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Touch and Concern is Dead: Long Live the Doctrine

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I. INTRODUCTION: ALI BIDS FAREWELL TO TOUCH AND CONCERN

The pending Restatement (Third) of Property: Servitudes abandons the requirement, first articulated in *Spencer’s Case*,¹ that to “run” with the land real covenants and equitable servitudes must touch and concern the benefitted and burdened land. The touch and concern requirement has been replaced with a series of non-constitutional standards which courts can use to invalidate real covenants and equitable servitudes. This Article criticizes the proposed new Restatement rules for jettisoning a vague, but useful, doctrine in favor of more unworkable and redundant invalidation standards. My criticism of the proposed Restatement is offered as part of a symposium honoring one of the most productive and thoughtful American property law scholars, Professor Lawrence Berger of the University of Nebraska College of Law. It is offered in the spirit of Professor Berger’s work. He has always tried both to explain and illuminate the purpose of the law of real property, as well as public and private land use controls, and to ground legal doctrines in basic ideas of fairness and efficiency.²

A. The Restatement (Third) of Property: Servitudes in Context

In comparison to the Restatements of Contracts and Torts, the history of the Restatement of Property has been a less happy story of the codification of the progressive reform efforts of common law judges.³

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3. The question of the basic purpose of the American Law Institute (ALI) continues to be the subject of lively historical and contemporary debate. The historical issue is whether the ALI’s original purpose was to implement progressive ideas of legal reform or to support the dominant elite’s effort to save the common law from statutory liberalization. N.E.H. Hull, *Restatement and Reform: A New Perspective on the Origins of the American Law Institute*, 8 Law & Hist. Rev. 55 (1990), sets out the case for the first view. John P. Frank, *The American Law Institute, 1923-1998*, 26 Hofstra L. Rev. 615 (1998), reviews the same history, acknowledges that the “is/ought” tension was present from the start, but suggests that the adoption of minority or evolving doctrines accelerated with the Restatement Seconds. The recent history of the Restatement (Third) of Torts: Products Liability illustrates that the tension between progressive reform and the maintenance of the status quo remains endemic to the ALI process. See The Honorable Shirley [Further details not provided here.]
The Restatement (First) of Property has long been viewed as a partially failed reform exercise. This view has developed because of the Restatement's failure to "restate" the law of real covenants which run with the land in accord with the widespread acceptance of the utility of private land use control instruments. Prepared in the midst of the Great Depression, the Restatement (First) of Property took a dim view of covenants running with the land. Affirmative covenants that required the payment of money were viewed by the Reporter as potential engines of small landowner bankruptcy, and their use was discouraged. The law was "restated" to impose a number of restrictions on subsequent purchasers regarding enforcement of affirmative burdens and benefits. The primary restriction was an extremely restrictive definition of horizontal privity. The rules articulated in the Restatement (First) and their underlying assumptions were contested at every stage of discussion in the Institute and savaged by commentators, such as Charles Clark, as ahistorical. However, the restrictive theory of affirmative covenants prevailed and as a result of the covenant section, the Restatement (First) of Property was largely ignored by courts. Thus, it never enjoyed the prestige of the Restatements of Contracts and Torts and consequently, never became an important source of doctrinal reform.

The Restatement (First) did not curb the widespread use of real covenants and other private land use control devices. Private land use restrictions flourished in the decades following World War II. Private, or as they are now called, "common interest communities," were created throughout the country. A mix of legal and equitable restrictions were employed to create de facto constitutions for the governance of residential community associations (RCAs). Such restrictions are generically called covenants, conditions and restrictions (CCRs), or simply servitudes. Courts were very supportive of the use of real covenants, equitable servitudes and liens to tax homeowners for the

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5. For Clark's classic attack, see Charles E. Clark, The American Law Institute's Law of Real Covenants, 52 YALE L.J. 609 (1944), reprinted in CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 206 app. I (2d ed. 1947) [hereinafter CLARK, REAL COVENANTS]. Henry Upson Sims was more measured, but nonetheless trenchant, in his attack on the Reporter, Oliver S. Rundell of the University of Wisconsin. See Sims, supra note 4, at 27-41.
provision of community services and to regulate property use and individual behavior. This view was also supported by many scholars who praised the privatization of public services. The Restatement (First)'s concern with the use of real covenants to impose unjust private tax burdens proved largely unfounded, but a new set of concerns arose. Students of local government worried about the political relationship between RCAs and traditional public governments. Others worried that common interest community citizens were entitled to less protection from arbitrary RCA actions than citizens of public communities who are protected by the full force of the Constitution.6

In the 1970s, the American Law Institute (ALI) began the process of rehabilitating the Restatement (First) by bringing property law in line with changed social conditions. The Restatement (Second) of Property addressed the rapidly changing law of landlord-tenant. The common law granted tenants few rights and imposed few duties on landlords. The Kennedy-Johnson War on Poverty triggered the use of landlord-tenant law to impose affirmative maintenance duties on landlords to benefit tenants living in “slum” housing. The Restatement (Second) adopted most of the reforms of the law of landlord-tenant spawned by the War on Poverty, most notably the implied warranty of habitability.7 The Restatement (Third) of Property has continued this reform tradition by validating the widespread creation of common interest communities by making it easy to create servitudes that create comprehensive regulation and taxation schemes. The Restatement (Third) also attempts to articulate non-Constitutional standards of judicial control which limit the use of servitudes that bump up against fundamental constitutional rights of individual expression and freedom from discrimination.

B. The Restatement (Third) of Property: Servitudes and the Risks of Living in a Common Interest Community

Since the 1980s, the Restatement (Third) of Property: Servitudes, hereinafter referred to as the Restatement (Servitudes), has been aggressively reforming and unifying the law of easements, real covenants, equitable servitudes and profits a prendre in two not entirely consistent ways. The Restatement (Servitudes) both tries to correct


the mistakes of the Restatement (First) by liberalizing the rules for
the creation and enforcement of real covenants, but at the same time
carries forward the policy of the Restatement (First) that the enforce-
ment of covenants should be rigorously policed by the judiciary. The
Restatement (Servitudes) simplifies a confusing, but utilitarian, part
of modern real property law. Privately negotiated instruments re-
specting the use of land are presumed to be an efficient and fair way
for landowners to share the use of two or more tracts, to assume recip-
rocally burdens and benefits, and to assume the necessary financial bur-
dens to effectuate the promises. Landowners are generally free to
create any servitude arrangement that they clearly intend, unless
there is a strong reason to restrain freedom of contract. However, the
Restatement (Servitudes) also squarely situates the modern problems
with servitudes in the context of the common interest community and
the concern with the failure of these "private governments" to ade-
quately protect minority rights.8

Common interest communities have been in place for over a cen-
tury, but they are becoming more and more prevalent. After initial
resistance, many people now choose condominium or town house liv-
ing, either out of personal preference or economic necessity. The prac-
tice of sorting people by homogeneous architecture and behavior rules
create islands of security and tranquility in the midst of a rapidly
changing society. In addition to a desire for maintenance-free living,
the fear of crime and social diversity is driving many people into
planned, gated communities. In response, many architects and plan-
ners are trying to construct neo-traditional communities which offer
the form of a smaller community. Neo-traditional communities offer
more social interaction, but have less unpredictability and risk of
"real" smaller communities. The regulation of the servitude regimes
found in these communities is difficult because no consensus exists
about the need for regulation.

Common interest communities are a mixed blessing because the
benefits are tempered by legitimate concerns for their residents and
for the larger society. Social commentators differ in their assessment
of these communities. The views range from uncritical enthusiasm to
fears that these communities, especially the new gated communities
in the West, seal the growing gap between rich and poor.9 Like all
governments, common interest communities provide services de-

8. See generally Edward J. Blakely & Mary Gail Snyder, Fortress America:
Gated Communities in the United States (1997); Evan McKenzie, Privatopia:
Homeowner Associations and the Rise of Residential Private Government
(1994). As fear of crime has increased, gated common interest communities have
dramatically increased in popularity. See Rebecca J. Schwartz, Comment, Public
Gated Residential Communities: The Rosemont, Illinois Approach and Its Constitu-
manded by the market at some cost to individual freedom and traditional notions of republican governance. Common interest communities promote both the liberal values of individual choice and autonomy. They allow individuals to purchase a richer menu of physical and social living arrangements than those provided by public governments. However, these liberal values can be undermined by the decision to opt into a common interest community. Common interest communities thus illustrate the central problem of communitarian ethics: the price of maintaining a community is often at the expense of individual autonomy. Physical differences among properties and a certain level of mess are the price we pay for individual choice. Authoritarian regimes create more well-ordered environments. Private representative governments can infringe autonomy values with less ease than public governments because of the power of common interest governance bodies to pass a wide range of restrictions on a member’s “life” and property use. These restrictions often, but not always, exceed the level of regulation that public governments think are necessary to maintain property values and to prevent externalities in an area. The Restatement (Servitudes) has articulated a great deal of new and controversial law regulating the use and enjoyment of property in the burgeoning common interest communities around the nation to bridge the central dilemma of closed community governance and the infringement of individual freedom. The question is whether the touch and concern doctrine has a continuing role in this project.

