Arkansas Law Review

Volume 75 | Number 3 Article 8

December 2022

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IS "TOUCH AND CONCERN" DEAD IN ARKANSAS?: A RECENT CASE AND ITS IMPLICATIONS FOR REAL COVENANTS

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INTRODUCTION

[I]t is easy to become concerned about touch and concern, but it is impossible to touch it.[1]

Real covenants occupy a doctrinal abyss within property law.[2] The subject perpetually frustrates first-year law students and legal scholars alike, as they confront concepts that appear esoteric and even anachronistic.[3] Naturally, the criticism has been sharp, with commentators quipping that the field "is an unspeakable quagmire," a "formidable wilderness," and plainly "ridiculous."[4]

Even critics, however, acknowledge the profound significance of this area of the law.[5] Indeed, the central role that real covenants have played in facilitating modern land development cannot be overstated.[6] Covenants provided a legal

* J.D. Candidate, 2023; Executive Editor, *Arkansas Law Review*. The author thanks Professor Stephen J. Clowney for his expertise and invaluable guidance during the writing process. The author also thanks his brother, Samuel T. Waddell, J.D. 2014, for his suggestion of this topic.

1. Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 928 n.23.

2. *See* William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 863 (1977).

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

4. EDWARD H. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 489 (1974); Susan F. French, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 NEB. L. REV. 653, 658 (1998) [hereinafter *Tribute*].

5. *See* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1261-63 (1982) [hereinafter *Ancient Strands*].

6. Ronald H. Rosenberg, *Fixing a Broken Common Law—Has the Property Law of Easements and Covenants Been Reformed by a Restatement?*, 44 FLA. ST. U. L. REV. 143,

device through which nineteenth-century landowners could protect their properties against encroaching industrialization when public regulations failed to do so.[7] Yet, the device also enabled commercial development to flourish.[8] Today, over 74 million Americans live in communities governed by homeowner associations, which impose extensive use and design controls to provide uniformity and protect property values.[9] These, too, are made possible through the use of covenants.[10]

Private land use restrictions form the legal framework of virtually every planned development in existence today, from shopping centers to condominiums, and their vitality will only increase as living arrangements become denser and more complex.[11] Real covenants are an attractive planning tool because they provide landowners with a sense of permanence, which protects expectations and encourages capital investments in property.[12] But these restrictions can impose onerous burdens that ultimately depress land values.[13] In light of this paradigm, courts have traditionally imposed several requirements on the creation of covenants "which are now accepted as almost sacrosanct."[14] Chief among these requirements is the touch-and-concern doctrine, which protects unsuspecting

144 (2016); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); Uriel Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139, 139 (1978) [hereinafter *Judicial Supervision*].

7. *Ancient Strands*, *supra* note 5, at 1262-63; Susan F. French, *Design Proposal for the New Restatement of the Law of Property—Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1214 (1988) [hereinafter *Design Proposal*].

8. *Design Proposal*, *supra* note 7, at 1214.

9. FOUND. FOR CMTY. ASS'N RSCH., 2020-2021 U.S. NATIONAL AND STATE STATISTICAL REVIEW: U.S. COMMUNITY ASSOCIATIONS, HOUSING UNITS, AND RESIDENTS 1 (2020), [https://perma.cc/V62N-M2LW]; A. Dan Tarlock, *Touch and Concern is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 806-08 (1998); Rosenberg, *supra* note 6, at 148-49; *see also Judicial Supervision*, *supra* note 6, at 139.

10. *See* Tarlock, *supra* note 9, at 806-07, 812.

11. RABIN, *supra* note 4, at 490; CHARLES M. HAAR & LANCE LIEBMAN, PROPERTY AND LAW 703 (1977).

12. *Ancient Strands*, *supra* note 5, at 1264; Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1184 (1982) [hereinafter *Unified Concept*]; CHRISTOPHER SERKIN, THE LAW OF PROPERTY 181 (2d ed. 2016).

13. *Ancient Strands*, *supra* note 5, at 1265.

