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## CONTEMPLATING WHEN EQUITABLE SERVITUDES RUN WITH THE LAND

ALFRED L. BROPHY\*

Equitable servitudes present some of the most difficult problems in property law for students (and judges). Determining whether subsequent purchasers from a promisor are bound by the servitudes—and whether subsequent purchasers from the promisee are able to enforce the requirements—are particularly elusive problems. The hornbook law on equitable servitudes is that they run if there is (1) intent for them to run, (2) notice, and (3) they “touch and concern” the land.<sup>1</sup> The first two are easy to figure out; the latter is much harder. The requirement that servitudes “touch and concern” the land is often a stand-in for qualitative judgments about whether the servitude should run with the land. As a result, judgments about “touch and concern” are made difficult because they are masking other decisions.

Typically, servitudes are said to touch and concern the land when they affect the legal relations of the parties in relation to land. Judge Clark has stated that

[i]f the promisor’s legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee’s legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land.<sup>2</sup>

That test has a seeming circularity about it,<sup>3</sup> although it has substantial adherents.<sup>4</sup>

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\* Professor of Law, University of Alabama. I would like to thank Mary Sarah Bilder and Kimberly E. Dean for their comments and Dedi Felman for teaching me about Frank Lloyd Wright.

1. JOSEPH WILLIAM SINGER, *INTRODUCTION TO PROPERTY* 226 (2001).

2. CHARLES E. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH THE LAND”* 97 (2d ed. 1947).

3. Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 *MINN. L. REV.* 167, 211 (1970) (suggesting the test is circular); JESSE DUKEMINIER & JAMES A. KRIER, *PROPERTY* 877 n.32 (4th ed. 1998) (same).

The 1944 Restatement of Property established a test—rather controversial at the time—that was a little more restricted and more definite. It purported to limit “touch and concern” to cases where “the promise will benefit the promisee or other beneficiary of the promise in the physical use or enjoyment of the land possessed by him.”<sup>5</sup> Courts often use similar formulations. Sometimes they limit the definition even more, by requiring that the servitude affect the parties interests “as landowners’, such that the benefits and burdens could not exist independent of the parties’ ownership interests in real property.”<sup>6</sup>

The Restatement (Third) of Property recognizes those difficulties and proposes an alternative analysis: whether the restriction is “illegal, unconstitutional, or against public policy.” The latter is judged in a number of ways, including whether it is “arbitrary, spiteful, or capricious;” unreasonably burdens a constitutional right; is an unreasonable restraint on alienation; is an undue restraint on competition; or is unconscionable.<sup>7</sup>

The Restatement’s project is admirable—and may win converts in the courts.<sup>8</sup> However, at this point, courts are still talking about the traditional

4. *See, e.g.*, *Gallagher v. Bell*, 516 A.2d 1028, 1033-36 (Md. Ct. Spec. App. 1986) (applying Restatement and concluding that agreement by otherwise landlocked parcel to pay part of the cost of paving in exchange for right-of-way touches and concerns the land). In *Gallagher*, as in so many other cases, there is a mixing of concepts. In this case there is mixing of an easement with a covenant. Nevertheless, it seems to be a reasonable mixing. *See* EDWARD E. CHASE, *PROPERTY LAW: CASES, MATERIALS, AND QUESTIONS* 860-61 (2002) (using *Gallagher* to teach “touch and concern”).

5. RESTATEMENT OF THE LAW OF PROPERTY § 537(a) (1944). Judge Clark questioned whether that section actually defined “touch and concern.” *See* CLARK, *supra* note 2, at 219. Judge Clark thought the Restatement departed too much from established cases and that its provision requiring a rough proportionality between the benefit conferred by the promise and the burden imposed by the promise was a “masquerader” that carried support “by reason of its false garb.” *Id.* *See* RESTATEMENT OF THE LAW OF PROPERTY § 537(b) (1944).

6. JOSEPH WILLIAM SINGER, *PROPERTY LAW: RULES, POLICIES, AND PRACTICES* 461 (2d ed. 1997) (quoting *Runyon v. Paley*, 416 S.E.2d 177, 182-83 (N.C. 1992)).

