
NOTES

TOUCH AND CONCERN, THE RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES, AND A PROPOSAL

At common law, real covenants and equitable servitudes¹ do not run with the land unless they touch and concern the land.² The touch and concern requirement, however, has long been a source of confusion and the target of criticism. In 1998, the American Law Institute (ALI) responded by eliminating the touch and concern requirement in the Restatement (Third) of Property: Servitudes.³ In its place, the ALI instituted a largely contractual regime under which a covenant will run with the land unless it is “illegal or unconstitutional or violates public policy.”⁴ As of this writing, only one line of cases has used the ALI’s new test. This Note argues that courts are correct in not embracing the Restatement’s new approach not only because it is questionable whether the Restatement accomplished the goals its drafters set for it, but also because of the high transaction costs, lack of flexibility for successors, risk of property fragmentation, and high information costs that stem from the Restatement’s overarching goal of keeping the original parties’ bargain in place. This Note does not, however, advocate maintaining the touch and concern requirement; instead, it proposes a regime under which parties would renegotiate covenants in good faith at set time intervals.

Part I describes the confusion surrounding the touch and concern requirement. Part II describes the Restatement, maps courts’ reactions to its provisions, and analyzes the regime. Part III describes the proposed legislation and compares it to the touch and concern and Restatement regimes. Part IV concludes.

¹ Real covenants were traditionally enforced by actions at law and “are used to impose affirmative duties” on a landowner, whereas equitable servitudes were traditionally enforced by actions in equity and “are used to impose restrictions on the use of land” by the landowner. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1269, 1276 (1982). Since the distinction is irrelevant for the purposes of this Note, the remainder of the Note will use the term “covenants” to refer to both real covenants and equitable servitudes.

² The additional requirements for covenants to run are as follows: For a burden to run at law, there needs to be intent, horizontal privity, and vertical privity. For a benefit to run at law, there needs to be intent and vertical privity. For a burden to run in equity, there needs to be intent and notice. For a benefit to run in equity, there needs to be intent. THOMAS W. MERRILL & HENRY E. SMITH, *PROPERTY: PRINCIPLES AND POLICIES* 1026–28 (2007).

³ RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES (2000) [hereinafter RESTATEMENT].

⁴ *Id.* § 3.1.

I. THE TOUCH AND CONCERN REQUIREMENT

The touch and concern requirement has had a tumultuous history. The requirement has endured decades of scholars' failed attempts at articulating a definitive definition, test, or rationale for the requirement, and it has weathered severe criticism. The touch and concern requirement was first conceived in the English courts in *Spencer's Case*,⁵ and later explained in *Congleton v. Pattison*⁶ as a requirement that the covenant must "directly affect[] the nature, quality, or value of the thing demised, [or] the mode of occupying it."⁷ In 1914, Professor Harry Bigelow, in his article *The Content of Covenants in Leases*,⁸ rejected the *Congleton* test, declaring it "vague" and "question-begging,"⁹ and articulated the following test: a covenant touches and concerns the land if it "operate[s] either to make more valuable some of the rights, privileges, or powers possessed by the covenantee or to relieve him in whole or in part of some of his duties."¹⁰ Professor Bigelow's test was later tweaked by Dean (later Judge) Charles Clark:

If 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 and concerns that land.¹¹

Though the Bigelow-Clark test has been widely criticized as being circular,¹² it remains an oft-quoted test because, despite many attempts,¹³ there has been no consensus on an alternative.

⁵ 5 Co. Rep. 16a, 77 Eng. Rep. 72 (K.B. 1583) (holding that a covenant will run with the land if it "touch[es] or concern[s] the thing demised," 5 Co. Rep. at 16b, 77 Eng. Rep. at 74).

⁶ 10 East 130, 103 Eng. Rep. 725 (Ch. 1808).

⁷ *Id.* at 136, 103 Eng. Rep. at 727 (opinion of Ellenborough, C.J.).

⁸ Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639 (1914).

⁹ *Id.* at 639.

¹⁰ *Id.* at 645.

¹¹ CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND" 97 (2d ed. 1947).

¹² See, e.g., *Abbott v. Bob's U-Drive*, 352 P.2d 598, 603–04 (Or. 1960) ("[The test] leaves open to judicial inquiry in each case the question of whether the interests of the parties affected by the covenant are those which they have 'as owners of the land in question' or separate and apart from such ownership. To this extent, then, the test begs the original question." (quoting CLARK, *supra* note 11, at 97)); Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 929 ("This formulation, however, runs in a circle. Of course the promisor's legal relations are lessened if a court finds that the promise sticks to the land, burdening all who come to own the land." (footnote omitted)).

¹³ See, e.g., JOHN E. CRIBBET, PRINCIPLES OF THE LAW OF PROPERTY 193 (2d ed. 1975) ("If the promises are those you would normally expect to find in a lease and if they relate to the subject matter of the lease . . . they undoubtedly 'touch and concern' the land. If they are abnormal and seem to relate to the personal relationship of the parties rather than the lease relationship . . . they are collateral."); 3 HERBERT THORNDIKE TIFFANY, THE LAW OF REAL PROP-

Many scholars chose to sidestep the quest for a definitive test for the touch and concern requirement and instead articulated varying rationales for the requirement.¹⁴ Though many of the suggested rationales are not mutually exclusive, if any scholar had hoped to clear up the confusion surrounding the requirement by articulating its *definitive* rationale, she has not achieved her goal; there is no consensus on a rationale for the touch and concern requirement.

Instead of adding to the confusion, other scholars chose to attack the touch and concern requirement. For example, Professor Susan French's criticism has focused on the confusion itself; she has criticized the requirement as vague, confusing, and complex — qualities which allow judges to invalidate servitudes without explanations and have led judges to error.¹⁵ Professor Richard Epstein has argued that the touch and concern requirement “denies the original parties their contractual freedom by subordinating their desires to the interests of future third parties, who by definition have no proprietary claim to the subject property.”¹⁶

II. THE RESTATEMENT'S ELIMINATION OF THE TOUCH AND CONCERN REQUIREMENT

A. *The New Regime*

From out of the myriad tests, rationales, and criticisms of the touch and concern requirement, the ALI proposed and eventually promul-

ERTY § 854, at 455 (3d ed. 1939) (“[A] covenant is regarded as touching and concerning the land if it is of value to the covenantee by reason of his occupation of the land or by reason of an easement which he has in the land, or if it is a burden on the covenantor by reason of his occupation of the land.”).

¹⁴ See, e.g., Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 211 (1970) (arguing that touch and concern puts “the normal expectations of society into effect unless an actual intent to the contrary is evinced”); Ben W.F. Depoorter & Francesco Parisi, *Fragmentation of Property Rights: A Functional Interpretation of the Law of Servitudes*, 3 GLOBAL JURIST FRONTIERS, Issue 1, art. 2, 2003, at 3, available at <http://www.bepress.com/gj/frontiers/vol3/iss1/art2> (arguing that the touch and concern requirement serves “as [an] instrument[] to limit excessive or dysfunctional fragmentation of property rights”); Stake, *supra* note 12, at 930 (“[C]ourts find that a covenant touches and concerns land when the benefit or the burden at issue is more efficiently allocated to the successors than to the original parties to the covenant.”); A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 813 (1998) (“Touch and concern protects the long-run economic expectations of landowners”); Molly Shaffer Van Houweling, *The New Servitudes*, 96 GEO. L.J. 885, 895, 903, 905 (2008) (arguing that touch and concern “promoted notice,” prohibited servitudes that “are especially likely to be undesirable to future generations,” and “weed[ed] out servitudes that impose harmful externalities”).