C. Touch and Concern and Its Substitutes

To many, the touch and concern doctrine is a feudal relic best abandoned. Modern attitudes toward touch and concern have been shaped, in part, by the fate of the Restatement (First)’s horizontal privity rule. In contrast to the Restatement (First), the new Restatement recognizes that the imposition of servitudes that are intended to bind subsequent purchasers of benefitted and burdened land are the norm, not the exception. To this end, it eliminates both the horizontal privity and touch and concern requirements. The elimination of the first requirement is long overdue. Horizontal privity has ceased to be a meaningful judicial barrier to running covenants. There never was a rational case for the 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.

This reasoning does not necessarily apply to the touch and concern doctrine. Touch and concern is an old but not totally dysfunctional...
doctrine compared to the requirement of horizontal privity. The contrast between the treatment of horizontal privity and the touch and concern doctrine illustrates the current Restatement's dual objectives of simultaneously simplifying and scrutinizing the use of these instruments. Touch and concern continues to be diligently, if incoherently, applied by courts because it has a function, although courts often have trouble articulating it. More recent drafts of the Restatement (Servitudes) grudgingly concede this point after initially discounting it. After consigning touch and concern to the rubbish heap of outmoded English land law doctrines along with horizontal privity, the latest draft of the Restatement (Servitudes) acknowledges that the doctrine "appears to retain more currency than other traditional doctrines" and seeks to retain the spirit of the test. The Restatement (Servitudes) formally abolishes the doctrine, but in place of the simple but extremely vague phrase, it substitutes a much broader and more intrusive test for judicial invalidity. A court may refuse to enforce a covenant that meets the intent and vertical privity standards if "it is illegal or unconstitutional or violates public policy."

Elimination of the touch and concern requirement in the Restatement (Servitudes) responds to longstanding criticisms of academic commentators and judges that the standard is either too imprecise to be a predictive guide to judicial scrutiny of a covenant or has ceased to perform any useful substantive screening function. However, the Restatement (Servitudes)'s decision to retain the doctrine's underlying function by formally expanding, rather than contracting, judicial discretion to invalidate real covenants and equitable servitudes is initially curious for two reasons. First, the elimination of the touch and concern requirement is inconsistent with the simplification thrust of the Restatement (Servitudes). The primary objective of the new Restatement is to eliminate much of the baroque facade of the law of "servitudes" and replace it with modern, functional doctrines which both unify and simplify the law. Unification starts with the adoption of the generic term "servitudes" for all of the private arrangements that the common law recognizes to share the use, as opposed to the possession, of different parcels of land among two or more parties. However, the Restatement (Servitudes) recognizes that some distinctions among servitudes must be maintained. An easement, for example, remains different from promises respecting the use of land because an easement performs a different function. The Restatement

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12. Id.
(Servitudes) replaces the terms "real covenant" and "equitable servitude" with the single term "covenant that runs with land." It simplifies the law by announcing, to the maximum extent possible, common intent-based requirements for all use-sharing arrangements and by eliminating rules that are no longer justified. However, with respect to touch and concern, the elimination of the formal requirement has not led to simplification, but to more open-ended standards to invalidate covenants.

The Restatement (Servitudes) replacement of the touch and concern doctrine with more intrusive rules of judicial intervention is an accurate mirror of the current debate over the doctrine's function, but discounts the strong support among courts and commentators for retention of the doctrine. There is a widespread consensus among commentators that the rule is vague and, therefore, impossible to reduce to a single, uniform test. However, there is a lively debate among academic commentators about the need for judicial review of servitudes imposed by predecessors in interest upon current possessors, especially since the current possessors are generally the only parties liable for breach of the servitude. In recent years, academic commentators have abandoned the effort to reduce "touch and concern" to a test. Instead, a great deal of work has been done to articulate the objectives that the standard seeks to achieve. Professor Lawrence Berger has been a leader in this effort. His foundation work has provided a strong platform for others to build upon and his scholarship has provided a more coherent rationale for the touch and concern doctrine to guide courts in applying the doctrine. Nonetheless, the Restatement sides with those who argue that there is a need for judicial supervision of past bargains and strikes out in a new direction that has quite limited academic and judicial support.

The elimination of touch and concern is not a simplification because the standards of servitude invalidity are increased, not decreased. The elimination of touch and concern is also not an adoption of the opinions of "progressive" courts which have jettisoned an old doctrine in favor of a new, more progressive rule. In Davidson

15. Recent influential commentators have endorsed the use of the doctrine. See infra notes 68-70, for a discussion of the modern defenses of the doctrine.
17. Section 433(3)(b) of the Restatement (Second) of Torts adopted Justice Carter's opinion in Summers v. Tice, 199 P.2d 1 (Cal. 1948). Summers involved a situation in which one of two hunters shot plaintiff but each denied liability. Plaintiff could never meet his burden to establish separate liability so the court presumed that both actors were liable and shifted the burden of proof to the defendants to absolve themselves. Summers is the foundation of alternative theories of liability for dangerous products or pollution when there are multiple potential actors
Brothers v. D. Katz & Sons, Inc., 18 one of the most recent leading cases to rethink the doctrine, the New Jersey Supreme Court recognized that the doctrine has evolved from a mechanical screening test to a more open-ended reasonableness test. However, the court did not substitute a reasonableness test for the traditional touch and concern doctrine. 19 The court held only that touch and concern "is but one of the factors that a court should consider in determining the reasonableness of the covenant." 20 The fact the courts continue to adhere to the doctrine half-heartedly is, of course, no reason to retain it. However, the question of the doctrine's modern function is more complex than the Restatement (Servitudes) acknowledges.

Placing the modern law of servitudes in the context of common interest communities represents the best, progressive tradition of the ALI. The harder task is to criticize the Restatement (Servitudes)'s total abandonment of touch and concern. This Article both explains and criticizes the replacement of touch and concern with more opened standards for judicial invalidation. The Restatement's new real covenant screening rules can be explained as a necessary exception to the move toward complexity, rather than simplification, by another major thrust of the Restatement (Servitudes). The dominant servitude paradigm has been a private two-party use sharing regime. However, the modern reality is that the most important use of servitudes is to provide the legal foundation for common interest communities. These communities range from high-rise urban condominiums to rural mobile home parks to sunbelt golf communities. These communities enhance the quality of living for their members and help guarantee the value of the property investment. But, as students of the New England town meeting and other small public interest "common interest" communities have learned, these communities can intrude deeply into personal choices and are not always models of fiscal prudence and responsibility. The Restatement (Servitudes) addresses common interest community governance directly by adopting community governance standards. It places all servitudes, especially real covenants and equitable servitudes, in the context of common interest community governance. Thus, servitudes are now subject to double screening. They must be valid under Section 3.1 of the Restatement (Servitudes) and under Sections 6.5 and 6.7, which are part of a new

which could have caused the injury. See, e.g., Sindell v. Abbott Lab., 607 P.2d 924 (Cal. 1980); King v. Cutter Lab., Inc., 714 So. 2d 351 (Fla. 1998).
19. See id. at 293-94.
20. Id. at 295.
section on common interest community governance. These two sections subject both assessments and regulations to a reasonableness standard.