7. RESTATEMENT (THIRD) OF PROPERTY § 3.1 (1991).

8. Courts seem to be embracing the Restatement (Third) of Property in a refreshingly wide range of areas. *See, e.g.*, *Roaring Fork Club, L.P. v. St. Jude’s Co.*, 36 P.3d 1229 (Colo. 2001); *Lazy Dog Ranch v. Telluray Ranch Corp.*, 965 P.2d 1229, 1234 (Colo. 2001); *Abington Ltd. P’ship v. Heublein*, 778 A.2d 885, 893 n.24 (Conn. 2001); *Schovee v. Mikolasko*, 737 A.2d 578, 586 (Md. 1999). Courts have relied upon it on the precise issue of whether servitudes run with the land. *See, e.g.*, *Exit 1 Props. Ltd. P’ship v. Mobil Oil Corp.*, 692 N.E.2d 115, 117 (Mass. App. Ct. 1998); *Beattie v. State ex rel. Grand River Dam Auth.*, No. 91,359, 2002 WL 49964 (Okla. Jan. 15, 2002) (concurring opinion); *Canyon Meadows Home Owners Ass’n v. Wasatch County*, No. 20000905-CA, 2001 Utah App. LEXIS 115, at \*10 n.5 (Utah Ct. App. Dec. 28, 2001).

Nevertheless, courts are reluctant to abandon the touch and concern test altogether. *See Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 579 A.2d 288, 293 (N.J. 1990) (explicitly applying touch and concern as one of several factors governing whether servitude is reasonable, including

requirements of equitable servitudes. This Essay describes several examples I use with students when exploring what the “touch and concern” requirement means.<sup>9</sup> The examples deal with both negative servitudes (restricting the use that one can make of property) and affirmative servitudes (imposing some affirmative duty on the owner of the burdened property, such as the payment of money). They also explore the distinction between servitudes where the benefit is appurtenant (that is, related to a neighboring parcel of land) and where the benefit is in gross (unrelated to land), and the seeming requirement that the servitude provide a rational benefit to the dominant estate.

### I. NEGATIVE SERVITUDES

It is easier to show that the burden of negative servitudes touch and concern the land than affirmative servitudes. Simply put, restrictions on land use are easy to construe as directly related to the land.<sup>10</sup> In every instance I can think of, negative servitudes touch and concern the land they are burdening. We are concerned with two sides of an equation: does the *burden* touch and concern the land and does the *benefit* touch and concern the land? If there is no dominant estate and if the land is burdened, but there is no corresponding parcel of land that is benefited, then we say that the benefit is in gross. If a benefit is in gross, the burden will not run.<sup>11</sup>

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then-proposed Restatement test); *Sonoma Dev., Inc. v. Miller*, 515 S.E.2d 577, 579 (Va. 1999) (acknowledging that the Restatement (Third) of Property abandons the horizontal privity requirement for covenants to run, while requiring horizontal privity in Virginia).

9. Because the requirements for equitable servitudes are substantially lower than real covenants, and because a plaintiff is typically interested in some form of injunctive relief, I spend relatively little time with students on the arcane requirements of real covenants. See generally JAMES L. WINOKUR ET AL., *PROPERTY AND LAWYERING* 642-43 (2002). There are some courts, however, that continue to hold plaintiffs to the requirements of real covenants—that there be horizontal privity. See, e.g., *Sonoma Dev.*, 515 S.E.2d at 579; *Waynesboro Village v. BMC Props.*, 496 S.E.2d 64, 68 (Va. 1998), cited in SINGER, *INTRODUCTION TO PROPERTY*, *supra* note 1, at 241 n.70. I find *Sonoma* difficult to understand, because the plaintiff there was seeking an injunction to prevent the defendant from building on the plaintiff’s property. Hence, it appears that the court should have applied the requirements for equitable servitudes rather than real covenants. The court gave no rationale for applying real covenant rules. See *Sonoma*, 515 S.E. at 579 (“In the present case, the Millers acknowledge that the ‘Declaration of Restriction’ does not fall within the second category of restrictive covenants.”).

10. See *Sloan v. Johnson*, 491 S.E.2d 725, 729 (Va. 1997) (restriction on building touches and concerns).

11. In the well-known case of *Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d 52, 53 (N.J. Super. Ct. App. Div. 1961), for example, there was a covenant that required landowners to use a particular construction company for building on their lots. The burden—the restriction that there could be building only through one construction company—touched and concerned the burdened land. *Id.* The benefit, however, was in gross: there was no parcel of land that benefited from the restriction. Therefore, the burden did not run. *Id.* at 56.