¹⁵ Susan F. French, Comment, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 NEB. L. REV. 653, 654, 666 (1998).

¹⁶ Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1360 (1982).

gated the Restatement, which in section 3.2 abolished the touch and concern requirement.¹⁷ The Restatement establishes a largely contractual regime that is characterized by a general presumption that a covenant will run with the land if the original parties so intended.¹⁸ The comment to section 3.2 and Professor French's¹⁹ scholarship detail the provisions that the Restatement views as replacing the touch and concern requirement. The major replacement provision is section 3.1,²⁰ which states that a servitude²¹ "is valid unless it is illegal or unconstitutional or [in violation of] public policy."²² Chapter 7 of the Restatement deals with modification and termination, and sections 7.10, 7.11, 7.12, and 7.13 are the specific provisions within the chapter that the Restatement and Professor French view as replacements for the requirement.²³ Sections 7.10 and 7.11 address the problem of changed conditions. Section 7.12 addresses the problem of covenants to pay money or provide services that are either of unlimited duration or are excessive when compared to the cost or value of providing the services or facilities, and section 7.13 addresses the problem of being unable to locate the beneficiaries of a servitude held in gross. Professor French also views section 4.5 and chapter 6 as replacements for the requirement.²⁴ Section 4.5 provides guidelines for whether a burden or benefit is transferable, and chapter 6 provides a

¹⁷ RESTATEMENT, *supra* note 3, § 3.2 ("Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude.")

¹⁸ See *id.* § 3.2 cmt. a; Tarlock, *supra* note 14, at 809 ("[The] 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."). See generally RESTATEMENT, *supra* note 3.

¹⁹ Professor French was the Reporter of the Restatement, see French, *supra* note 15, at 653 n.*, and was thus arguably the most influential member of the committee of the Restatement's drafters.

²⁰ See RESTATEMENT, *supra* note 3, § 3.2 & cmt. a; French, *supra* note 15, at 661.

²¹ This Note continues to use the term "covenant" to refer to equitable servitudes and real covenants. In a complex set of provisions, the Restatement defines a servitude as "a legal device that creates a right or an obligation that runs with land or an interest in land," RESTATEMENT, *supra* note 3, § 1.1, and a covenant as "a servitude if either the benefit or the burden runs with land," *id.* § 1.3, and it makes clear that "[t]he terms 'real covenant' and 'equitable servitude' describe servitudes encompassed within the term 'covenant that runs with land,'" *id.* § 1.4. The upshot is that the Restatement's use of "servitude" includes both equitable servitudes and real covenants.

²² *Id.* § 3.1. Section 3.1 further explains that "[s]ervitudes that are invalid because they violate public policy include, but are not limited to: (1) a servitude that is arbitrary, spiteful, or capricious; (2) a servitude that unreasonably burdens a fundamental constitutional right; (3) a servitude that imposes an unreasonable restraint on alienation under § 3.4 or § 3.5; (4) a servitude that imposes an unreasonable restraint on trade or competition under § 3.6; and (5) a servitude that is unconscionable under § 3.7." *Id.*; see also *infra* p. 947.

²³ See RESTATEMENT, *supra* note 3, § 3.2 cmts. a, b (suggesting that sections 7.10, 7.12, and 7.13 can be viewed as replacements for the touch and concern requirement); French, *supra* note 15, at 661–65 (suggesting that sections 7.10, 7.11, 7.12, and 7.13 can be viewed as replacements for the touch and concern requirement).

²⁴ French, *supra* note 15, at 662, 665.

detailed set of provisions on servitudes and covenants used to govern common interest communities.

The fact that the Restatement and Professor French earmarked certain provisions as replacements for the touch and concern requirement is illuminating because the very concept of replacements assumes that the “correct” rationales for touch and concern have been identified and that the replacement provisions are serving those rationales. Of course, because there is no consensus on the rationales for the touch and concern requirement, the Restatement is simply a reflection of one committee’s view of what the touch and concern requirement accomplishes and what aspects of it should be retained.

B. Courts’ Reactions to the Restatement’s Regime

As of this writing, only the *Bennett v. Commissioner of Food and Agriculture*²⁵ line of cases has followed the Restatement. The issue before the Supreme Judicial Court of Massachusetts in *Bennett* was whether the Bennetts were allowed to construct a dwelling for their use anywhere on their land even though it was subject to an agricultural preservation restriction (APR) negotiated by the previous owners of the land.²⁶ The Commissioner of Food and Agriculture negotiated the APR with the Bennetts’ predecessors pursuant to Massachusetts General Laws chapter 184, section 31.²⁷ The Bennetts’ first argument was that since their dwelling was going to be used for family living, it fit under the exception in subsection (a) of section 31.²⁸ The court declined to resolve what it deemed to be a statutory “ambiguity,” and instead held that section 31’s description of an APR was merely a default and was made irrelevant by the specific and enforceable APR in the land’s deed to which the Bennetts’ predecessors agreed.²⁹ The

²⁵ 576 N.E.2d 1365 (Mass. 1991).

²⁶ *Id.* at 1365–66.

²⁷ An agricultural preservation restriction means a right, whether or not stated in the form of a restriction, easement, covenant or condition, in any deed, will or other instrument executed by or on behalf of the owner of the land appropriate to retaining land or water areas predominately in their agricultural farming or forest use, to forbid or limit any or all (a) construction or placing of buildings except for those used for agricultural purposes or for dwellings used for family living by the land owner, his immediate family or employees; (b) excavation, dredging or removal of loam, peat, gravel, soil, rock or other mineral substance in such a manner as to adversely affect the land’s overall future agricultural potential; and (c) other acts or uses detrimental to such retention of the land for agricultural use. Such agricultural preservation restrictions shall be in perpetuity except as released under the provisions of section thirty-two. All other customary rights and privileges of ownership shall be retained by the owner including the right to privacy and to carry out all regular farming practices.

MASS. GEN. LAWS ch. 184, § 31 (2008).

²⁸ *Bennett*, 576 N.E.2d at 1366–67.