The critical thesis of this Article is that the touch and doctrine has a useful role to fulfill in policing the enforcement of servitudes over time which is not fully reflected in the new, more intrusive screening rules. Touch and concern protects the long-run economic expectations of landowners who assume a financial servitude obligation. The modern function of the doctrine is primarily to assure subsequent purchasers that there is a reasonable relationship or nexus between the financial burdens imposed and the benefits to their property. Most of the Restatement (Servitudes)'s new screening rules, especially the direct replacements for touch and concern, are efforts to curb the power of common interest communities to regulate lifestyle choices. In the rush to extend the scope of landowner protection, the Restatement (Servitudes) may have diminished the traditional pocketbook protection that landowners have enjoyed. Touch and concern, with all its vagueness, remains a useful judicial tool to protect legitimate financial expectations of purchasers when they are frustrated by the use of funds for purposes with remote benefits to the burdened land.

II. A BRIEF AND NOT TOO HELPFUL HISTORY OF TOUCH AND CONCERN

A. What Little We Know About Spencer's Case

Landowners may enter into promises which allocate benefits and burdens among related parcels of land. These servitudes can be enforced by successors in interest to the original parties to the agreement. The common law has long allowed promises relating to the use of land to “run,” although the reasons are often difficult to determine. Initially, real covenants which ran with the land were a special class of promises enforceable in law. They were an exception to the general rule that promises were personal to the makers. English land law viewed real covenants that run with great suspicion, but the law virtually ceased to develop because real covenants became less important after Tulik v. Moxhay. Tulik created a new class of servitudes which run with the land, equitable servitudes, although real covenants remained the only basis for the imposition of fiscal obligations on landowners. Tulik v. Moxhay applies only to negative uses restrictions.

22. See id. §§ 6.4, 6.7.
23. 41 Eng. Rep. 1143 (Ch. 1848).
There are three formal requirements for a running covenant,24 which have remained relatively unchanged since the Sixteenth Century. First, the original parties must intend that the covenant run.25 Second, there must be horizontal privity between the original covenanter and covenantee and vertical privity between the original parties and their successors in interest.26 Third, the covenant must touch and concern the land.27 In addition to these three requirements, the person against whom enforcement is sought must have notice of the restriction, a due process-based notion.

American courts adopted the law of Spencer's Case but liberalized English land law. The restrictive English rules for horizontal privity were expanded to make it easier for covenants to run.28 In addition, with the possible exception of New York, American courts have rejected the per se prohibition against the running of affirmative, as opposed to negative, covenants.29 Courts continue to assert that the covenant touch and concern the land, but the requirement has never been a major barrier to the running of covenants. The history of the doctrine does not provide any clear guidance to its historical function or purpose. The subsequent history of the doctrine does show that the current policy debates about the core function the requirement performs—judicial screening of remote bargains that impose unreasonable fiscal burdens on landowners—have long been part of the law of real covenants. Thus, a core function with continuing utility can be identified.

"Touch and concern" is conventionally traced to the statement in Spencer's Case that running covenants are limited to those which "touch and concern the thing devised" and not to those that are "merely collateral to the land."30 The case reflects the fact that covenants originated in promises relating to land31 and that certain land-related obligations had long been allowed as exceptions to the principle that Quia Emptores barred all encumbrances. Touch and concern was originally confined to real covenants, but it is equally a requirement for the enforcement of an equitable servitude,32 although the

26. See id.
27. See id.
29. See infra note 113.
31. See James Barr Ames, Lectures on Legal History 98 (1913). Ames observed that "[t]he earliest covenants we find in the books seem to touch the land." Id.
32. See Norcross v. James, 2 N.E. 946 (Mass. 1885).
courts have been less than consistent in requiring it. 33 History sheds little direct light on the meaning of the term, but it does illuminate the conflict between praise and condemnation of the doctrine that has characterized the modern law of real covenants. In brief, touch and concern is a minor part of the larger development of a special class of promises that did not remain personal to the original makers. To Holdsworth, the interesting question was whether the burden or benefit of a covenant could run with the reversion. 34 The idea of succession of rights and duties can be traced as far back as Bracton's adoption of the Roman fiction that the status of pater families continued in spite of deaths of the corporal head of the family. 35 The idea of succession had long been applied to allow successive transferees of an estate in fee simple and was extended to allow assignees of lifetime leases to sue to enforce a covenant of warranty. 36

Doctrinally, the law of real covenants that run is conventionally explained as an outgrowth of the law of warranties, but the immediate origins of the modern covenants can be traced to Henry VIII's decision to redistribute the Catholic Church's land holdings in England after the country left the Roman Catholic Church for the Church of England. A 1540 statute, 37 enacted to shore up Henry VIII's gift of reversions of dissolved former Catholic monasteries, forfeited to the crown under the Statute of Mortmain, 38 to his favorites. The law, as understood at the time, appeared to bar the running of any covenant unrelated to warranties, and the statute was ambiguous on whether it confirmed or extended the common law. 39 To make the reversions valuable, the Statute provided that both the assignees of the reversion and of the lease should have the same advantages against the lessees as the original lessors had to enforce the benefits and burdens of any

33. See Berger, supra note 24, at 220-32.
34. See 7 W.S. Holdsworth, A HISTORY OF ENGLISH LAW 287 (1924).
36. See Holdsworth, supra note 34, at 287.
37. The Statute of 1540, 32 Henry 8, ch. 34.
38. The monasteries had been, of course, anticipating dissolution since the break with Rome in 1534 and with the increasing assertion of Royal control over the nascent Church of England, had begun to lease the lands. Thus, Henry VIII had to make the reversions valuable. Parliament did this by allowing the grantees of the reversion to enforce the benefit of the covenants and by making the assignees of the lessees reciprocally liable for burdens. See A.W.B. Simpson, A HISTORY OF THE LAND LAW 255-56 (2d ed. 1986). The dissolution of the monasteries marked a final step in the creation of the Church of England and was an important step in the 16th century transformation of land into a market commodity. See G.R. Elton, Reform and Reformation: England, 1509-1558, at 230-49 (1977).
39. See Sims, supra note 4, at 9-10 (arguing that "there is nothing in the early law to justify" an assumption that "assignees of reversions before the statute did not have the right to enforce covenants in leases").
covenants. Lessees and their successors in interest were given reciprocal rights against the lessor and "their heirs and successors." 40

The statute was ambiguous because one section confirmed that lessees could enforce their common law rights against the original lessors and their "heirs and successors," but the section did not contain a correlative grant to lessees and their assigns. 41 This led to doubts among conveyancers as to whether burdens, as opposed to benefits, ran at common law. Not surprisingly, the great opponent of Stuart divine right, Edward Coke, regarded the question of the ability of the burden of a covenant to run between a landlord and a tenant as settled, although he admitted that the issue was a matter "upon which there is little or no medieval authority." 42 Other authorities were more circumspect. Spencer's Case both recognized that burdens could run and was the first case to place limits on covenants which could run, but it did not settle the broader question of whether privately imposed land use burdens could run at common law.

Holdsworth explained the case as both based on older precedent and then contemporary "obvious needs of landlords and tenants" for a reciprocal rule of running burdens and benefits. 43 Therefore, the case was "perhaps new law." 44 He characterized the case as another in the long line of cases limiting the power of private parties to encumber the use of land and justified the touch and concern standard because it strikes a balance between freedom of alienability and "considerations of convenience." 45 Spencer's Case is a perfect reflection of the transition from the medieval to the modern world that occurred in the 16th century. 46 Furthermore, two strains in the debate about touch and concern can be traced to Holdsworth's sketchy reading of the case. One line of analysis views the basic idea of running covenants as an unfortunate incursion on alienability because it imposes undue and unanticipated financial burdens on subsequent landowners. This view was articulated by Lord Brougham in Kepple v. Bailey 47 and is today vigorously defended by A.W.B. Simpson, 48 as well as by Richard

40. The Statute of 1540, 32 Henry 8, ch. 34.
41. See id.
42. Holdsworth, supra note 34, at 287.
43. See id. at 289.
44. Id. at 290.
45. Id.
47. 39 Eng. Rep. 1042 (Ch. 1834).
48. See Simpson, supra note 38. Simpson states, "The effect of a restrictive covenant is to sterilize the use of a parcel of land permanently; in principle it is not at all clear that a private landowner ought to be allowed to do this without public control over his activities." Id. at 257.
Under this view, the problem is not with touch and concern per se, but with the basic idea that a real covenant can run. The second strain assumes that sharing arrangements are mutually beneficial to the benefitted and burdened land, and thus, should endure until unanticipated conditions intervene or until enforcement becomes unfair. It recognizes that encumbrances can decrease the value of land, but places the burden on the party objecting to enforcement to establish this. Lord Broughham, Simpson and Epstein start from the presumption that servitudes will decrease the value of land. Others start from the opposite presumption, provided that judicial invalidation remains an option in limited cases.

