<sup>127</sup> See *id.*

<sup>128</sup> *Id.*

contract.<sup>129</sup> Therefore, there is substantively very little limitations on the covenants that can be imposed by the CIC's and thus the board of directors for the homeowners association enjoy great discretion in drafting these covenants. Further since these covenants are often servitudes running with the land, they can be enforced against all successive landowners. This power is also described in Restatement (Third) of Property (Servitudes) § 6.7.<sup>130</sup>

CIC servitude's have more recently changed to focus on environmental sustainability from the traditional restrictions on architectural restrictions, pet policy regulations, and smell and sight nuisances.<sup>131</sup> The following cases demonstrate the flexibility and latitude CIC regulations are given as applied to the landowners in the CIC's.

In *Raintree Homeowners Ass'n v. Bleimann*, the home owners made improvements in their home without the approval of the architectural review committee, as was required by the restrictive

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<sup>129</sup> *Id.* at 769.

<sup>130</sup> The Restatement contains the following text: "(1) Except as limited by statute or the governing documents, a common-interest community has an implied power to adopt reasonable rules to (a) govern the use of the common property, and (b) govern the use of individually owned property to protect the common property. (2) If the declaration grants a general power to adopt rules, the common-interest community also has the power to adopt reasonable rules designed to (a) protect community members from unreasonable interference in the enjoyment of their individual lots or units and the common property caused by use of other individually owned lots or units; and (b) restrict the leasing of units to meet valid underwriting requirements of institutional lenders." RESTATEMENT (THIRD) OF PROP. (SERVITUDES) § 6.7 (AM. L. INST. 2000).

<sup>131</sup> Prum & Aalbert, *supra* note 102, at 159.

covenant.<sup>132</sup> The Supreme Court of North Carolina held that the covenant requiring approval was legally enforceable and it permitted the committee to deny a homeowner's request on any grounds, even purely aesthetic ones.<sup>133</sup> In *Nahrstedt v. Lakeside Vill. Condo. Ass'n*, the Supreme Court of California upheld a pet restriction which only allowed keeping birds and fish and held that one of the homeowners violated the restriction by having cats in her unit.<sup>134</sup> The rationale was that the restriction was rationally related to legitimate concerns of the residents in maintaining the sanitation, health and noise level in the condominium units.<sup>135</sup> Further, it promoted public policy by providing predictability and stability that the restrictions will be enforced uniformly.<sup>136</sup>

Besides these prohibitions and restrictions, courts have upheld restrictions on how one's storm doors/screens or window curtains are styled, how tall the trees can be and their ratio to grass and shrubs, whether certain signs can be posted, or whether basketball hoops can be mounted.<sup>137</sup> There are even servitudes that mandate that one's master house and doghouse be made of the same material and hidden from view by greenery or a six-foot fence.<sup>138</sup> Restrictions also include prohibitions against guests wearing flip-flops from using common area chairs,

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<sup>132</sup> *Raintree Homeowners Ass'n v. Bleimann*, 463 S.E.2d 72, 73 (N.C. 1995).

<sup>133</sup> *Id.* at 75–76.

<sup>134</sup> *See Nahrstedt v. Lakeside Vill. Condo. Ass'n*, 878 P.2d 1275, 1278, n.3 (Cal. 1994).

<sup>135</sup> *Id.* at 1290.

<sup>136</sup> *Id.* at 1292.

<sup>137</sup> Paula A. Franzese, *Does It Take a Village? Privatization, Patterns of Restrictiveness and the Demise of Community*, 47 VILL. L. REV. 553, 555–56 (2002).

<sup>138</sup> *Id.* at 556.

prohibitions against wok cooking, and even bizzare regulations forcing "poorly dressed guests to ride in service elevators."<sup>139</sup> If these cases are any indication, it is highly probable that covenants and rules prohibiting Japanese Knotweed will be upheld. If the reasoning established by the Supreme Court of California in *Nahrstedt* is followed, then the harm of planting Japanese Knotweed far outweighs its benefits. As explained previously, there are virtually no benefits to planting Japanese Knotweed other than beautification purposes, whereas its harm as both environmental and economic will be unmanageable if not prohibited.