²⁹ *Id.* at 1367.

court further held that the terms of the APR in question gave the Commissioner the power to “control the construction of any dwelling unit on the site.”³⁰ The Bennetts’ second argument was that the APR did not run with the land, so as successors, they were not bound.³¹ Citing an early draft of section 3.1 of the Restatement,³² the court fashioned the following test: as long as the APR did not contravene public policy when it was made and its current enforcement was consistent with public policy and was reasonable, the APR should be enforced against the Bennetts.³³ Though the court did not explicitly identify the public policy on which it was relying, the court found that the APR was “consistent with, indeed strengthen[ed], the public policy expressed in [Massachusetts General Laws] § 31.”³⁴

Bennett had the potential to be a turning point for the touch and concern requirement and the Restatement for two reasons. First, *Bennett* arguably abolished the touch and concern requirement and put Restatement section 3.1 in its place. An explanation for this statement is required, however, because the court appeared to be entirely unaware that it abolished the touch and concern requirement. The court’s state of oblivion appears to have stemmed from its decision to call the APR an “easement in gross.”³⁵ If the court were correct in calling the APR an easement in gross, its decision to use Restatement section 3.1 and not mention the touch and concern requirement would make sense because at common law, the easement would not have been required to touch and concern the land in order to be transferred to successors.³⁶ The court, however, was incorrect in calling the APR an easement of any kind. An easement “creates a right to enter and use land belonging to another and obligates the landowner to refrain from interfering with the authorized use.”³⁷ The APR described in the *Bennett* case did not give the government a right to enter and use the Bennetts’ property. Instead, the government had, through the APR, purchased the landowner’s promise to refrain from using the land in a

³⁰ *Id.*

³¹ *Id.* at 1366.

³² *Id.* at 1367–68. The court cited RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES § 3.1 (Tentative Draft No. 2, 1991). The language of the draft section 3.1 was slightly different than the language of today’s section 3.1; however, the meaning is the same. The draft language read: “A servitude . . . is valid unless the arrangement it purports to implement infringes a constitutionally protected right, contravenes a statute or governmental regulation, or violates public policy.” *Id.*

³³ *Bennett*, 576 N.E.2d at 1367.

³⁴ *Id.* at 1368.

³⁵ *Id.* at 1367.

³⁶ RESTATEMENT, *supra* note 3, § 5.8 & cmt. b.

³⁷ A. JAMES CASNER ET AL., CASES AND TEXT ON PROPERTY 890 (5th ed. 2004).

particular way. Such a promise is called a restrictive covenant,³⁸ and in order for a restrictive covenant to run with the land, it must fulfill the touch and concern requirement. The *Bennett* court, by only requiring that the APR not violate public policy as required by Restatement section 3.1, effectively abolished the touch and concern requirement. Second, the *Bennett* court signaled that the Supreme Judicial Court of Massachusetts was willing to give the rest of the Restatement regime a chance. Specifically, the *Bennett* court ended its opinion by saying that the case prompted the court “to observe that certain common law rules concerning the creation, validity, and enforcement of servitudes may no longer be sound and that we are willing to reconsider them in appropriate cases.”³⁹

Despite *Bennett*'s potential to be used by other Massachusetts courts, and perhaps non-Massachusetts courts, as precedent for abolishing the touch and concern requirement and using the Restatement's regime instead, no courts have taken *Bennett*'s cue. Instead, courts have used the *Bennett* opinion as precedent for applying the Restatement regime only when they are dealing with a case the facts of which closely hew to the facts of *Bennett*.⁴⁰ It bears mentioning, however, that no court has affirmatively rejected the new regime from a substantive perspective. Instead, courts ignore the Restatement altogether,⁴¹ find technical reasons not to apply the Restatement regime,⁴²

³⁸ A covenant is a promise by or to a landowner intended to bind or benefit successors to the land that either: [o]bligates the landowner to use or refrain from using the land in a particular way (a restrictive covenant); or [o]bligates the landowner to make payments or provide some other performance to another (an affirmative covenant); or [e]ntitles the landowner to receive payments or some other performance from another.

Id. (emphasis added). In a later opinion, *Commonwealth v. Boston Redevelopment Authority*, 633 N.E.2d 1043 (Mass. 1994), the Supreme Judicial Court of Massachusetts suggested that *Bennett* dealt with a restrictive covenant, though the opinion subsequently conflated the term “restrictive covenant” with “easement in gross.” See *id.* at 1045. The APR in *Bennett* could also be viewed as a conservation easement, see Julia D. Mahoney, *Perpetual Restrictions on Land and the Problem of the Future*, 88 VA. L. REV. 739, 741–42 (2002), which Professor Mahoney acknowledges “bear[s] a greater resemblance to real covenants and equitable servitudes than to easements,” *id.* at 748 n.32.

³⁹ *Bennett*, 576 N.E.2d at 1368 n.4.

⁴⁰ See, e.g., *Wolfe v. Gormally*, No. 274368, 2006 WL 3246467, at *8 (Mass. Land Ct. Nov. 9, 2006) (distinguishing *Bennett* on the grounds that no public funds were used to secure the restriction in question and that the restriction did not result in a public benefit); *Murphy v. Town of Hopkinton Planning Bd.*, No. 282691, 2006 WL 510416, at *8 (Mass. Land Ct. Mar. 3, 2006) (similar facts to *Bennett*); *Weston Forest & Trail Ass'n v. Fishman*, No. 301928, 2005 WL 1313605, at *4 (Mass. Land Ct. June 3, 2005) (similar facts to *Bennett*).

⁴¹ See, e.g., *Calabrese v. McHugh*, 170 F. Supp. 2d 243 (D. Conn. 2001).

⁴² See, e.g., *Refinery Holding Co. v. TRMI Holdings, Inc. (In re El Paso Refinery, LP)*, 302 F.3d 343, 356 n.19 (5th Cir. 2002) (declining to address the Restatement's abolishment of the touch and concern requirement because the case was being decided under Texas law and “Texas has not yet adopted this approach”); *Garland v. Rosenshein*, 649 N.E.2d 756, 758 & n.4 (Mass. 1995) (declining to decide whether to abolish the touch and concern requirement per the Restatement be-

or cite the Restatement in another part of the opinion for another purpose entirely — showing that courts know the content of the Restatement — but do not mention it when conducting a touch and concern analysis.⁴³

C. Analysis of the Restatement's Regime

Though the courts have not been explicit about why they have not adopted the Restatement's new regime in place of the touch and concern requirement, this Note argues that the courts are correct in not embracing the Restatement's regime. Not only is it questionable whether the Restatement accomplishes the goals its drafters set out for it, but several problems stem from the regime's overarching objective of keeping the original parties' bargain in place.

1. *Evaluating the Regime Based on Its Own Goals.* — The Restatement and Professor French's scholarship reveal three main goals behind abolishing the touch and concern requirement and implementing the Restatement's regime: allowing greater freedom of contract, minimizing or eliminating confusion in the doctrine, and forcing judges to write clearer opinions. The Restatement may accomplish the first goal to a limited extent; however, it is at best unclear whether the Restatement succeeds in accomplishing the latter two goals.

(a) *Freedom of contract.* — The comment to Restatement section 3.2 states that eliminating the touch and concern requirement and putting in its place section 3.1, which "assumes the validity of a servitude," will allow for "innovative land-development practices using servitudes."⁴⁴ The comment's language implies that this is not an absolute goal; rather, it is a goal relative to the common law regime.⁴⁵ It is questionable whether the Restatement achieves this goal. To understand why, it is helpful to think of a covenant in two stages: the first stage is the period during which the covenant binds the original parties; the second stage commences when one or both original parties sells to a successor or successors. Under both the common law and

cause the lower court had rested its holding on statutory grounds rather than common law grounds, although "[e]ven under traditional common law principles, the restriction fails," *id.* at 758); 1515-1519 Lakeview Blvd. Condo Ass'n v. Apartment Sales Corp., 17 P.3d 639, 640 (Wash. Ct. App. 2000) (choosing not to apply the Restatement because the argument for its use was made in a motion for reconsideration rather than in a brief).