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

possessors against incurring the personal promises of generations past by virtue of taking title to land.[15]

However, in *Bernard Court, LLC v. Walmart, Inc.*, a recent case concerning the enforcement of a commercial anticompetition covenant, the Arkansas Court of Appeals proclaimed that the touch-and-concern requirement does not exist under Arkansas law.[16] In *Bernard Court*, Walmart conveyed a parcel of land adjoining one of its supercenters[17] to a commercial developer but imposed a restrictive covenant in the deed prohibiting the property from being "used as a grocery store/supermarket or discount department store or wholesale club, such as or similar to Target, Price Club or K-Mart."[18] Bernard Court later took title to the parcel and, despite repeated attempts for nearly a year, was unable to lease the property to chain retailer Dirt Cheap due to the restriction.[19] Bernard Court subsequently filed a complaint for declaratory judgment seeking to avoid enforcement of the covenant, arguing in part that it was not binding because covenants intended to restrict competition do not touch and concern the land in Arkansas at law or in equity.[20] The circuit court agreed that the covenant did not touch and concern but enforced the restriction as an equitable servitude.[21]

The court of appeals reversed, finding that courts in Arkansas have never required that covenants satisfy this traditional rule to run with the land, as evidenced in caselaw by the absence of the words "touch and concern."[22] "Rather," the court noted, "our supreme court has held that a covenant is

15. *See id.*; *see also* discussion *infra* Part III.

16. 2020 Ark. App. 563, at 13, 2020 WL 7251256, at *6. Although the case is unreported, it is nonetheless precedential. ARK. SUP. CT. R. 5-2(c) ("Every Supreme Court and Court of Appeals opinion issued after July 1, 2009, is precedent and may be relied upon and cited by any party in any proceeding.").

17. *See* Appeal Record at 127, Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, 2020 WL 7251256 (No. CV-19-536).

18. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 2, 2020 WL 7251256, at *1.

19. *Id.* at 2, 2020 WL 7251256, at *1; Appeal Record, *supra* note 17, at 192.

20. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 2, 12, 2020 WL 7251256, at *1, *6.

21. *Id.* at 12-13, 2020 WL 7251256, at *6-7.

22. *Id.* at 12-13, 2020 WL 7251256, at *6-7.

enforceable in law when the covenant is beneficial or essential to the use of the land conveyed . . . ."[23]

In a robust dissent, Chief Judge Harrison opined that contrary to the majority's conclusion, "Arkansas is currently a touch-and-concern state, though the underdeveloped caselaw admittedly expresses this old common-law concept in a different way."[24] Specifically, the phrase "beneficial or essential to the use of the land" is synonymous with the touch-and-concern requirement and reflects the same legal principle.[25] In this vein, the supreme court requires that a covenant touch and concern the land to be enforced at law or in equity, and accordingly, an anticompetition covenant fails to satisfy this requirement because it confers only a financial benefit to the covenantee.[26]

Which opinion more accurately distills the law in Arkansas? This Comment endeavors to answer that question. The court, unlike other jurisdictions, articulated no alternative doctrine to replace touch and concern's protective function, meaning that the majority's holding has troubling implications for property owners in the state.[27] Indeed, the potential ramifications and uncertainties that *Bernard Court* presents are all the more significant given the Arkansas Supreme Court's denial of certiorari in the case.[28]

Part I of this Comment explores the development of the modern real covenant, tracing its lineage from England to American courtrooms today. Expanding on this history, Part I then discusses the traditional requirements needed to create a covenant, with the touch-and-concern doctrine receiving the most attention. Further, Part I explores both the various sub-doctrines that have developed out of the touch-and-concern rule, including at law and in equity, and their application to the context of

23. *Id.* at 12, 2020 WL 7251256, at *6. The court also stated that the covenant must be "expressly made binding upon the heirs, assigns, or successors of the grantor." *Id*. at 12, 2020 WL 7251256, at *6. This language draws from the intent requirement, which is discussed in Section I.B.2.

24. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 16, 2020 WL 7251256, at *8 (Harrison, C.J., dissenting).

25. *Id.* at 16-17, 2020 WL 7251256, at *8.

26. *Id.* at 17-19, 2020 WL 7251256, at *9.

27. *See infra* notes 291-97 and accompanying text.

28. Denial of Petition for Review, Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, 2020 WL 7251256 (No. CV-19-536).

commercial anticompetition covenants. Part II then applies these principles to an explication of Arkansas caselaw in an effort to resolve the ambiguities created by the decision in *Bernard Court*. Finally, Part III expounds the theoretical underpinnings of the touch-and-concern doctrine, its relevance in modern property law, and the implications of the *Bernard Court* holding.