III. THE FUTILE MODERN SEARCH FOR A SIMPLE DEFINITION OF TOUCH AND CONCERN

The vagueness of the touch and concern standard did not become a major issue until the twentieth century when more pervasive and intrusive private land use restrictions came into use. Public land use controls are basically a product of the post-World War I United States. Prior to this time, servitudes and the law of nuisance were the primary means of land use control. The modern common interest community is an outgrowth of the rapid expansion of cities after the Civil War and the creation of the modern suburb as a separate and superior enclave from the central city. Courts aided these developments by adapting the law of servitudes to their widespread use to buffer residential enclaves from external and incompatible development. Judicial decisions eliminated the per se barrier against the running of affirmative covenants, created the common plan doctrine which allowed equitable servitudes to be implied from a reasonably apparent, geographically delineated scheme of land use restrictions, and eroded the prohibition against express novel negative easements. These liberal rules created a need for some limitation on the use of servitudes to reflect the common law's traditional distrust of encumbrances on land and the realization that servitude schemes could have major impacts on land values. Touch and concern was the best available limitation because it was not an archaic feudal rule whose origi-

52. See Peterson v. Friedman, 328 P.2d 264 (Cal. 1958)(negative easement of view).
nal function had ceased, but a flexible doctrine that did not unduly deter the creation of servitude regimes.

The touch and concern doctrine posed problems for the rising academic legal community. Open-ended standards are more troublesome to law professors than to lawyers and judges. Law professors abhor doctrinal vacuums because they prefer predictability and rationality to open-ended rules that can be molded by either party to a dispute.\textsuperscript{53} Despite our celebration of the give and take of common law adjudication,\textsuperscript{54} we strive for the precision of civil law rules. When this is not possible, we try to restate rules as a multi-factor balancing test. Touch and concern has defeated all efforts to turn the law of covenants into a rule or even multi-factor test. Courts and commentators have been able to agree on the core requirement of touch and concern, but on little else. The essence of the touch and concern doctrine is that the covenant must relate to the physical use of land,\textsuperscript{55} as opposed to merely specifying individual behavior. This is another way of saying that the original covenantor and covenantee must intend that the covenant run with the land, and thus, the agreement is not personal to them. However, there is a crucial difference between the intent test and the touch and concern test. Intent always looks backwards to the intention of the parties at the time that the covenant was created. Touch and concern looks both backwards and forwards. The physical relationship requirement must be met at the creation of the covenant and is a continuing screen to assure that the purpose of the covenant can be fulfilled, regardless of who currently owns the property. This requirement also assures that the enforcement of the covenant as a land use restriction is fair because it fulfills the reasonable expectations of the landowner.

\textsuperscript{53} The older realistic tradition of law as a method of dispute resolution, has been challenged both by the utopian left and the right who articulate a variety of reductionist theories of law. Generalizing wildly, the left wants to use law to create a virtuous society. See Steven D. Smith, \textit{Reductionism in Legal Thought}, 91 COLUM. L. REV. 68, 73-74 (1991). Smith surveys the damage done to the common law by these newer theories and advocates a return to the legal process school of the 1960s which was premised on a faith in principled, interest-based decision-making by judges. See \textit{id}. On the other hand, the right wants to use law to promote efficiency or to govern society by a new version of the German Rechtsstadt, fixed rules divorced from justice. See Justice Antonin Scalia, \textit{The Rule of Law as a Law of Rules}, 56 U. CHI. L. REV. 1175 (1989).

\textsuperscript{54} See Edward Levi, \textit{The Legal Process} (1949).

\textsuperscript{55} See Clark, \textit{Real Covenants}, \textit{supra} note 5, at 99 (describing touch and concern “as intimately bound up with the land.”); John P. Dwyer & Peter S. Menell, \textit{Property Law and Policy: A Comparative Institutional Perspective} 759 (1998)(describing touch and concern as a requirement that “often refers to a physical use or restriction of the covenator”) Recent cases to articulate the use of land test include \textit{Loury v. Norris Lake Shores Development Corporation}, 203 S.E.2d 171 (Ga. 1974), and \textit{Mercantile-Safe Deposit & Trust Company v. Mayor of Baltimore}, 521 A.2d 734 (Md. 1987).
Professor Harry Bigelow stated the most ambitious and influential analytical test for touch and concern, but the test has been more often quoted than actually applied. Thus, it has not led to a more consistent standard or practice of judicial intervention. Influenced by the John Wesley Hohfeld’s scheme of legal relations, Bigelow tried to develop a coherent, universal test for the doctrine. He defined touch and concern by measuring the legal relations of the parties as landowners with and without the covenant. If the covenant changed a party’s relations as a landowner, rather than a general member of the public, the covenant touched and concerned. The burden of a covenant touched and concerned if it rendered the covenantor's interest less valuable and the benefit touched and concerned if it rendered the covenantee's more valuable. The initial problem with the test is its circularity. Any restriction will be applied to an individual as opposed to the general community. The restriction changes the individual’s powers, privileges, rights and duties compared to his or her position without the covenant. In addition to circularity, the test fails to articulate any standard to help a court separate “good” from “bad” burdens.

The weaknesses of the Bigelow test were well recognized at the time of the drafting of the Restatement (First). Legal realism was in full flower, and Dean (later Judge) Charles Clark tried to recast the Bigelow test as a simpler common sense inquiry: “Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in a similar capacity, the requirement should be held fulfilled.” The problem is that courts have often tried to combine the two tests. This unfortunate tendency can be traced back to Judge Lehman’s heroic attempt to adapt the touch and concern test to the modern common interest community in Neponsit Property Owners Association v. Emigrant Industrial Savings Bank.

57. See id.
58. See id. at 646.
59. See id.
60. For a formalistic and unwarranted application of the Bigelow test for touch and concern see Mapleturn Utilities, Inc. v. Foxcliff South Associates, Inc., 673 N.E.2d 5 (Ind. Ct. App. 1996). A subdivider advanced money to a private utility to extend water service to a new unit of the development, and the two parties covenanted that the utility would remit a portion of the connection fees it charged private lot owners. The agreement also granted the developer an easement over the utility’s real estate for construction and maintenance purposes. The court conceded that the utility extension added value to the lots in the unit, but that the grant of the utility did not concern the subdivision unit properties.
61. Clark, Real Covenants, supra note 5, at 99.
62. 15 N.E.2d 793 (N.Y. 1938).
case held that common area assessments touched and concerned when the roads and "public places" that they maintained added value to the individual lots in a well-maintained private community. As a good common law judge trying to uphold a fair bargain, Judge Lehman had to bob and weave around the exception-riddled New York law of affirmative covenants in order to uphold the covenant. Judge Lehman accepted the Bigelow test because it had "the merit of realism." In the end, however, he articulated a much more general standard:

Thus, unless we exalt technical form over substance, the distinction between covenants which run with land and covenants which are personal, must depend upon the effect of the covenant on the legal rights which otherwise would flow from ownership of land and which are connected to with the land. The problem then is: Does the covenant in purpose and effect substantially alter these rights? This problem is that the issue is not the change in legal rights but the nexus between the burdens and benefits assumed and promised.