⁴³ See, e.g., *Kaanapali Hillside Homeowners' Ass'n v. Doran*, 162 P.3d 1277, 1289-90 & n.14 (Haw. 2007); *Jeremiah 29:11, Inc. v. Seifert*, 161 P.3d 750, 753 (Kan. 2007).

⁴⁴ RESTATEMENT, *supra* note 3, § 3.2 cmt. a; see also Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 931-32 (1988).

⁴⁵ See RESTATEMENT, *supra* note 3, § 3.2 cmt. a ("The purpose of changing from the touch-or-concern doctrine to a rule that assumes the validity of a servitude is to permit innovative land-development practices using servitudes without the sometimes irrational impediments imposed by the touch-or-concern doctrine and the rule against indirect restraints on alienation . . .").

Restatement regimes, the first stage is governed solely by common law contract principles.⁴⁶ In other words, if one of the original parties challenged the validity of the covenant as against the other original party, a judge would decide the case solely under common law contract principles. In the first stage, therefore, the common law regime and the Restatement regime offer the same degree of freedom of contract to make innovative arrangements.

The regimes' restrictions in the second stage affect freedom of contract only to the extent that they potentially restrict the durations of the covenants negotiated during the first stage. Both regimes impose a number of restrictions in the second stage. At common law, a covenant is valid during the second stage if the covenant touches and concerns the land, if there is intent that the covenant should run, if there is the requisite privity (required only for actions at law), and if there is notice (required only for an equity action involving a burden).⁴⁷ Since it is unlikely that intent, privity, or notice will be lacking,⁴⁸ the restriction with teeth is the touch and concern requirement. Under the Restatement regime, a covenant's validity in the second stage is judged under the entire Restatement, including sections 3.1 and 4.5, chapter 6, and sections 7.10 to 7.13.⁴⁹ Given the myriad interpretations of touch and concern, it is highly uncertain whether a litigant would find common law restrictions or Restatement restrictions more burdensome at the second stage. However, the common law's placement of the burden of proof on the person seeking to enforce a covenant as opposed to the Restatement's placement of the burden of proof on the person seeking to avoid enforcement means that the Restatement is likely, though not conclusively, a more favorable regime for the enforcement of covenants for a longer duration than is the common law regime.⁵⁰ Therefore, to the limited degree to which "innovative land-development practices" are linked to duration of a covenant, the Restatement might achieve its goal. It is more uncertain, however, whether the Restatement regime overall is effective in promoting greater freedom of contract.

⁴⁶ Though it would appear, from the text of the Restatement provisions, that the entire Restatement would apply at this first stage, the comment to section 3.1 clearly states that it does not. *Id.* § 3.1 cmt. a ("The validity of the underlying transaction is determined by the law of contracts or conveyances, not by this Restatement. These rules address the question whether the transaction, even though valid between the original parties, is invalid as a servitude — whether allowing the benefits or burdens to run with the land would create such risks of social harm that a servitude should not be permitted.").

⁴⁷ See *supra* note 2.

⁴⁸ Of these requirements, horizontal privity is the most difficult to achieve; however, "the doctrine has little support in modern case law and none among scholars of servitudes law." French, *supra* note 44, at 935 (footnotes omitted); see also *id.* at 935 nn.26–27.

⁴⁹ See *supra* section II.A (explanations of the various provisions).

⁵⁰ See *infra* p. 949.

(b) *Minimizing or eliminating confusion.* — Another reason that the Restatement abolished the touch and concern requirement was to eliminate the vagueness and confusion surrounding the doctrine.⁵¹ Professor French made clear that this is not an absolute goal; instead, it is a relative goal as compared to the common law regime.⁵² It is certainly true that by abolishing the touch and concern requirement, the Restatement has jettisoned decades of confusing scholarly literature and judicial precedent.⁵³ However, it is an open question whether the Restatement simply replaced the confusion surrounding the touch and concern requirement with an entirely new set of confusions. For example, section 3.1 says that “[a] servitude . . . is valid unless it is illegal or unconstitutional or violates public policy.” Though section 3.1 then gives a list of what violates public policy,⁵⁴ this list is deemed non-exclusive, and the comment to section 3.1 makes clear that the Restatement contemplates a broad and open-ended definition of what violates public policy. Specifically, the comment to section 3.1 states that contract law may be used as a guide;⁵⁵ however, the Restatement does not mean for contract law to be a complete guide because the comment goes on to state that public policies “may be purely the product of judicial development, or they may be based on legislation, or on the provisions of state or federal constitutions.”⁵⁶ The comment provides some guidance to a prospective party or a judge by giving several examples of what would constitute a violation of public policy;⁵⁷ however, the examples are hardly intended to provide comprehensive lists, as the comment acknowledges.⁵⁸ Another example is section 7.10, the Restatement’s changed conditions provision. Though the language of the provision provides a sense of the boundaries of what would be considered a changed condition,⁵⁹ neither the provision’s language nor the accompanying comment sheds much light on what amounts to a changed condition under the provision. On the one hand, the com-

⁵¹ See French, *supra* note 44, at 930.

⁵² See *id.* (“Although simplification and clarification of the law are its major goals, the [Restatement] is not designed to provide the ultimate simplification that would result from adopting a laissez-faire attitude toward servitudes.” (footnote omitted)).

⁵³ See *supra* Part I.

⁵⁴ See *supra* note 22.

⁵⁵ See RESTATEMENT, *supra* note 3, § 3.1 cmt. e.

⁵⁶ *Id.* § 3.1 cmt. f.

⁵⁷ See *id.* § 3.1 cmt. e, f, i.

⁵⁸ “Because policies change to meet changing conditions of society, it is not practicable to predict the policy assessments judges will make in the future.” *Id.* § 3.1 cmt. f.

⁵⁹ When a change has taken place since the creation of a servitude that makes it impossible as a practical matter to accomplish the purpose for which the servitude was created, a court may modify the servitude to permit the purpose to be accomplished. If modification is not practicable, or would not be effective, a court may terminate the servitude.

Id. § 7.10(1); see also *infra* p. 950.

ment to section 7.10 suggests several times that the substantial existing common law doctrine should serve as a guide;⁶⁰ on the other hand, the comment also suggests departures from the common law,⁶¹ leaving prospective parties and judges with little guidance on the extent to which existing precedent should be followed.

Though it is difficult to compare the vagueness and confusion of the touch and concern doctrine to the Restatement's open-ended "violation of public policy" and its ill-defined changed conditions provision, at the very least, it is certainly not clear that the Restatement accomplishes its goal of "simplification and clarification of the law"⁶² relative to the common law regime. If courts were to adopt the Restatement regime in earnest, over time perhaps sufficient precedent would develop so that these now-vague concepts would become well-defined. At that point, it might be possible to provide stronger proof that the Restatement's regime offers a less vague and less confusing regime than the touch and concern regime.