The above proposal can be an essential tool for avoiding a Japanese Knotweed problem in new towns and communities as well as for existing towns and communities that presently have not encountered the introduction of the Japanese Knotweed. The servitudes provide a governance scheme with flexibility to adapt to challenges faced presently or those that might arise in future. Further, the communities can get relief through injunctions and specific performance thus providing relief to the landowners.

Equitable servitudes also cure the defect of post-facto problems of the Nuisance and Trespass law. Further, an equitable servitude does not require knowledge of the problem on the part of the owner to impose liability. Thus, even if a vacant property owned by a CIC community member is infected and he is unaware of the problem, the private regulatory scheme of the CIC imposes a duty on him to curb the problem or face liability for violating the rule. This cures one of the major problems of the nuisance law which rooted liability on the theory of negligence and leaves no recourse in cases where the owner is unaware

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<sup>139</sup> *Id.*

or has not taken steps to curb the problem making him not liable at common law. Additionally, this also remedies the drawback of Trespass law which requires an intentional act on the part of the property owner.

### **b. Existing Communities with Japanese Knotweed Problem**

Equitable servitudes accomplish its goals in cases where the Japanese Knotweed has not taken a hold of the land. But, when coupled with tools that can provide relief after its introduction where the towns have no amendment clause for their rules, an integrated approach can be achieved that can accomplish the very goal that has not yet been made possible through legislative efforts of governmental regulations. Nuisance and Trespass are the causes of action that along with equitable servitude provide the wholesome structure that is needed to effectively deal with the Japanese Knotweed problem.

#### **i. Nuisance and Trespass**

As explained in the earlier section of the paper, Nuisance and Trespass law are very effective tools in dealing with the Japanese Knotweed problem when equitable servitude is not a viable option. Joint action in nuisance and trespass is available in encroachment of vegetation upon adjoining land if the “adjoining owner established an intentional intrusion upon her exclusive possession of her premises.”<sup>140</sup>

There are currently four theories of nuisance law that apply to cross-boundary vegetation in different states.<sup>141</sup> A Virginia rule which

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<sup>140</sup> Robert Roy, *Encroachment of trees, shrubbery, or other vegetation across boundary line*, 65 A.L.R.4th 603, § 33 (1988).

<sup>141</sup> See Daniel J. Wisniewski, *Vegetation as a Nuisance*, 8 J.L. ECON. & POL'Y 931, 932 (2012).



allows removal when the noxious vegetation has caused imminent or actual harm, the Restatement which allows removal only if the vegetation is artificial and has caused imminent or actual harm, a Massachusetts rule which only limits remedy to self-help and doesn't allow removal, and a Hawaii rule allowing removal upon showing of actual or imminent harm.<sup>142</sup>

Since the 1980s, the Hawaii rule has dominated the nuisance law as applied to cross-boundary vegetation as courts are recognizing that as the houses get closer, the likelihood of conflict also increases and thus the responsibility to maintain harmony between plants and structures should also increase.<sup>143</sup>

The following cases more clearly illustrate the point. In *Chandler v. Larson*, the plaintiff sued his adjoining property owner for damages to his garage caused by the roots of the tree growing on the defendant's property.<sup>144</sup> The Appellate Court of Illinois held that the urban property owner owed the adjoining property owner a duty of reasonable care which necessarily would include taking reasonable steps to prevent damage to adjoining property owner's garage caused by roots of urban property owner's trees.<sup>145</sup> In *Abbinett v. Fox*, the roots from a large cottonwood tree on the defendant's property caused severe damage to the plaintiff's property, including damaging a patio slab, creating cracks in the sides of the swimming pool, breaking a portion of the fountain and a block wall and also clogging a sprinkler system on

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<sup>142</sup> *Id.* at 932–33.

<sup>143</sup> *Id.* at 933.