Two primary views of the touch and concern doctrine have emerged post-Neponsit. The simplest view is that the touch and concern doctrine performs no function and is, in Professor Epstein's opinion, bankrupt. Principles of freedom of contract and ownership should allow property owners to impose any restriction they want. These covenants, efficient or not, should run so long as subsequent purchasers have adequate notice of them. The more complex and more widely shared view among property scholars is that the presumption that the original restriction is mutually beneficial is rebuttable, and that a covenant may cease to touch and concern over time. The intent of the original parties, as reflected in the language of the covenant, is therefore less important than the impact of the burdens and benefits over time. Touch and concern requires an application of the law of relational contracts. As Professor Berger put it in 1970: "The real policy, then, is to give effect to the intent that most people

63. Id. at 796.
64. Id.
65. See infra notes 101-111 and accompanying text for a fuller elaboration of this argument.
66. See Epstein, supra note 49, at 1360.
67. Professor Epstein goes further and argues that the touch and concern requirement imposes transaction costs on subsequent purchasers because the requirement "will have to be evaluated in every case." Id. at 1361.
68. See Berger, supra note 24, at 219-20. Professor Berger argued that touch and concern pertains not to the actual state of mind of the original parties but to "what the normal expectations of society would be as to whether this particular benefit or burden so relates to the owner in his capacity as owner that the average person would assume that the law would decree that such benefit or burden would accompany the ownership." Id.
69. The best articulation of this position is Stewart E. Sterk, Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions, 70 Iowa L. Rev. 615 (1985). For a critical analysis of this justification for judicial intervention, see
would probably have if they thought about the issue and thereby protect subsequent parties against unexpected and unexpected liability.”

IV. THE RESTATMENT (THIRD) OF PROPERTY: SERVITUDES AND THE VALIDITY OF SERVITUDES

A. The ALI Case for Judicial Scrutiny

ALI Restatements have been extremely influential because they bring order and uniformity to a welter of cases in the 50 states. More generally, they reflect the shift from common law to civil law analysis. Modern judges have less time and patience to synthesize long lines of cases. General principles, embodied in Restatements, allow them to decide cases. The Restatement (Servitudes)’s reform of the law of servitudes generally fulfills the expectations of the restatement process. However, in a replay of the intense debates surrounding the 1944 Restatement (First), the Restatement (Servitudes)’s handling of touch and concern has not been without controversy. The basic issue is whether the elimination of touch and concern and its rebirth in the new rules of servitude invalidity represent progress. The basic standards of invalidity were proposed in 1990 and were revised constantly until their approval at the May, 1998 annual meeting of the ALI.

The Restatement (Servitudes) is premised on the assumption that the use of extensive and intrusive servitude schemes by common interest communities renders the touch and concern requirement obsolete because it does not adequately “identify servitudes that create risks of harm.” Thus, more sophisticated tests are needed to screen modern servitudes. The Restatement (Servitudes) identifies two categories of potentially invalid servitudes: (1) lifestyle restrictions and (2) assessments that lack a sufficient nexus between the amount and


70. Berger, supra note 24, at 208. Professor Singer articulates a similar justification for the doctrine. “The dominant consideration in touch and concern cases seems to be the conclusion that the obligation and/or benefit is the kind that should run with the land . . . .” JOSEPH WILLIAM SINGER, PROPERTY LAW § 4.4.1.4 (2d ed. 1997).


73. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 cmt. b (Tentative Draft No. 7, 1998).
homeowner benefits.\textsuperscript{74} In general, the Restatement (Servitudes) assumes that the serious contemporary issue is not a fiscal issue, but an intrusion on autonomy and dignity. The battle revolves around restrictions on speech, pets, children and the exclusion of controversial land uses.\textsuperscript{76} The primary goal of the Restatement (Servitudes) is to articulate a non-constitutional standard of judicial review to address such restrictions.

B. Common Interest Communities and State Action

Many modern servitude challenges involve the assertion of constitutional rights, but there is no consensus that the Constitution protects common interest community residents against RCA restrictions. This is a different issue from the power of these communities to practice exclusion and discrimination which cannot be practiced by citizens and public governmental units. The Constitution only protects individuals against "state action," and the issue is whether servitudes imposed by private common interest communities constitute state action.

The mere enforcement of a common law right is not state action. There are two exceptions to this rule. The first is the rule of \textit{Shelly v. Kramer} \textsuperscript{76} which holds that racially restrictive servitudes are unconstitutional. The second is the "company town" doctrine which holds that private communities that perform the function of public communities are subject to the First Amendment.\textsuperscript{77} However, neither doctrine supports subjecting RCA servitude schemes to constitutional review. \textit{Shelly}'s rationale remains problematic and the case remains confined to racial and other similar discriminatory covenants. \textit{Shelly} supports the central twentieth century constitutional principle that direct racial segregation is unconstitutional, but it is not the basis for general application of the state action doctrine to common interest communities.\textsuperscript{78} Common interest communities vary too widely in size and scope to warrant a blanket rule that they are the functional equivalent

\textsuperscript{74} See id. § 3.1 cmts. a-d.
\textsuperscript{75} See Restatement (Third) of Property: Servitudes § 3.8 (Council Draft No. 8, 1997).
\textsuperscript{76} 334 U.S. 1 (1948).
\textsuperscript{77} See Marsh v. Alabama, 326 U.S. 501 (1946). \textit{Marsh} was applied in Guttenberg Taxpayers & Rentpayers Association v. Galaxy Towers Condominium Association, 688 A.2d 156 (N.J. Super. Ct. Ch. Div. 1996), which held that the condominium association was a company town, and thus, could not deny access to citizens group to distribute campaign flyers. However, other courts have upheld sign restrictions. See Midlake on Big Boulder Lake, Condominium Ass'n v. Cappuccio, 679 A.2d 340 (Pa. Super. Ct. 1996).
\textsuperscript{78} See Laguna Royale Owners Ass'n v. Darger, 174 Cal. Rptr. 136, 144 (Ct. App. 1981)(stating that there is "considerable doubt" as to whether the actions of the condominium association constitute state action.)
of public governments. This reasoning has been generally applied by the courts to common interest communities to distinguish them from public governments.\textsuperscript{79} Moreover, not all assertions of autonomy rise to the constitutional level. For example, there is no constitutional right to own a pet.\textsuperscript{80} The Reporter initially sought to develop rules that applied both constitutional and common law tests to the validity of such servitudes, but the attempt to develop a constitutional law of servitude invalidity "met with substantial disagreement."\textsuperscript{81} In response, Section 3.1 restates the obvious—unconstitutional servitudes are invalid—but attempts to articulate rules of non-constitutional invalidity which mix well-understood common law doctrines with new less well understood ones.\textsuperscript{82}

The Restatement's current position reflects a grudging acceptance of the theory that common interest communities are voluntary associations, and thus, it is fair to subject members to regulation which is not subject to constitutional standards. The contract rationale is supported by two considerations. First, the typical regulations, such as architectural and design covenants adopted to promote the homogeneity of the community, do limit individual choice, but seldom infringe fundamental constitutional rights.\textsuperscript{83} Servitudes intended to exclude different groups, such as racial and religious minorities or the handi-

\begin{enumerate}
\item The cases are collected in Restatement (Third) of Property: Servitudes § 3.1 Reporter's note to cmt. d (Tentative Draft No. 7, 1998), and show little judicial inclination to extend Shelly v. Kramer beyond the racial exclusion context.
\item See Nahrstedt v. Lakeside Village Condominium Assoc., 878 P.2d 1275, 1291 (Col. 1994) (Condominium declaration can exclude cats and dogs because "[t]here is no federal or state constitutional provisions . . . that confer a general right to keep household pets in condominiums or other common interest developments."); Board of Dirs. of 175 East Del. Place Homeowners Ass'n v. Hinojosa, 679 N.E.2d 407 (Ill. App. Ct. 1997). The proposed Restatement (Servitudes) originally made it easy to invalidate prohibitions on pet ownership. See Restatement (Third) of Property: Servitudes § 6.7(4) (Preliminary Draft 14, 1997). However, the final version adopted in May, 1997, makes it more difficult to challenge pet restrictions. See Restatement (Third) of Property: Servitudes § 6.7(3) (Tentative Draft No. 7, 1998). Section 6.7(3) prohibits "regulations governing use or occupancy of, or of behavior with, individually owned property," but subsections (1) and (2) allow reasonable rules to protect the use of common property or to protect other unit owners from "unreasonable interference in the enjoyment of their properties." As a cat and dog lover, I can vouch for the Restatement's unstated proposition that pet ownership is an important aspect of human self-fulfillment. There are, however, a number of competing community and individual interests that must be accommodated in the development of a pet or companion animal policy. See Companion Animals Act 1998, No. 87 of New South Wales, Australia (imposing strict identification and control standards on cat and dog ownership).
\item Restatement (Third) of Property: Servitudes (Council Draft No. 8, at 50).
\item See Restatement (Third) of Property: Servitudes § 3.1 (2) (Tentative Draft No. 7, 1998).
\item As Clayton Gillette has observed, "The existence of homogeneity suggests that minority interests are less likely to arise, since residents share a common vision embodied in the covenants." Gillette, supra note 69, at 1413.
\end{enumerate}
capped, pose the greatest risk that constitutional principles will be undermined. But, the risk has been reasonably well-contained by federal and state anti-discrimination laws and state laws prohibiting certain exclusionary covenants. Second, there is a sufficient choice among common interest communities and exit is generally an affordable option to support the contract justification for holding that these communities are not de facto public governments.