(c) *Judicial clarity.* — Finally, another of the Restatement's goals was to force judges to be clearer in stating their reasons for why they were not allowing a covenant to run with the land.⁶³ This goal appears to be relative to the touch and concern regime, rather than an absolute goal.⁶⁴ Since so few courts have used the Restatement's regime, it is unclear empirically whether the Restatement accomplished this goal. Theoretically, it seems true that by listing specific requirements, such as "public policy" or "changed circumstances," the Restatement will force a judge to identify the requirement under which she is invalidating a covenant; however, nothing in the Restatement forces a judge to provide more of an explanation. *Bennett* is a great example of what a judge may do when applying the Restatement. In that case, the justice held that the covenant comported with public policy, but he did not bother to identify or explain the exact public policy under which he held the covenant valid.⁶⁵ The Restatement, therefore, perhaps forces judges to be a little more transparent when vali-

⁶⁰ See, e.g., RESTATEMENT, *supra* note 3, § 7.10 cmt. a ("Because servitudes create property interests that are generally valuable, courts apply the changed-conditions doctrine with caution. Of the many changed-conditions cases that have produced appellate decisions, few result in modification or termination of a servitude.").

⁶¹ See, e.g., *id.* ("The changed-conditions rule has traditionally been used to terminate servitudes, rather than to modify them, but the less drastic step should be taken if modification would permit the servitude to continue to serve the purpose for which it was designed to an extent that is worthwhile.").

⁶² French, *supra* note 44, at 930.

⁶³ *Id.* at 933; see also RESTATEMENT, *supra* note 3, § 3.2 cmt. a.

⁶⁴ See RESTATEMENT, *supra* note 3, § 3.2 cmt. a ("[T]he law will encourage clearer identification of the issues and clearer explanations of the reasons why servitudes may not be used to implement particular arrangements than was ever possible using the touch-or-concern doctrine.").

⁶⁵ See *Bennett v. Comm'r of Food & Agric.*, 576 N.E.2d 1365, 1367-68 (Mass. 1991).

dating or invalidating covenants, but the regime still gives judges plenty of rhetoric behind which to hide, should they so choose.

2. *Evaluating the Restatement Regime on Its Own Terms.* — Even though it is questionable whether the Restatement accomplished the goals it set out for itself as compared to the touch and concern regime, the more important question is whether the Restatement's regime is a desirable one. The overriding aim of the Restatement is to keep the original parties' bargain in place. In order for a covenant to be invalidated under a provision of the Restatement, the party that wishes for the covenant to be invalidated must file suit.⁶⁶ The Restatement regime explicitly places the burden of proof on the person seeking to avoid enforcement,⁶⁷ and that person must prove that the covenant is illegal, unconstitutional, or in violation of public policy,⁶⁸ or that there has been a change in the conditions warranting either a modification or a termination.⁶⁹ A variety of problems stem from the Restatement's general goal of keeping the original parties' bargain in place: there is not sufficient flexibility for successors to create the land arrangements they want; high transaction costs may prevent invalid covenants from being invalidated; there is a risk of property fragmentation; and there are potentially high information costs. Though some of the criticisms leveled at the Restatement could also be leveled at the touch and concern requirement, the purpose of this section is not to compare the Restatement regime to the touch and concern regime; rather, it is to evaluate the Restatement regime on its own terms.

First, the Restatement regime does not provide sufficient flexibility to take into account a successor's ideas about how her land should best be put to use. Assuming that the covenant does not contravene section 3.1, the only flexibility that the Restatement offers a successor is the potential for modification or termination of the covenant if there are changed conditions. Though it is unclear exactly what would constitute a "change" under section 7.10, the text of the provision and the accompanying comment provide a sense of the boundaries of the provision: a court may modify a covenant if "a change has taken place since the creation of [the covenant] that makes it impossible as a practical matter to accomplish the purpose for which the [covenant] was created,"⁷⁰ and a court may terminate a covenant if "there has been such a radical change in conditions since creation of the [covenant]

⁶⁶ This assumes that not all affected parties agree that the covenant is invalid; were they all to agree, they could simply bargain among themselves rather than turn to the courts.

⁶⁷ RESTATEMENT, *supra* note 3, § 3.2 cmt. a. In contrast, under the touch and concern regime, the burden was on the party seeking to enforce the covenant. *See id.*

⁶⁸ *Id.* § 3.1.

⁶⁹ *Id.* § 7.10.

⁷⁰ *Id.*

that perpetuation . . . would be of no substantial benefit to the dominant estate.”⁷¹ The changed conditions provision is not likely to be helpful to, for example, a successor land owner whose land benefits substantially from a covenant, but who believes that his land could yield even more benefit if he were able to enter into a different covenant. The problem is that the proposed covenant is inconsistent with the covenant already in place. Since the original covenant bestows a substantial benefit, a court following the Restatement will not modify or terminate the covenant. One could argue that if the successor’s new idea for a covenant is more beneficial to all parties than the old covenant, she should be able to bargain with the other parties for either a modification or a termination outside of the Restatement regime. The problems with that argument, however, are that it assumes that all parties are able to value the current and proposed covenants accurately, that the successor has the resources available to buy her way out of a covenant, and that the successor has the power to bring the other parties to the table. Since any one of these assumptions may not be true, the successor may be stuck with the original parties’ bargain. The original parties’ bargain, however, is not necessarily superior to the new one the successor is contemplating. In fact, there is no evidence that the original parties were better equipped to know what was best for their successors than the successors themselves.⁷² Nonetheless, the Restatement regime privileges the original parties’ bargain by not providing sufficient flexibility to successor land owners.

Second, the potentially high transaction costs of invalidating, terminating, or modifying a covenant under the Restatement regime may cause covenants that should be invalidated, terminated, or modified to remain in force. Filing suit and incurring the accompanying litigation costs are prerequisites to invalidating, terminating, or modifying a covenant under the Restatement. Since litigation costs can be astronomical, even a party with a strong argument may understandably choose to allow a covenant to continue in order to avoid the transaction costs of litigation. Moreover, the litigation costs are likely to be higher when courts first start to use the Restatement’s regime because there is no precedent to counsel against an appeal.

Third, the Restatement does not provide much protection against excessive property fragmentation. The danger of property fragmentation is that it could become a restraint on alienation because the parcel

⁷¹ *Id.* § 7.10 cmt. c.

⁷² See Gerald Korngold, *Resolving the Intergenerational Conflicts of Real Property Law: Preserving Free Markets and Personal Autonomy for Future Generations*, 56 AM. U. L. REV. 1525, 1527 (2007) (discussing the “impossibility of predicting the shifts of the future”); Mahoney, *supra* note 38, at 768 (arguing that future landowners are better equipped than current landowners to target lands worthy of preservation).

could end up with so many owners that a potential buyer who is looking to buy the whole parcel may incur prohibitive transaction costs due to the need to track down all of the owners and reassemble the parcel.⁷³ Excessive fragmentation is possible under the Restatement regime because not only are there relatively few reasons for a covenant to be invalidated or terminated,⁷⁴ but also, as described above, the prospect of enormous litigation costs may prevent covenants that could be invalidated or terminated under the Restatement from ever being brought to a court.