I. ORIGINS OF THE REAL COVENANT: A BRIEF PRIMER

A. The Covenant Defined

At its core, a real covenant is a contract respecting the use of land.[29] Between the original parties, the promise departs from traditional contract law in no considerable respect.[30] Rather, the novelty of the real covenant lies in its ability to bind successors to the original promise in the absence of contractual privity.[31] That is, the common law has created a mechanism through which the covenantor and covenantee's successors in interest assume the rights and duties of the contract by virtue of assuming title to their predecessors' respective estates in land.[32] As such, real covenants provide a "unique example of the possibility of one being sued as a promisor upon a promise he has not made."[33] This is possible because real covenants create nonpossessory interests that allow the benefit and the burden of the covenant to "run with the land," thus obviating the need for express assignment or delegation since these rights and duties pass by operation of law when successors assume ownership or occupancy of the property affected by the

29. CLARK, *supra* note 3, at 4; SERKIN, *supra* note 12, at 182.

30. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, ch. 45, intro. note (AM. L. INST. 1944); 9 RICHARD R. POWELL, POWELL ON REAL PROPERTY § 60.01 (Michael Allan Wolf ed., 2022).

31. *See* RESTATEMENT (FIRST) OF PROP. div. V, pt. III, ch. 45, intro. note (AM. L. INST. 1944); SHELDON KURTZ ET AL., THE LAW OF PROPERTY: AN INTRODUCTORY SURVEY 356 (7th ed. 2018).

32. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, ch. 45, intro. note (AM. L. INST. 1944); KURTZ ET AL., *supra* note 31, at 356.

33. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944); *see also* Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 170 (1970) [hereinafter *Policy Analysis*] ("[A successor covenantor] would be liable for all obligations under the covenant arising during his period of ownership just as if he had entered into them himself.").

original promise.[34] Essentially, as a contract, the promise personally binds the original parties; as a covenant, it binds both the original parties and their successors.[35]

Although this form of private land use planning can be found in early Year Book cases,[36] the Industrial Revolution precipitated the concept of the running covenant as it exists today.[37] Historically, English courts were hostile to encumbrances on the use of land and recognized only profits and easements as valid servitudes.[38] The law specifically viewed negative easements narrowly and enforced only those restrictions that prohibited landowners from blocking their neighbors' access to light, air, water, or structural support.[39] Such limited forms provided woefully inadequate protections to owners against incompatible land uses in a rapidly modernizing world;[40] accordingly, courts were pressured to innovate.[41] The result was a reimagined legal device that could, in theory, offer "nearly unlimited flexibility" in imposing obligations on another's property.[42] For example, one could convey a parcel of land with a deed specifying that the property be used only for residential purposes, thereby preserving the character of a neighborhood.[43]

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34. *Design Proposal*, *supra* note 7, at 1214-15; Stoebuck, *supra* note 2, at 864.

35. Stoebuck, *supra* note 2, at 887.

36. *See, e.g.*, The Prior's Case, YB 42 Edw. 3, fol. 3a-4a, Hil. 14 (1368) (Eng.).

37. *Ancient Strands*, *supra* note 5, at 1262; *Design Proposal*, *supra* note 7, at 1214.

38. *See* JOHN G. SPRANKLING, UNDERSTANDING PROPERTY LAW 574 (4th ed. 2017); *Unified Concept*, *supra* note 12, at 1187-88; Keppell v. Bailey (1834) 39 Eng. Rep. 1042, 1049; 2 My. & K. 517, 535 ("But it must not therefore be supposed that incidents of a novel kind can be devised and attached to property at the fancy or caprice of any owner.").

39. *Unified Concept*, *supra* note 12, at 1187 n.42; Russell R. Reno, *The Enforcement of Equitable Servitudes in Land: Part I*, 28 VA. L. REV. 951, 959 (1942) [hereinafter *Equitable Servitudes: Part I*]; SPRANKLING, *supra* note 38, at 570. That negative easements could bind landowners without notice, including through prescription, contributed to courts' ambivalent application of the doctrine. SPRANKLING, *supra* note 38, at 570.

40. *See Ancient Strands*, *supra* note 5, at 1262; *see also Design Proposal*, *supra* note 7, at 1214. Indeed, courts were faced with unprecedented conflicts during this period, including "elaborate arrangements between riparian owners concerning power generated by streams, servitudes subjecting residents to industrial nuisances, and modern 'industrial parks.'" *Unified Concept*, *supra* note 12, at 1183.