<sup>144</sup> *Chandler v. Larson*, 500 N.E.2d 584, 585 (Ill. App. Ct. 1986).

<sup>145</sup> *Id.* at 588.

the plaintiff's property.<sup>146</sup> The trial court not only awarded monetary damages to the plaintiff but also authorized "the plaintiffs to utilize self-help to destroy or block the roots of the defendant's cottonwood trees from encroaching on their land in order to prevent further property damage."<sup>147</sup> The Court of Appeals also affirmed the trial court's decision of holding defendant negligent in causing damages by letting the cottonwood tree roots to cross onto adjoining property.<sup>148</sup>

*Lane v. W.J. Curry & Sons*, following on the lines of *Abbinett*, shows the extent of damage that can be caused to a property owner from the negligence of the adjoining property owner. In *Lane*, the branches and roots from an oak tree growing on the defendant's property caused havoc on the plaintiff's property.<sup>149</sup> The large branches of the oak tree never allowed the plaintiff's roof to dry resulting in it and walls to turn brown.<sup>150</sup> The plaintiff thus had to get the roof replaced because "the ceiling was just falling down."<sup>151</sup> Further, a large limb from the neighbor's oak tree fell through the plaintiff's roof, attic and then kitchen ceiling causing the rainwater to damage plaintiff's stove and floor.<sup>152</sup> Moreover, for two years the plaintiff was not able to use her sink, bathtub, or toilet because the sewer line was clogged by infiltration of the plant roots causing extreme plumbing problems including raw sewage bubbling in her bathtub.<sup>153</sup> Though the plaintiff could not physically reach the limbs, she did try to cut off the roots which just

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<sup>146</sup> *Abbinett v. Fox*, 703 P.2d 177, 179 (N.M. Ct. App. 1985).

<sup>147</sup> *Id.* at 179.

<sup>148</sup> *Id.* at 182.

<sup>149</sup> *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 357 (Tenn. 2002).

<sup>150</sup> *Id.*

<sup>151</sup> *Id.*

<sup>152</sup> *Id.*

<sup>153</sup> *Id.*

kept growing back and continued to cause plumbing problems to the degree that plaintiff had to use her neighbor's restroom.<sup>154</sup> "The plaintiff testified regarding the condition of her home that everything is all messed up. I cannot bathe. I cannot cook. I do not want people coming to my house because it has odors in it, fleas, flies, bugs. It has just been awful for me."<sup>155</sup> The court held that where the tree branches and roots from neighboring property causes damage to the property owner, they are not limited to self-help but can also seek a nuisance action and demand damages.<sup>156</sup>

In similar line of cases, *Fancher v. Fagella* involved a plaintiff whose property was being damaged by the large sweet gum tree on the defendant's property, impairing plaintiff's house foundation, blocking water and sewer pipes, and displacing the wall between the properties.<sup>157</sup> Similar to *Lane*, the plaintiff attempted self-help and tried to remove the roots, but they ultimately proved ineffectual.<sup>158</sup> The Supreme Court of Virginia remanded the case to the lower court to determine whether the defendant owed a duty to remove the roots. If the defendant did, the court was to also determine when the defendant will be liable for damages and will be required to remove the tree and its root systems.<sup>159</sup>

One of the cases that is of particular relevance here is *D'Andrea v. Guglietta*, where the suit was brought for damages to waylite block

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<sup>154</sup> *Id.*

<sup>155</sup> *Lane v. W.J. Curry & Sons*, 92 S.W.3d 355, 357 (Tenn. 2002).

<sup>156</sup> *Id.* at 356.

<sup>157</sup> *Fancher v. Fagella*, 650 S.E.2d 519, 520 (Va. 2007).