Fourth, an inherent danger with a covenant bargained for under the Restatement is that the original parties will not take into account the information costs they are imposing on third parties.⁷⁵ Since the Restatement puts relatively few restrictions on the substance of the covenants for which original parties can bargain, original parties are able to bargain for covenants that are highly tailored to the specific property at hand. The problem with a highly tailored covenant, however, is that it imposes information costs on third parties.⁷⁶ First, there are the successors to the property. When a successor is in the process of purchasing a property that is burdened or benefited by a highly tailored covenant, any prudent successor will spend time learning about and valuing the covenant that is in place. The time and money the successor spends on this activity constitute information costs.⁷⁷ Second, the covenant imposes information costs on all potential purchasers of land because as long as these highly tailored covenants are in the market, all potential purchasers involved in the market will have to spend time and money investigating properties they are considering purchasing.⁷⁸

An original party can internalize the information costs to the successors by lowering the purchase price;⁷⁹ however, this is not an ideal solution to the problem of information costs for two reasons. First, original parties cannot internalize the information costs of all potential purchasers because most potential purchasers have no contact at all with the original purchasers.⁸⁰ Second, it would be preferable for the information costs to be minimized or eliminated instead. One way to

⁷³ See Van Houweling, *supra* note 14, at 902–03 (citing Michael Heller, *The Tragedy of the Anticommons: Property in the Transition from Marx to Markets*, 111 HARV. L. REV. 621, 624 (1998)).

⁷⁴ See *supra* section II.A.

⁷⁵ Cf. Thomas W. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 YALE L.J. 1, 26–27 (2000) (noting that creations of “new” and “idiosyncratic” property rights impose information costs on third parties).

⁷⁶ See *id.*

⁷⁷ *Id.* at 27.

⁷⁸ See *id.* at 28.

⁷⁹ *Id.* at 27.

⁸⁰ *Id.* at 45.

minimize information costs for successors and potential market participants is by putting a recording system in place; however, even recording systems “can require lengthy and error-prone searches.”⁸¹ A far more effective way to minimize, or perhaps even eliminate, information costs is to require adherence to standard types of covenants.⁸² With a standardized regime, successors and potential market participants would be familiar with all of the different standard covenants and would not have to spend time investigating their content or valuing them once such a covenant was discovered. However, standardizing covenants would create a regime in which land would not be able to be put to its most efficient uses. A middle ground is therefore necessary. The Restatement does provide a middle ground in that it is neither purely contractual nor purely standardized, but it is unsatisfactory because it is not likely to weed out very many covenants.

III. PROPOSED LEGISLATION

Some scholars have responded to the Restatement regime by mounting vigorous defenses of the touch and concern regime; however, these defenses simply add to the dizzying array of rationales for touch and concern.⁸³ Though courts have not warmed to the Restatement regime, continuing with touch and concern is not necessarily the answer. The touch and concern regime is sufficiently confusing that the search for a new system should not end with the Restatement. This Part offers an alternative.

A. *The Proposal*

The basic proposal is as follows: All covenants will last for thirty years, at which time the parties⁸⁴ must negotiate in good faith and decide whether the covenant should continue as is or continue with modifications. If negotiations are successful, the parties must negotiate

⁸¹ *Id.* at 44.

⁸² *Id.* at 33–34. Professor Glen Robinson argues that there is no externality problem, even with potential market participants, if all potential successors are provided with sufficient notice. Glen O. Robinson, *Personal Property Servitudes*, 71 U. CHI. L. REV. 1449, 1486–87 (2004). Even if sufficient notice were required, however, not all potential market participants will necessarily be serious enough about every property they look at to warrant a current owner’s giving them notice. Moreover, even with sufficient notice of the terms of a covenant, successors and potential market participants still must incur additional information costs that are not internalized by this type of notice because they must value the servitudes themselves.

⁸³ See, e.g., Stake, *supra* note 12 (arguing that although some clarification of touch and concern is required, *id.* at 971–72, the doctrine should not be abolished because it “allows courts to determine the efficient allocation of the benefits and burdens of the land promise,” *id.* at 945); Tarlock, *supra* note 14, at 813 (“Touch and concern protects the long-run economic expectations of landowners who assume a financial servitude obligation.”).

⁸⁴ Whether they are the original parties or their successors.

in good faith every ten years thereafter. If the negotiations fail at any of the intervals, then the covenant is automatically terminated.⁸⁵ If one or more parties cannot be found and thus the mandatory negotiations are unable to take place, the covenant will terminate at the time the negotiation was to have occurred.⁸⁶

1. *Explanation of Time Intervals.* — The general idea behind the chosen duration and renewal periods was to strike a balance between the probable time period during which a covenant is useful and the inevitable changes in parties and circumstances that occur during the life of a covenant. Statutes provided a useful benchmark in choosing the time intervals. A handful of states have enacted legislation limiting the duration of covenants.⁸⁷ Some states provide for automatic termination with no chance of renewal, while other states provide for an initial period with opportunities for renewals. Covenants under the two

⁸⁵ Other authors have made similar proposals involving maximum lifespans of covenants. See, e.g., CLARK, *supra* note 11, at 201 n.14 (citing Charles E. Clark, *Limiting Land Restrictions*, 27 A.B.A. J. 737 (1941)) (proposing that covenants be terminated at the earlier of either thirty years or when they become of “merely nominal value”); Robert C. Ellickson, *Alternatives to Zoning: Covenants, Nuisance Rules, and Fines as Land Use Controls*, 40 U. CHI. L. REV. 681, 717 (1973) (advocating legislation imposing maximum lifespans for covenants); Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1414 (1982) (advocating legislation that states a “presumptive life span of servitudes for different development purposes”); Dean Owens, Comment, *Removing Old Restrictive Covenants — An Analysis and Recommendation*, 15 U. KAN. L. REV. 582, 590 (1967) (proposing that restrictions be enforceable for thirty years and automatically renewed for successive periods of ten years “unless an instrument [is] signed by a majority of the then owners . . . agreeing to change the restrictions in whole or in part”); Margot Rau, Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 182–83 (1978) (proposing a thirty-year durational limit on covenants). A handful of states have legislation similar to this proposal in place already. See GA. CODE ANN. § 44-5-60 (2008) (restrictive use covenants in municipalities and counties that have zoning laws have a twenty-year lifespan with possibility of renewal in limited circumstances); IOWA CODE ANN. § 614.24 (West 2008) (use restrictions limited to a twenty-one-year lifespan with the possibility of twenty-one-year renewal periods); MASS. GEN. LAWS ch. 184, §§ 23, 27 (2003) (conditions or restrictions on real property limited to a thirty-year lifespan with possibility of renewal periods of up to twenty years under limited circumstances); MINN. STAT. ANN. § 500.20 (West 2008) (private covenants, conditions, or restrictions limited to a thirty-year lifespan); R.I. GEN. LAWS § 34-4-21 (2007) (covenants or restrictions on real property limited to thirty-year lifespan).

⁸⁶ There are two other clarifications of the proposal that should be mentioned at the outset. First, common law contract principles are still in place. Leaving the contract law regime in place is necessary to weed out covenants that are the result of one party’s taking advantage of another party. Second, the goals of the proposed legislation, see *infra* section III.B, would be largely defeated if the original parties could specify longer durations for their covenants than are provided for in the proposal. However, the original parties would not be defeating the legislation’s purposes if they contracted for an automatic termination after fewer than thirty years or if they contracted for the initial period and/or the renewal periods to be shorter than prescribed by the proposed legislation; therefore, these types of contracts should be permitted.