41. SERKIN, *supra* note 12, at 181.

42. *Id.*

43. SPRANKLING, *supra* note 38, at 574-75; *Ancient Strands*, *supra* note 5, at 1263-64; SERKIN, *supra* note 12, at 181.

English courts, however, did not eschew their suspicions of land-related restrictions, nor did the device shed its doctrinal roots.[44] In effect, courts repackaged the application of an ancient legal doctrine governed by a number of historic requirements, the effect of which was to produce a body of law "encrusted with the debris of ages."[45] Namely, the requirements of writing, intent, notice, privity, and touch and concern developed through centuries of common law and have instigated much of the confusion surrounding the subject today.[46]

B. The Covenant Arrives in America

The modern concept of the real covenant quickly found itself across the Atlantic as landowners in the United States, beset with similar issues surrounding rapid industrialization, turned to the doctrine in earnest.[47] However, courts were perplexed as to what English law required and thus haphazardly applied the traditional rules that govern the device: the confusion was so great that courts have at times ruled inconsistently even in the same jurisdiction.[48] In fact, the unpredictability persists to such an extent today that one will search in vain to find a property treatise providing a definitive encapsulation of the law of covenants.[49]

Nonetheless, American courts' adoption of the English covenant rules advanced what many deemed to be a public policy preference for the unfettered use of land, as these safeguards were intended to assuage concerns that covenants could be used to impose restrictions so exacting that the effect would be to distort

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44. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

45. RABIN, *supra* note 4, at 489.

46. POWELL, *supra* note 30, § 60.04.

47. *See* RABIN, *supra* note 4, at 490; *Unified Concept*, *supra* note 12, at 1189.

48. Browder, *supra* note 14, at 44-45; POWELL, *supra* note 30, § 60.04; SPRANKLING, *supra* note 38, at 577.

49. *See* CLARK, *supra* note 3, at 2; *Unified Concept*, *supra* note 12, at 1180. As one court lamented: "Probably in no single subject of the law is there found a greater divergence of opinion among the courts of the several States than on the nature, extent, and construction of covenants restricting . . . the use of land." McFarland v. Hanley, 258 S.W.2d 3, 4 (Ky. 1953).

desirable land development and ultimately impair alienability.[50] This Section briefly explores the rules that courts generally—albeit sporadically—require to enforce either the burden or the benefit of a covenant; these elements provide a contextual basis for a discussion of the touch-and-concern doctrine, which is regarded as the most contested rule that courts impose.[51]

1. Writing

At early common law, a promise respecting the use of land created an enforceable covenant only if the parties reduced the promise to writing and the promisor signed under seal.[52] More recently, as states have abolished the seal requirement, a writing that comports with the statute of frauds suffices in jurisdictions that consider a covenant an interest in land.[53] Notably, a few states view covenants solely as a contract right and thus do not require parties to memorialize their agreement.[54] Regardless, the writing requirement rarely poses enforcement issues, as covenants are typically created by deed.[55]

2. Intent

Courts are in near unanimity that a covenant will bind successors in interest only if the original parties intend that the covenant run with the land; otherwise, the promise is of a personal nature and will be treated as a traditional contract.[56] Furthermore, the benefit and burden must be analyzed separately, as the parties

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50. Paula A. Franzese, *"Out of Touch:" The Diminished Viability of the Touch and Concern Requirement in the Law of Servitudes*, 21 SETON HALL L. REV. 235, 237 (1991); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000).

51. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 884 (1988); *see also* Carol M. Rose, *Servitudes, Security, and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1409 (1982).

52. *See* CLARK, *supra* note 3, at 94; RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944).

53. KURTZ ET AL., *supra* note 31, at 357.

54. POWELL, *supra* note 30, § 60.02; *see also* 3 HERBERT THORNDIKE TIFFANY, TIFFANY REAL PROPERTY § 848 (3d ed. 2021).

55. POWELL, *supra* note 30, § 60.02.

56. *Policy Analysis*, *supra* note 33, at 173; Browder, *supra* note 14, at 13; POWELL, *supra* note 30, § 60.01.

may intend for the benefit to run to the covenantee's successors while the burden remains personal to the covenantor, and vice-versa.[57]

While most courts do not require that the parties use specific language, various approaches are used to ascertain intent.[58] Most states will consider extrinsic evidence, including the facts and circumstances surrounding the conveyance.[59] Other states require that evidence of intent be determined from the language of the document itself, which can create obvious enforcement issues where the intent to create a running covenant is implicit.[60]