The contractual theory of a private government posits that the citizen gets what the private constitution provides and no more. However, this theory, like all theories, has its limitations. Purchase of a property interest in a community is consent to the private constitution. Because the purchase of a unit of real property is so important, purchasers will self-select into communities with acceptable regulation. This theory can be seen in the cases which hold that private architectural review covenants allow for greater beneficiary discretion compared to a public government. The basic problem with the contract argument is that it focuses on the initial entry, rather than on the continuing relationship between the community and the member. The contract theory is a strong argument for less judicial protection compared to a public community. It is not an argument for no protection.

C. Substitute State Action

The new and innovative part of the proposed Restatement (Servitudes) is the section on servitude invalidity. The section both restates basic laws and substitutes several new standards of servitude invalidity for the touch and concern doctrine. The section has been extremely controversial because of the effort to subject servitudes to new constitutional or quasi-constitutional standards. Section 3.1 provides: “A

84. See, e.g., Barrett v. Dawson, 71 Cal. Rptr. 2d 899 (Ct. App. 1998) (California statute that voided covenants which excluded day care centers in residential neighborhoods retroactive).

85. See Marc Rosen, The Outer Limits of Community Self-Governance in Residential Associations, Municipalities and Indian Country: A Liberal Theory, 84 Va. L. Rev. 1053 (1998). Professor Rosen attempts a liberal political justification for allowing a high degree of autonomy among some types of “perfectionist” communities, such as non-traditional religious sects. The existence of exit options is a critical part of these arguments that these communities are compatible with the idea of equal liberty for all citizens. See id. at 1097-1106. Common interest communities are not perfectionist communities because they lack an affirmative vision, but the principle that exit justifies a high degree of autonomy supports the claim that they are not de facto public governments.

servitude created under the rules set forth in Chapter 2 is valid unless it is illegal or unconstitutional or violates public policy. 87

Servitudes that are invalid because they violate public policy include, but are not limited to: (1) servitudes that are arbitrary, spiteful or capricious; 88 (2) servitudes that unreasonably burden fundamental constitutional rights; 89 (3) servitudes that impose unreasonable restraints on alienation under the rules of § 3.4 and § 3.5; 90 (4) servitudes that impose unreasonable restraints on trade or competition under the rule of § 3.5; 91 and (5) servitudes that are unconscionable under the Rule of § 3.7. 92 Section 3.1 performs four separate functions. These will be discussed in descending order of controversy. First, the section simply restates the law without either elaborating or clarifying well-established doctrines. Subsection three restates the modern rule that reasonable restraints on alienation in common interest communities will be allowed, but that courts retain the power to decide if a restraint is unreasonable. 93 The Restatement (Servitudes) provides a minor elaboration of this rule, but does not add to the analysis developed by the courts. 94 Second, Section 3.1 eliminates many per se rules against the creation of servitudes. The two most important rules that it eliminates are the distinction between affirmative and negative covenants that is followed only in New York state 95 and the per se prohibition against covenants not to compete. 96 Third, it attempts to articulate a common law-based theory of invalidity that is more precise and more suited to policing common interest communities than the touch and concern requirement. This is where the Restatement (Servitudes) becomes more problematic. Fourth, the section retains the "company town" doctrine articulated in Marsh v. Alabama 97 because it allows courts to apply constitutional standards

88. See id. § 3.1 (1).
89. See id. § 3.1 (2).
90. See id. § 3.1 (3).
91. See id. § 3.1 (4).
92. See id. § 3.1 (5).
93. See id. § 3.1 (3).
94. Sections 3.4 and 3.5, approved in 1991, distinguish between indirect and direct restraints. Most servitudes will be challenged as indirect restraints and Section 3.5 requires courts to weight the utility of the restraint against the injurious consequences of enforcement. See Restatement (Third) of Property: Servitudes § 3.4-3.5 (Tentative Draft No. 2, 1991).
95. See infra note 113.
96. American courts have long enforced restrictions against competition if they are intended to run and are limited to a specific geographic area. See Whitinsville Plaza, Inc. v. Koteles, 390 N.E.2d 243 (Mass. 1979). The issue is not the unfairness to a subsequent purchaser with notice but whether area consumer choice is unduly constricted.
to servitudes, but gives RCAs a greater defense compared to public governments. If a law infringes a fundamental constitutional interest, the government has the difficult burden of establishing a compelling state interest. In contrast, a RCA may assert a rule of reason defense.

The basic problem with third and fourth standards is that they are too vague and will deter judicial use. They confer a great deal of discretion on courts, but the occasions for their use will be very limited. Neither unconscionability nor public policy are likely to be major restraints on servitude enforcement and do not represent an improvement over the touch and concern doctrine. Section 3.1 allows a court to invalidate servitudes “that are unconscionable under the Rule of § 3.7.” 98 The Restatement (Servitudes) borrows the term from the Uniform Commercial Code. 99 Unconscionability is a backward-looking doctrine that refers to the circumstances surrounding the original covenant. The doctrine is both procedural and substantive, 100 but neither definition is likely to apply to most servitude schemes. The UCC model of oppressive over-reaching and equal bargaining power does not fit the normal common interest community purchaser. 101 It will be difficult for a unit owner to prove that a servitude was imposed to take advantage of a purchaser by over-reaching. Furthermore, courts are unlikely to find that a servitude is substantively unfair merely because it imposes financial burdens on the purchaser. The purchaser generally gets some substantial benefit from the CCRs. The issue is whether there is a sufficient nexus between burdens and benefits. Touch and concern is better tailored to address nexus issues than is unconscionability.

Public policy is a better candidate for an invalidation standard than unconscionability. Courts have long held that covenants which are contrary to public policy are invalid. 102 However, courts are un-


99. Section 3.7, approved in 1991, originally provided that “[a] Servitude is invalid if it is unconscionable and that a court may refuse to enforce a servitude or may limit or modify its application to avoid any unconscionable result.” Restatement (Third) of Property: Servitudes § 3.7 (Preliminary Draft No. 6, 1990). The final version contains only the first sentence. See Restatement (Third) of Property: Servitudes § 3.7 (Tentative Draft No. 2, 1991). The original comments quoted Robert Natenberg, Law of Property Owners Associations § 7.7 (1989), who reported that he found no case invalidating a servitude on substantive unconscionability and the final illustrations include prohibitions against suing the RCA or the requirement that purchasers pay the RCA a royalty on future unit sales, but they do not provide a general analysis of the doctrine applicability to servitudes as opposed to commercial and consumer sales.


likely to use public policy as a general invitation to create a new common law of invalidity. Courts have interpreted public policy to be a doctrine that invalidates contracts which are contrary to legislation, "good morals," or are for an illegal or immoral purpose. Most real covenants will fall under the first category, and thus, courts will generally only invoke public policy if there is sufficiently clear legislative guidance. In short, the doctrine is not a general invitation to courts to determine what is or is not consistent with public policy. Rather, it is a doctrine that allows courts to infer that the legislature has preempted RCA authority. Courts are either likely to find that the covenant serves a public policy or to find that the state has preempted the use of private servitudes to exclude certain groups, such as the handicapped or child care facilities, from common interest communities. It will seldom, if ever, be applied to determine where there is a sufficient nexus between financial burdens and benefits.

The close connection between public policy and preemption is illustrated by Providence Construction Co. v. Bauer. The case invalidated a covenant imposed in the deeds of purchasers in the first phase of a multi-stage mixed use project. In essence, the covenant warned that subsequent phases would not be only single family residential lots but would include "apartments, townhouses, condominiums, patio homes, shopping centers . . . " and prohibited first phase purchasers from opposing any rezoning petitions on "any and all contiguous land" which the developer presently owned or might acquire. The developer analogized the covenant to covenants restricting the use of land, but the court applied Georgia's anti-SLAPP statute and held that the covenant was contrary to public policy. Both its vagueness and over-broadness "would prevent all lot purchasers in a development from exercising their constitutional rights to oppose government action which may effect their neighborhood's character and the properties' value."