⁸⁷ See *supra* note 85. These statutes are being used merely as benchmarks, but it bears noting that not all of the statutes apply to all types of covenants.

automatic termination statutes last for thirty years.⁸⁸ The initial period for covenants under the renewal statutes ranges from twenty to thirty years, and the renewal periods span up to twenty-one years.⁸⁹

Two handbooks also provided useful benchmarks. *The Homes Association Handbook* recommends that private covenants provide for an initial period equal to the time “it will take to amortize . . . initial home mortgages” followed by automatic ten-year renewals “unless the home owners alter or abrogate them by recording an instrument signed by two-thirds of the then owners.”⁹⁰ A handbook put out by the Department of Housing and Urban Development includes a “Declaration of Covenants, Conditions and Restrictions” form that provides for an initial period of twenty years plus automatic extensions for successive ten-year periods.⁹¹

Given the benchmarks, the initial period chosen could have been anywhere between twenty and thirty years. The thirty-year period was chosen for three reasons. First, the statutes that had initial periods shorter than thirty years provided opportunities for extensions. Second, as *The Homes Association Handbook* implies, individuals obtain mortgages based on the value of their land as it is affected by any covenant that is put in place. Considering that most mortgages are thirty years in duration,⁹² a thirty-year initial period for a covenant allows an individual to enter into a mortgage without the fear that his property value or the rents from the property will decrease. Third, Professor French suggests that the useful life of a servitude is greater than thirty years.⁹³ Professor French’s suggestion does not, however, mandate a longer initial period (particularly since there are opportunities for renewal) because the hope was to balance the useful life of a servitude with future changes in parties and circumstances; instead, Professor French’s argument is yet another reason not to choose a duration of less than thirty years.

The successive ten-year renegotiation periods were chosen partly based on the benchmarks and partly because as a covenant gets older,

⁸⁸ See MINN. STAT. ANN. § 500.20; R.I. GEN. LAWS § 34-4-21.

⁸⁹ See GA. CODE ANN. § 44-5-60 (twenty-year initial period, twenty-year renewal period); IOWA CODE ANN. § 614.24 (twenty-one-year initial period); MASS. GEN. LAWS ch. 184, §§ 23, 27 (thirty-year initial period, twenty-year renewal period).

⁹⁰ URBAN LAND INST., *THE HOMES ASSOCIATION HANDBOOK* § 12.81, at 212 (rev. ed. 1966). Though *The Homes Association Handbook*’s suggestion contemplated a common interest community context, it can also be a benchmark for covenants between individual landowners.

⁹¹ U.S. DEP’T OF HOUSING & URBAN DEV., *LAND PLANNING PROCEDURES AND DATA FOR INSURANCE FOR HOME MORTGAGE PROGRAMS* app. 2, at 6 (1973), available at <http://www.hud.gov/offices/adm/hudclips/handbooks/hsg/4140.2/index.cfm>.

⁹² U.S. DEP’T OF HOUSING & URBAN DEV., *Common Questions from First-time Homebuyers*, <http://www.hud.gov/buying/comq.cfm> (last visited Dec. 6, 2008) (“Most loans are for 30 years . . .”).

⁹³ See French, *supra* note 1, at 1315 nn.254–55.

there is a greater chance that its terms will not be beneficial to one or more parties; therefore, a relatively short period of time was in order. Of course, if landowners find these ten-year intervals too short, they can always draft an entirely new covenant to which the initial thirty-year period will be applicable.

2. *Explanation of Good Faith Requirement.* — The proposal mandates that the parties bargain in good faith both after the initial thirty-year period as well as after each successive ten-year period. Unfortunately, there is no common law duty to bargain in good faith from which to draw guidance.⁹⁴ Some courts even refuse to enforce agreements to negotiate in good faith.⁹⁵ However, a robust elaboration of a duty to bargain in good faith exists in the realm of labor law. The specific duty is encapsulated in the National Labor Relations Act:⁹⁶ the duty to bargain collectively is an “obligation of the employer and the representative of the employees to meet at reasonable times and confer in good faith with respect to wages, hours, and other terms and conditions of employment.”⁹⁷ The very fact that there is quite a bit of federal common law that elaborates the general duty to bargain in good faith in the labor context makes the labor law duty an ideal body of law from which to borrow.⁹⁸ Moreover, the parties to a covenant are in a similar posture to employees and employers in that both are coming to the table in an effort to decide whether or not to continue previous relationships that had, at least at one time, been beneficial.

A possible wording of the proposal’s duty is as follows: “The parties are obligated to meet at reasonable times and confer in good faith with respect to the terms and conditions of the covenant; a court shall look to 29 U.S.C. § 158 and judicial precedents interpreting it for elaboration of this obligation.” Wording the duty in this way allows the proposal to borrow labor law’s common law elaboration of “good faith” and “other terms and conditions.”⁹⁹ Moreover, by incorporating judicial interpretations of 29 U.S.C. § 158, the proposal can take advantage of common law elaborations of what constitutes bad faith bargaining, bargaining impasses, and the duty to furnish information.¹⁰⁰

⁹⁴ Emily M.S. Houh, *The Doctrine of Good Faith in Contract Law: A (Nearly) Empty Vessel?*, 2005 UTAH L. REV. 1, 3–4.

⁹⁵ *E.g.*, *Candid Prods. v. Int’l Skating Union*, 530 F. Supp. 1330, 1336–37 (S.D.N.Y. 1982).

⁹⁶ 29 U.S.C. §§ 151–169 (2006)

⁹⁷ *Id.* § 158(d).

⁹⁸ See generally Archibald Cox, *The Duty To Bargain in Good Faith*, 71 HARV. L. REV. 1401 (1958); Charles P. O’Connor & Charles I. Cohen, *Unfair Labor Practices — Collective Bargaining and the Concept of Good Faith* (ALI-ABA Course of Study, Mar. 1, 2001), WL SF41 ALI-ABA 1, 1.

⁹⁹ See O’Connor & Cohen, *supra* note 98, at 4.

¹⁰⁰ See *id.* at 8–10.

3. *Explanation of Automatic Termination.* — The proposal mandates that if negotiations should fail either after the initial period or after one of the successive ten-year periods, the covenant will terminate. The main reason for this piece of the proposal is to provide assurance that the covenant is still the most efficient use of the parties' resources. If the parties come together to negotiate and the covenant is indeed the most efficient arrangement, then absent information gaps or disparities, there should be no reason to doubt that the covenant, or an updated version of it, will be reinstated. If, however, the parties come together and are unable to come to an agreement, it is a good indication that the previous arrangement is no longer the most efficient use of the parties' resources, and therefore an automatic renewal would not provide the proper default. Moreover, if the default upon failure of negotiation were automatic renewal, it would unduly privilege the original parties' ideas of what was best for their future selves or their successors. There is no reason to think that the original parties are in a better position to understand the needs of future owners than are their future selves or successors.¹⁰¹ *The Home Association Handbook* argues for the use of automatic renewals because it suggests that in the context of a common interest community, even if the covenant is useful to all affected parties, it may nonetheless be difficult to gather the necessary votes to enable the covenant to be renewed in its original or modified state.¹⁰² The simpler solution to this potential problem, however, is for the proposed legislation to contain a provision mandating that common interest communities elect or hire agents for the entire community who will have the power to negotiate and finalize covenant renewals.