In rare instances, state statutes abolish the requirement that the servitude touch and concern some dominant estate. Massachusetts, for instance, permits conservation servitudes to restrict development on land, even though there is no identifiable dominant parcel.<sup>12</sup> Yet, for the burden to run to subsequent purchasers, the servitude must also touch and concern a dominant parcel. That is, the servitude must touch and concern both the servient estate and the dominant estate. Of course, as many have discussed, touch and concern is a stand-in for ambiguous questions about what promises we want to enforce. Lawrence Berger phrased the rationale underlying touch and concern in 1970. Touch and concern is designed to give:

effect to the intent that most people would probably have if they thought about the issue [of whether the benefit or burden runs] and thereby protec[t] subsequent parties against unexpected and unexpectable liability. Touch and concern is a device for intent effectuation, through which the law conforms itself to normal, usual or probable understanding of the community.<sup>13</sup>

To graph this, let me suggest a couple a very simple case, of a negative covenant, where the promisor agrees not to build on her land in a way that interferes with her neighbor’s view of a lake. Both the burden (the restriction on building) and the benefit (the view) touch and concern the land.

NEGATIVE SERVITUDE THAT TOUCHES AND CONCERNS THE LAND

	<i>Burden</i>	<i>Benefit</i>
Original Parties	Will not build in a way that obstructs view	Promisee gets unobstructed view of the lake
Subsequent Purchaser	Bound by promise	Benefits from promise

To try and see the vagaries of “touch and concern,” I start with a negative covenant, based on a South Carolina deed: “No Yankees may occupy Tara-acre.”<sup>14</sup> That anti-Yankee covenant is probably unenforceable—it is an undue

12. See generally Bennett v. Comm’r of Food and Agric., 576 N.E.2d 1365 (Mass. 1991); Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433 (1984). In other instances, courts seem willing to relax other requirements of servitudes to uphold conservation servitudes. See generally Nature Conservancy v. Congel, 689 N.Y.S.2d 317 (N.Y. App. Div. 1999) (applying third party beneficiary theory to allow non-party to enforce conservation servitude). *Nature Conservancy* is consistent with a series of decisions that allow non-parties to enforce servitudes that were created for their benefit. See, e.g., Snow v. Van Dam, 197 N.E. 224 (Mass. 1935); Zamiarski v. Kozial, 239 N.Y.S.2d 221, 223 (N.Y. App. Div. 1963).

13. Lawrence Berger, *Integration of the Law of Easements, Real Covenants, and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 362 (1986) (quoting Berger, *supra* note 3, at 208-09).

14. The covenant is described in *Yankee Restrictions*, ARK. DEMOCRAT-GAZETTE, Feb. 7, 1998, at A2.

restraint on alienation and it violates the Fair Housing Act<sup>15</sup>—but I think it touches and concerns the *burdened* land. It limits the use that one may make of land and, therefore, satisfies the usual requirements for a servitude to run with the land. Yet courts also speak of the requirement that the servitude touch and concern a dominant parcel. That is, the servitude must touch and concern the servient estate and the dominant estate. Here I think the dominant estates are the neighboring properties, which would have the “benefit” that no Yankees would live nearby. But is that “benefit”—that there are no Yankees nearby—a sufficient benefit that we say it touches and concerns the dominant estate?

There seems to be yet one other requirement, which is often lightly passed over by courts, that the benefit be reasonable, or something that would be considered a benefit to a reasonable person. That seems to be an important, though little-discussed, way of disciplining frivolous servitudes.<sup>16</sup> So perhaps the anti-Yankees covenant is not enforceable because it does not touch and concern the dominant estate in the way that courts require. It may be better classified as a benefit in gross; it is unlikely that reasonable subsequent purchasers will care—and hence it does not make sense to continue to enforce.

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Another common servitude is a restriction on architectural modifications of structures. Frequently those restrictions are imposed on historically significant

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15. See Alfred L. Brophy & Shubha Ghosh, *Whistling Dixie: The Invalidity and Unconstitutionality of Covenants Against Yankees*, 10 VILL. ENVTL. L.J. 57, 70-71, 88 (1999).