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106. Id. at 529.

107. See id. at 528, 530. The "anti-SLAPP" statute was designed to prevent "Strategic Litigation Against Public Participation," and to encourage citizens to participate in matters of public interest through the exercise of their constitutional rights. See id. at 528-29.

108. See id. at 530.

109. Id. The court distinguished Muldauer v. Stribling, 256 S.E.2d 357 (Ga. 1979), which enforced a covenant between two adjoining lot owners which forbade the purchaser from rezoning. See id.
V. A CONSUMER PROTECTION RATIONALE FOR TOUCH AND CONCERN

A. The Consumer Protection Theory: A Benefit-Burden Nexus

The most persuasive rationale for the touch and concern doctrine is that it protects the expectations of common interest community purchasers.\(^{110}\) Common interest community residents purchase a service package. To borrow from the Supreme Court's land use exaction jurisprudence, purchasers accept that a reasonable nexus between financial burden and demonstrable benefits will be maintained over time.\(^{111}\) The consumer protection rationale is supported by the following two primary reasons. First, the consumer protection rationale limits the scope of judicial intervention. Judicial intervention will be limited to a narrow class of cases where the benefit or burden is unrelated "to an objective purpose of land planning."\(^{112}\) Second, the consumer protection rationale is less costly to administer compared to other rationales advanced for touch and concern.

The consumer protection rationale starts from the assumption that a restrictive covenant scheme is a private government. An RCA is not a private redistributive scheme. A member has a right to the dedication of assessments which benefit his or her property and common community facilities. Transaction cost considerations may dictate some form of representative government so each member need not agree to each expenditure. The status of a citizen of a private government, compared to a citizen of a public government, is the subject of considerable scholarly dispute. The consumer protection rationale resolves this dispute by characterizing the citizen as primarily a consumer of limited services. Public governments also provide services,

\(^{110}\) Professor Jeffrey E. Stake made this argument in his 1988 article, Toward an Economic Understanding of Touch and Concern, 1988 Duke L.J. 925. His basic argument was that the doctrine was a useful check against improvident actions and should be used to determine the efficient allocation of the burdens and benefits of land-related promises rather than to invalidate covenants that had become inefficient over time. In my opinion, the focus should be on fairness rather than efficiency. But, his central point remains valid because efficiency and consumer protection will often lead to the same results because a burden that imposes high costs with few corresponding benefits can be characterized as both inefficient and unfair. See id. at 963; cf. Nahrstedt v. Lakeside Village Condominium Assoc., 878 P.2d 1275 (Cal. 1994)(adopting an expectation protection analysis to uphold a condominium declaration which excluded cats and dogs, but too narrowly limited expectation protection to the enforcement of the originally recorded document).

\(^{111}\) See Dolan v. City of Tigard, 512 U.S. 374 (1994). The Supreme Court's application of the nexus test to public governments has been justly criticized as too restrictive, but the case for reasonable nexus between burdens and benefits is stronger in common interest community. A purchaser should receive the services promised by the RCA.

\(^{112}\) Reichman, supra note 28, at 1233.
but a citizen has no right to any particular service package. A judicial role to ensure that decisions do in fact enhance the fair and efficient allocation of resources within the community follows. This consumer protection function historically has been performed by the courts, although some local consumer protection agencies provide advice to RCA members to enable them to assert what rights they have. This rationale does not depend on the size of the private government. It may be a two-citizen direct democracy if the burden and benefit of the covenant is limited to two tracts of land. It may equally be a representative government involving many tracts of land in a large scale, planned community. The expectations of citizens of private governments are essentially the same. The core landowner expectation is to receive measurable benefits that inure to the value of the land.

The most important issue regarding the touch and concern requirement is whether the enforcement of the covenant against the present benefit and burden holders is fair. This test can be reduced to per se rules such as whether the covenant is affirmative or negative.113 However, per se tests are only a proxy for determining whether the burden is unfair over a long period of time.114 Thus, this question should be addressed directly as touch and concern allows courts to do. A court must determine whether the original rationale for the covenant is still present. This inquiry is tied up with the question of whether the parties intended that the covenant be personal or “run” with the land, but it is different, as earlier argued, because it is both backward and for-


114. This analysis is explicit in City of New York v. Delafield 246 Corporation, 662 N.Y.S.2d 286 (N.Y. App. Div. 1997). The current owner of a 10.5 acre estate that was being converted to residential units refused to comply with a covenant that required the original mansion on the estate to be preserved. The covenant further provided that a set number of individual components of construction be completed within a specified period. See id. at 288-89. The owner-developer argued that the covenant was a void affirmative covenant because it imposed a burden in perpetuity. See id. at 294. However, the court held that the covenant did not impose a burden in perpetuity because the duty would be extinguished once the owner submitted a plan to restore the mansion and that the owner-developer could petition the holder of the benefit, New York City, for a modification of the agreement and a zoning amendment for the land. See id. at 296.
ward looking. As a lower New York court put it: "The greater the
degree the covenant imposes obligations unique to the covenan
tors, which cannot exist independently of them, the less likely the covenant . . .
touches and concerns the land. Conversely, the greater the effect
of the covenant on the land itself, without regard for who owns it, the
more likely it will be binding on successor owners." In that case,
the current owner of a 10.5 acre estate originally bequeathed to
Columbia University refused to perform a covenant to preserve existing
trees on the property and to restore any trees damaged during the
construction of a 38 unit residential development. The court found
that the covenant touched and concerned the land because it was in
tended "to preserve and protect the natural features and ecological
balance of the property." The court's decision reflects an implicit
judgment that the expressly assumed burdens and benefits remain
fair at the time of the litigation.

B. Some Possible Cases for the Use of Touch and Concern

1. Assessment Diversion

The primary function of the touch and concern doctrine is judicial
protection of purchaser expectations from risks, such as fund diver-
sion or uneven maintenance. The growing evidence of RCA member
dissatisfaction with the performance of associations suggests a need
for some judicial constraints on association decisions. The first pur-
chasers in an RCA strike an explicit and implicit bargain with the
developer for the allocation of assessments. However, this allocation
may be unilaterally altered as time passes. Consistent with this anal-
ysis, courts sensibly have used the touch and concern doctrine to po-
lce the assessment process. The modern law is premised on the
assumption that members of an RCA have a right to have assessments
dedicated to the benefit of the community and continue to inure to the
unit owner's property. Courts require that the RCA establish stan-
dards to allocate the assessments and that the members receive the
primary benefit of the assessments.

115. Courts use the intent inquiry to invalidate covenants, often between two individ-
uals, that include burdens and benefits that are difficult to measure and thus
pose a risk of unfairness over time. See Caulliet v. Stanley Stilwell & Sons, Inc.,
which reserved right in grantor to construct a house on land conveyed to
covenantor).

1997).

117. See id. at 288-89.

118. Id. at 294 (quoting the covenant). The court used the same rationale to justify
enforcement of covenants to construct an underground garage and to regrade the
property.
Touch and concern can play a useful consumer protection function when a homeowners' association diverts fees intended for community common areas. *Beech Mountain Property Owners Association v. Seifart*119 is an example of a case where the touch and concern doctrine can be applied to justify a result that the court reached with no analysis. The dispute arose in a Blue Ridge Mountains subdivision with a golf course, tennis courts, swimming pool and ski runs.120 Condominium purchasers assumed road and recreational facility maintenance assessments.121 In the mid-1970s, the developer filed for bankruptcy and the reorganized corporation opened the golf course and ski runs to the general public.122 Several homeowners objected to the use of their assessments for the golf facility which consumed 75% of the assessment.123 No assessments were used to maintain the ski runs.124 The court framed the issue of whether the covenants were sufficiently certain to be enforced, rather than if they ran.125 However, the court's result is grounded in the touch and concern doctrine. The court held that the covenants contained "no sufficient standard by which to measure the defendants' liability for assessments"126 because there was "no clearly defined limiting standard by which the court can determine whether the assessment made in any particular year against any particular property owner is authorized both as to amount and purpose by the covenants applicable to his property."127

The business judgment rule is an alternative route to this result, but the proposed Restatement (Servitudes) makes it difficult to apply to assessment diversion cases. To catch obvious redistribution attempts, courts have imposed a fiduciary duty on the RCA directors toward their members. This doctrine polices the decisions of an RCA by trying to decide when the directors have engaged in self-dealing, as opposed to having made a good faith, but unpopular, decision that benefits the members. This doctrine provides minimum guarantees that RCAs function as representative governments, but does not intervene in efficient, but unpopular, decisions.