The proposal also includes automatic termination if one or more parties cannot be found. Automatic termination not only helps to make the property more alienable, but it also assumes that if the covenant were useful to the absent party, she would have come forward to renegotiate.

*B. Comparing the Proposed Regime to
Touch and Concern and the Restatement*

The best way to judge the merits of the proposed legislation is to compare it to the touch and concern regime and the Restatement regime. At the macro level, there are similarities among the three systems. Like touch and concern and the Restatement, the proposed legislation enables covenants to run with the land, and like the Restatement regime, the proposed legislation does not incorporate a

¹⁰¹ See *supra* note 72 and accompanying text.

¹⁰² See URBAN LAND INST., *supra* note 90, § 12.8, at 212.

touch and concern requirement. However, at the micro level, the proposed legislation avoids or at least minimizes many of the problems inherent in the touch and concern and the Restatement regimes.

First, the proposed legislation does not labor under the vast amount of confusion surrounding both the touch and concern and Restatement regimes. Like the Restatement regime, by not incorporating the touch and concern requirement, the proposed regime has cast off decades of confusion created by the array of proposed tests and rationales for the touch and concern requirement.¹⁰³ Unlike the Restatement regime, however, the proposed legislation does not require parties to grapple with vague terms such as “public policy” and “changed conditions.”¹⁰⁴ Though the proposed legislation does contain the vague term “good faith,” the proposal minimizes the potential for confusion by plugging the term into a parallel regime in labor law. A byproduct of the general lack of confusion surrounding the proposed legislation is that parties are able to predict the fates of their covenants: the original parties and their successors know that if their covenant does not contravene common law contract principles, it will survive for at least thirty years; they do not have to be concerned that at some future point a court might invalidate the covenant because, for example, it does not touch or concern the land, or because it violates public policy.

Second, the proposed legislation eliminates the litigation costs associated with invalidating, terminating, or modifying a covenant under either the touch and concern or Restatement regimes. Under both the touch and concern and Restatement regimes, in order to invalidate, terminate, or modify a covenant, one party would have to file suit, and both parties would potentially incur enormous litigation costs. The proposed legislation, however, mostly takes the courts, and the accompanying litigation costs, out of the picture. Under the proposal, a party is not able to invalidate a covenant by going to court unless the covenant contravenes common law contract principles. Instead, a party knows that after thirty years, if the covenant is no longer beneficial to one party, it will either be altered during the mandatory good faith negotiation, or, if the negotiations fail, it will be eliminated. In other words, under the proposed legislation, there is no reason for parties to a covenant to go to court unless a party believes either that the covenant contravenes common law contract principles or that the other parties are not negotiating in good faith. Under the touch and concern and Restatement regimes, however, unless the parties can agree to negotiate, the only method by which a party can modify, terminate, or invalidate a covenant is to go to court. Though the pro-

¹⁰³ See *supra* Part I.

¹⁰⁴ See *supra* section II.C.1(b).

posed regime imposes transaction costs of its own in the form of negotiation costs, it seems unlikely that these negotiation costs would ever equal the litigation costs.¹⁰⁵

Third, unlike the touch and concern and Restatement regimes, the proposed legislation provides successors with a great deal of flexibility. Under the touch and concern regime, if the covenant touches and concerns the land, a successor's only hope of flexibility is if the other parties are receptive to negotiation, or if she finds a judge who is receptive to a changed circumstances argument. Under the Restatement regime, if the covenant does not contravene section 3.1, a successor will only enjoy flexibility if she succeeds under the changed conditions provisions.¹⁰⁶ In contrast, under the proposed legislation, successors have an enormous amount of flexibility to decide how their property is used because they are able to renegotiate covenants after an initial period of thirty years and every ten years thereafter.

Fourth, the proposed legislation helps to minimize property fragmentation that could eventually become a restraint on alienation.¹⁰⁷ Under both the touch and concern regime and the Restatement regime, excessive property fragmentation is possible not only because there is a limited number of reasons under either regime for a covenant to be invalidated, but also because the prospect of enormous litigation costs may prevent invalid servitudes from ever being brought to a court. In contrast, under the proposed legislation, excessive property fragmentation is less likely because if an owner sees that his property is becoming excessively fragmented to the point where it is causing a restraint on alienation, it is likely that the covenants causing that fragmentation are no longer of value to him, and, as a result, those covenants will not likely be renewed in good faith negotiations. Moreover, excessive fragmentation is also prevented by the piece of the proposal that mandates automatic termination of a covenant if one or more parties to the covenant cannot be found at the times of the mandatory negotiations.¹⁰⁸

Finally, the proposed legislation lowers the information costs imposed on third parties. Under the touch and concern and Restatement regimes, there is a danger that the original parties will not take into account the potentially substantial information costs they are imposing

¹⁰⁵ In fact, the only scenario that may yield lower transaction costs under the touch and concern and Restatement regimes than under the proposed regime is that in which neither the original parties nor their successors ever seek to invalidate the covenant in court and the covenant either continues in perpetuity, or is the subject of a small number of negotiations among the parties.

¹⁰⁶ See RESTATEMENT, *supra* note 3, §§ 7.10, 7.11.

¹⁰⁷ See *supra* p. 951.

¹⁰⁸ See *supra* p. 953.

on third parties.¹⁰⁹ Under the proposed legislation, however, the original parties need not be as concerned about the information costs imposed on third parties because the proposal lowers those costs. Though a potential successor will likely incur information costs when she is looking at a property because the proposed legislation allows for highly tailored covenants, the information costs will likely be somewhat lower than those under the touch and concern or Restatement regimes because the successor knows that she will be able to renegotiate the covenant before long. The same is true for all potential purchasers of land; though they too will incur information costs because of the existence of highly tailored covenants, they need not be excessively vigilant in gathering information because they know that regardless of the characteristics of the property they buy, they will be able to renegotiate any covenants in due course.

IV. CONCLUSION

The Restatement's ultimate problem is that it sees itself as a *replacement* for the touch and concern regime. As such, it labors under many of the same problems afflicting that regime. This Note has attempted to address the problem of covenants that run with the land from a posture that was more detached from the touch and concern regime. Though the proposed legislation is far from perfect, it does eliminate or at least minimize many of the problems that plague both the touch and concern and Restatement regimes. The Restatement regime, however, has a practical advantage over the proposed legislation, which may partially explain its approach: the Restatement hews closely enough to the common law touch and concern requirement that many judges could feel comfortable adopting the regime without the legislature's having adopted it first. The proposed regime, however, is different enough from the touch and concern requirement that it is doubtful that any court would adopt the regime without the legislature's having adopted it first. Given courts' reluctance to sway from touch and concern, perhaps it is time for legislatures to step in.

¹⁰⁹ See *supra* pp. 951-52.