16. See, e.g., *Caullett v. Stanley Stilwell & Sons, Inc.*, 170 A.2d 52, 55-56 (N.J. Super. Ct. App. Div. 1961) (contending that court will only enforce covenant if it produces a benefit that justifies the burden). This in essence imposes an objective standard for touch and concern: there must be a benefit to a reasonable person. That objective standard is in line with other areas of property law, even other areas of equitable servitudes. See, e.g., *Sanborn v. McLean*, 206 N.W. 496, 497 (Mich. 1925) (adopting test of constructive notice to determine whether subsequent purchasers had notice of implied restrictions).

The question of whether there is a benefit to a reasonable person is reminiscent of (though narrower in scope) the analysis of whether a servitude is unenforceable because it is unreasonable. Unreasonableness arises in cases of restrictions on competition, see, e.g., *Whitinsville Plaza, Inc. v. Kotseas*, 390 N.E.2d 243, 246 (Mass. 1979); *Davidson Bros., Inc. v. D. Katz & Sons, Inc.*, 579 A.2d 288, 293 (N.J. 1990). The issue of unreasonableness is also addressed in questions of alienability, see, e.g., *Kerley v. Nu-West, Inc.*, 762 P.2d 631, 633 (Ariz. Ct. App. 1988). The Restatement (Third) of Property uses such cases as the basis for its proposed reasonableness test. RESTATEMENT (THIRD) OF PROPERTY § 3.4 (1992) (balancing utility or restraint against “injurious consequences” in measuring validity of direct restraints on alienation).

There also seems to be a related equal protection principle read into the servitudes by some courts. See, e.g., *Petersen v. Beekmere, Inc.*, 283 A.2d 911, 920-21 (N.J. Super. Ct. Ch. Div. 1971) (refusing to enforce covenant to pay money for upkeep of common areas when covenant applies to only some of the beneficiaries of the common area).

properties. Such restrictions, part of a common scheme, touch and concern both the servient estate and the surrounding dominant estates, particularly when all the estates are bound.<sup>17</sup>

But do all architectural restrictions run with the land? Try this one out. What if Frank Lloyd Wright imposes a restriction on a house he designs that there may be no architectural modifications made to the inside of the house?<sup>18</sup> What if there are specific clauses that power outlets cannot be added and that walls must be painted a certain color? The restrictions certainly limit the uses the servient estate owners may make of their property. But do they touch and concern a dominant parcel or are they in gross? It is difficult to see how they benefit neighboring properties.<sup>19</sup> I think that such a servitude would, like the anti-Yankee covenant, not run with the land.

## II. AFFIRMATIVE SERVITUDES<sup>20</sup>

If negative covenants are so difficult to analyze, what of affirmative covenants? Courts view with increased suspicion requirements that landowners undertake some affirmative duty, rather than merely refraining from doing something. They have viewed with suspicion the requirement that homeowners pay money, such as for the upkeep of a country club,<sup>21</sup> although the modern view is that affirmative servitudes “touch and concern the land if the payment is for something that enhances the value of the property, its security, or the quality of life on the property.”<sup>22</sup> By exploring affirmative covenants, we get a fuller exploration of what touch and concern means.

One wonders whether an agreement to provide water to a neighbor’s land, for which the neighbor agreed to pay \$35 per year, touches and concerns the land? The New York Court of Appeals held in *Eagle Enterprise v. Gross* that

17. *Sanborne*, 206 N.W. at 496-97.

18. See Douglas Martin, *Home Sweet Landmark: When Permanent House Guest Is Frank Lloyd Wright*, NEW YORK TIMES, Aug. 7, 1996, at B1.

19. That is different, of course, from outside architectural modifications, which obviously touch and concern because the neighboring parcels all have an interest in the appearance of the surrounding property.

20. Although affirmative servitudes frequently involve the obligation to pay money—and thus invoke issues of the whether the requirements of real covenants are satisfied—this Essay does not address the requirements of real covenants (such as vertical and horizontal privity) that are distinct from those involving equitable servitudes.