The Restatement test is not well-suited to resolve disputes over assessments and other fees when intervention may be warranted. For example in *Rasp v. Hidden Valley Lake, Inc.*,128 a group of lake subdivision lot owners challenged a take or pay covenant imposed by the

120. See id. at 180-81.
121. See id.
122. See id. at 182.
123. See id.
124. See id.
125. See id. at 182-83.
126. Id. at 183.
127. Id. at 184.
developer for the benefit of its water and sewer subsidiary. They argued that non-connected lots received no benefits from the utility. The court first applied a public policy analysis and posed a dilemma: the covenant furthered the policy of orderly and healthful land development but was inconsistent with private entrepreneurial activity. It resolved the dilemma by resort to public utility law. The best public policy encourages, by a "mildly coercive incentive" all lot owners to connect to the utility so that public health is improved and the broader the rate base, the lower the rates the utility can charge. The court also held that the covenant touched and concerned the land, but it did offer any reasons for its decisions. Take or pay obligations could be defended if the property in the subdivision is in fact benefitted, but the touch and concern doctrine would allow the owners to prove that an insufficient nexus exists between burden and benefit.

2. Excessive Product Bundling: The Problem of Compulsory Club Memberships

Service providers, such as public utilities, have traditionally sold bundled products. For most electricity consumers, the tariff includes the price of fuel, generation, transmission and distribution. The electric utility industry is currently undergoing a radical restructuring, and one of the goals of this process is to unbundle products. When products are unbundled, a consumer might chose to buy only transmission from a utility. Like public utilities, many common interest communities offer bundled services. Courts have not used the touch and concern doctrine to unbundle the basic service package, which includes common areas and open space. Courts have not articulated a general theory of the basic service package, but the theory seems to be that all members must use certain common areas, such as roads. This extends to less essential services such recreational facilities. Covensants that require a landowner to purchase membership in sports club have raised more problems.

129. See id. at 155-56.
130. See id. at 156.
131. See id.
132. See id. at 157.
134. See Anthony v. Brea Glenbrook Club, 130 Cal. Rptr. 32 (Ct. App. 1976); Bessemer v. Gersten, 381 So. 2d 1344 (Fla. 1980). This analysis is also supported by the cases which imply the power to levy recreational assessments. See, e.g., Meadow Run and Mountain Lake Park Ass'n v. Berkel, 598 A.2d 1024 (Pa. Super. Ct. 1991) (stating that residential communities are "analogous to mini-governments" and are dependent on collection of assessments to provide and maintain recreational facilities).
The cases are split on the issue of whether such servitudes touch and concern, although the majority rule seems to be that recreational assessments touch and concern the land.\textsuperscript{135} Courts which hold that mandatory sports club membership touches and concerns the land have concluded that the club confers value on the lot, regardless of whether the protesting owner uses the facility or not.\textsuperscript{136} There have been dissenting courts. Several courts have found that the covenant does not touch and concern because the covenant is personal\textsuperscript{137} or does not “necessarily increase the value of the individual lots.”\textsuperscript{138} One can accept the rationale that service bundle benefits the property even if individuals perceive no benefit. In general, courts have been wise to leave the original service bundle in place. Purchasers who follow Robert Maynard Hutchins’ dictum that “[w]henever I feel the need to exercise, I lie down,”\textsuperscript{139} are not harmed because the service package adds value to their property which can be recouped when it is sold. However, servitudes with unequal benefits suggest that touch and concern can be used to catch the occasional case where the nexus between burden and benefit is too strained because of additional limitations on the allocation of the benefits. An Oregon Court of Appeals held that a mandatory golf club initiation fee did not enhance the value of protestant’s lot because the declaration limited mandatory purchasers to the original purchasers.\textsuperscript{140} Subsequent owners were merely eligible to become members.\textsuperscript{141}

VI. CONCLUSION

In the sixteenth and seventeenth centuries, Roman law was received on the European continent and again threatened the survival of the common law. In addition, the absolutism of the Stuarts “put common law in great peril, for government by unrestrained divine right

\textsuperscript{135} See Streams Sports Club, Ltd. v. Richmond, 457 N.E.2d 1226, 1231 (Ill. 1983).
\textsuperscript{136} See Anthony v. Brea Glenbrook Club, 130 Cal. Rptr. 32 (Ct. App. 1976)(maintenance of common swimming pool made it unnecessary for individual lot owners to install pools); Four Seasons Homeowners Ass’n v. Sellers, 302 S.E.2d 848 (N.C. Ct. App. 1983)(recreational facilities do not have to be adjacent to each lot to touch and concern); Homsey v. University Gardens Racquet Club, 730 S.W.2d 763 (Tex. App. 1987)(fact that club open to the public irrelevant for purposes of determining whether landowners benefited from covenant).
\textsuperscript{139} Robert Maynard Hutchins, The Higher Learning in America 77 (1936). This oft quoted remark was a humorous defense to his promotion of the abolition of intercollegiate athletics at the University of Chicago and reflected his deep-seated belief that “body building” had no place in the true university.
\textsuperscript{141} See id. at 701-02.
might have produced subservient judges.”¹⁴² Many historians attribute the survival of the common law to its ability to offer a less arbitrary, more democratic alternative to Stuart absolutism.¹⁴³ The idea that common law can be perfected by systematic reform lives on. The Restatement (Third) is the living embodiment of this ideal and partially reflects the argument of the law and economics movement that courts judge common law rules by their efficiency rather than by their fairness. However, in the end, fairness is a preferable judicial objective. It builds on a long common law tradition, and thus, can be administered in a restrained, but effective, manner. A major benefit of the vagueness of the touch and concern standard is that while it locks the court into a single test, it gives the court flexibility to adapt the doctrine to contemporary servitude issues.¹⁴⁴ In short, the open-ended nature of the doctrine is its greatest virtue¹⁴⁵ and there is a case for the Restatement to simply “restate” the doctrine and let courts continue to develop it as necessary.¹⁴⁶

¹⁴³ One of the great legacies of Seventeenth Century England is the idea that law is designed to check arbitrary state power and to promote individual dignity and freedom of action. See Sir William S. Holdsworth, The Influence of the Legal Profession on the Growth of the English Constitution, in ESSAYS ON LAW AND LEGAL HISTORY, 71, 72 (A.L. Goodhart & H.G. Hanbury eds. 1946).
¹⁴⁴ See, e.g., ROBERT H. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 484 (3d ed. 1992). Professor Curtis J. Berger and Joan Williams argue that the vagueness of the doctrine confuses two separate issues: enforcement against the original covenantor and the refusal to enforce against subsequent purchasers because of changed conditions or public policy. See CURTIS J. BERGER & JOAN WILLIAMS, PROPERTY: LAND OWNERSHIP AND USE 707 (4th ed. 1997).
¹⁴⁵ In his essay on the theoretical underpinnings of common interest communities, Gregory S. Alexander writes that “open-ended legal norms, precisely because they do not purport to have achieved closure ex ante, create opportunities for those inside and those outside to engage each other in dialogue. They deny to both sides the apparently comforting message that their side is legally privileged.” Gregory S. Alexander, Dilemmas of Group Autonomy: Residential Community Associations and Community, 75 CORNELL L. REV. 1, 57 (1988). In a recent article, Realism and Formalism in the Severance of Joint Tenancies, 77 NEB. L. REV. 1, 32-33 (1998), Professor R.H. Helmholz has shown that reform of the common law does not eliminate the need for formalism. Old common law doctrines can be infused with more open-ended concepts such as intent and reasonableness and still continue to perform useful functions in the resolution of individual disputes.
¹⁴⁶ The Restatement process will always have its limits. Judge Learned Hand was both appreciative of the ALI’s efforts to rationale precedents and suspicious of the ultimate merits of the idea. See GERALD GUNThER, LEARNED HAND: THE MAN AND THE JUDGE 312-13 (1994).