<sup>158</sup> *Id.*

<sup>159</sup> *Id.* at 523.

boundary fence caused by maple tree roots.<sup>160</sup> The maple tree was planted three years before the construction of defendant's boundary fence and about three and a half feet from the common boundary.<sup>161</sup> The trial court awarded money judgment to the defendants for the claim of abatement of nuisance and damages.<sup>162</sup> The Superior Court of New Jersey affirmed that the maple tree roots planted by plaintiff caused property damage that is actionable as nuisance. Sure enough, the defense of avoidable consequence is unavailable because the roots were not evident when defendants built the wall and could not have "foreseen the direction and extent of the tree root's growth."<sup>163</sup> This case provides relief to New Jersey residents who unknowingly build a property near infectious Japanese Knotweed and were unaware of its existence at the time they build their property or the common fence.

An official system combining these initiatives is necessary if the Japanese Knotweed problem is to be resolved. In fact, imposition of common law liability can serve as an impetus for such governmental action. One of the prime examples of such an impetus is *Kelly v. Gwinnell*. *Kelly* was a tort suit in which the Supreme Court of New Jersey held that a host who provided alcohol to the guest and knows that that "the guest is intoxicated and will thereafter be operating a motor vehicle, is liable for injuries inflicted on a third party as a result of the negligent operation."<sup>164</sup> The New Jersey legislature superseded *Kelly* by promptly intervening and creating a statute to protect hosts who unknowingly provided alcohol to a guest who then later made the decision to drive, and also allowing the statute to compensate innocent

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<sup>160</sup> D'Andrea v. Guglietta, 504 A.2d 1196, 1196–97 (N.J. App. Div. 1986).

<sup>161</sup> *Id.* at 1197.

<sup>162</sup> *Id.* at 1196.

<sup>163</sup> *Id.* at 1199.

<sup>164</sup> *Kelly v. Gwinnell*, 476 A.2d 1219, 1224 (N.J. 1984).

victims.<sup>165</sup> The Bill arose out of months of public meetings, serious debate, involvement by the governor of New Jersey, and creation of a commission.<sup>166</sup>

Legislative efforts should also incorporate the successful implementation techniques that has been applied in other countries. For example, the U.K. government imposes extremely strict rules to Japanese Knotweed similar to those that govern toxic waste.<sup>167</sup> The Environmental Act of 1990 in the U.K. requires that only those firms which are licensed remove the plant and receive the waste.<sup>168</sup> Further, it is forbidden to dump the removed Japanese Knotweed in the trash or into a landfill.<sup>169</sup>

## V. CONCLUSION

Japanese Knotweed poses a sufficient threat which justifies legislative efforts incorporating the above multi-faceted regime:

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<sup>165</sup> Pidot, *supra* note 76 at 228.

<sup>166</sup> *Id.*

<sup>167</sup> Middleton, *supra* note 1.

<sup>168</sup> *Id.*

<sup>169</sup> *Id.* Few new initiatives are also relevant in dealing with the Japanese Knotweed problem. An Ireland start-up company is enlisting the help of dogs to detect the presence of Japanese Knotweed. *40 Times Faster Than Humans: How Dogs Are Tackling Japanese Knotweed on Building Sites*, GLOB. CONSTR. REV. (Feb. 13, 2020), <http://www.globalconstructionreview.com/innovation/40-times-faster-humans-how-dogs-are-tackling-japan/>. The dogs can scout an area 40 times faster than a team of humans and are particularly good at detecting rhizomes and thus detecting Japanese Knotweed presence even when they are below the surface of soil. *Id.*

equitable servitude with nuisance and trespass, then used as a model to rectify gaps in current legal authority. Governmental action is also necessary to enable lawsuits under public common-law cause of action of nuisance and trespass, as plaintiffs vindicating their rights individually may be quite limited. Legal identification of the problem in the positive law would help in generating the necessary professional and public awareness which is required to deal with this problem effectively. The most significant drawback of any solution is its unavailability and unawareness to the general public, and legislative efforts can help rectify that drawback. Japanese Knotweed can be a major source of economic and environmental harm when left unchecked. It needs particular focus because without any liability, it is more likely to be introduced by corporations, developers and individuals for its beautification properties, unaware of its effect and its resistance to eradication.