21. See DUKEMINIER & KRIER, *supra* note 3, at 882-83 (collecting conflicting cases on whether requirement that homeowners pay money for athletic facilities touch and concern); SHELDON F. KURTZ & HERBERT HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 679 (2d ed. 1993) (“The overwhelming majority of courts hold that reasonably distributed covenant obligations to pay money are enforceable if the money benefits either the lots themselves or some facility related to the subdivision, such as community facilities [or] country clubs . . .”).

22. KURTZ & HOVENKAMP, *supra* note 21, at 661.

it did not, at least when the people obligated to pay for the water drilled their own well.<sup>23</sup> Perhaps that case is wrong. Try flipping the facts around. Do we really believe that the water supplier could get away from the promise to provide water? Does that obligation not touch and concern the land?<sup>24</sup> *Eagle Enterprise* did not raise this possibility. However, it may be that the agreement did not touch and concern the land *after* the well was drilled, because there was no *benefit* to the water supply.<sup>25</sup>

For example, try this covenant out, taken from *The Great Gatsby*. The man who built Gatsby's house was rumored to have offered to pay the taxes of the surrounding houses for five years if they would thatch their roofs.<sup>26</sup> That would have made their property look like peasant cottages and his house, by comparison, like a manor house. The neighbors did not take him up on the offer, for "Americans, while willing, even eager, to be serfs, have always been obstinate about being peasantry."<sup>27</sup>

And so, while we are deprived of an example of such a servitude, because of the independence of the neighbors, I wonder whether such a servitude would run with the land?<sup>28</sup> There are affirmative promises going both ways: the neighbors agree to thatch their roofs and the owner of the "manor house" agrees to pay the taxes.

Now let's try a somewhat more outrageous example. Suppose Gatsby's predecessor did not want the continuing burden of paying taxes, so he offers to sell the property at a reduced rate up front and in return extracts a promise (an affirmative covenant) that whenever people appear on the property outside of the house they will wear peasant clothes. Does that affirmative covenant touch and concern the land? To make it look even more like a feudal incident, suppose they must appear on the first day of June and pay homage to the owner of the manor house? Such servitudes certainly affect people in their use of the property, but perhaps they provide an insufficient current benefit to landholders for us to say that the servitude touches and concerns the land.

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23. 349 N.E.2d 816, 820 (N.Y. 1976).

24. *Nicholson v. 300 Broadway Realty Corp.*, 164 N.E.2d 832, 835-36 (N.Y. 1959) (stating in dicta that agreement to provide steam heat ran with the land, though imposing liability to provide steam through contract, rather than property, rationale).

25. See *supra* note 16 (discussing requirement that for servitude to touch and concern there must be a benefit to a reasonable person, which presumably is not present when the water is no longer needed); *DUKEMINIER & KRIER*, *supra* note 3, at 884 (fitting *Eagle Enterprise* into a framework of servitudes that become unenforceable because of subsequent events). Kurtz and Hovenkamp suggest that the availability of an alternative source of water was important, though they do not provide a rationale why. *KURTZ & HOVENKAMP*, *supra* note 21, at 678.

26. F. SCOTT FITZGERALD, *THE GREAT GATSBY* 70 (Oxford University Press ed., 1998).

27. *Id.*

28. In this case, if the neighbors sought enforcement of the agreement to pay taxes, the servitude might have to follow the rules of restrictive covenants. The covenant would, obviously, bind the original parties.



### III. THINKING ABOUT SERVITUDES THAT RUN WITH THE LAND

Even a cursory discussion of the vagaries of servitudes suggests why the Restatement (Third) of Property has such appeal: it offers the hope of a fairly straightforward approach to determining when promises regarding land use will be enforced against subsequent purchasers of property. However, there are some key considerations that students can identify as they struggle with servitudes. First, negative covenants are more likely than affirmative covenants to touch and concern the land. They always, so far as I can tell, touch and concern the servient estate. They usually touch and concern a dominant estate, although in some instances there may not be an identifiable dominant estate or the promise may be so outrageous that it fails to touch and concern because there is no rational benefit from it.

Affirmative covenants will touch and concern when they impose an obligation closely related to the use and enjoyment of land. But figuring out when and how closely related the obligation is to the use and enjoyment of land will continue to require courts, and students, to struggle. They will also, it seems, use that vague construct to invalidate oppressive servitudes.