3. Privity of Estate

Lord Kenyon declared in the English decision of *Webb v. Russell* that, "in order to make [a real covenant] run with the land, there must be a privity of estate between the covenanting parties."[61] Debates as to the meaning and application of this rule have led to divergent privity doctrines among jurisdictions which have produced significant differences in legal outcomes.[62] Generally, courts require horizontal privity between the covenantor and covenantee for the burden to run and vertical privity between successors in interest and the original parties for both the benefit and burden to bind successors.[63] While English law requires the covenanting parties to share a simultaneous legal interest in the same parcel, which is typically satisfied only through a landlord-tenant relationship,[64] most American courts have expanded the rule by recognizing horizontal privity in

57. POWELL, *supra* note 30, § 60.04.

58. *See* Stoebuck, *supra* note 2, at 866; *Unified Concept*, *supra* note 12, at 1230; CLARK, *supra* note 3, at 95.

59. Kirtland L. Mablum, Comment, *Covenants Not to Compete—Do they Pass?*, 4 CAL. W. L. REV. 131, 134 (1968).

60. *Id.* at 134-35; Lawrence Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 359 (1986) [hereinafter *Integration of Servitudes*].

61. (1789) 100 Eng. Rep. 639, 644; 3 T.R. 393, 402.

62. *Policy Analysis*, *supra* note 33, at 179.

63. POWELL, *supra* note 30, § 60.04; *see also* HERBERT HOVENKAMP ET AL., PRINCIPLES OF PROPERTY LAW 408-09 (7th ed. 2016).

64. TIFFANY, *supra* note 54, § 850. This requirement is also known as mutual, or tenurial, privity. POWELL, *supra* note 30, § 60.04.

grantor-grantee relationships, where the parties form a covenant that becomes effective with the conveyance of the estate from one party to the other.[65]

Vertical privity, on the other hand, requires that a "sufficient nexus" exist between successive owners, which is satisfied when the covenanting parties' successors assume ownership or possession of the same quantum of estate as their predecessors.[66] Notably, however, many courts relax this requirement when a covenantee's successor wishes to enforce the promise against the original covenantor provided that the successor assumes at least part of the covenantee's estate.[67]

4. Touch and Concern

The intangibility of the touch-and-concern doctrine has confounded legal scholars since its inception in *Spencer's Case* over 400 years ago, when an English court pronounced that no real covenant will run if it is "merely collateral to the land, and doth not touch or concern the thing demised in any sort."[68] Although nothing more was offered, courts in the United States later adopted the cryptic requirement, such that it is now an axiom of American common law that a covenant will bind successors only if its performance relates to the land to such a degree that it metaphorically touches and concerns the land.[69] Indeed, courts, at least traditionally, have almost ubiquitously recited the requirement despite enforcing other covenant rules more sparingly, as touch and concern is the only rule that functions as an independent constraint on the substance of the covenant rather than merely the form.[70]

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65. SPRANKLING, *supra* note 38, at 583-84. In practice, this requires that the covenant usually be contained in a deed. KURTZ ET AL., *supra* note 31, at 358.

66. SERKIN, *supra* note 12, at 183.

67. POWELL, *supra* note 30, § 60.04. Professor Powell notes that this position is one of practicality, as the original covenantor was obviously a party to the transaction. *Id.*

68. (1583) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b. This doctrine was first applied in the leasehold context but has since expanded to fee estates. CLARK, *supra* note 3, at 96.

69. *Integration of Servitudes*, *supra* note 60, at 361.

70. *See* Stoebuck, *supra* note 2, at 866 ("[O]f all the elements of real covenants [touch and concern] continues to occupy center stage."); SPRANKLING, *supra* note 38, at 579-80.

However, the doctrine has been interpreted so varyingly among the several states that it is impossible to frame an authoritative test to guide courts in determining when a promise actually touches and concerns.[71] This jurisdictional incoherence—a common theme in the law of covenants—is the product of a doctrinal "metamorphosis" resulting from centuries of judicial discretion in applying the rule.[72] At its core, though, the purpose of the touch-and-concern requirement is to provide a supervisory tool for courts to distinguish mere personal obligations, i.e., those that dictate individual behavior, from those that run with the land.[73]

Courts and scholars alike have made several attempts to articulate an operational definition for the doctrine, some of which have gained more traction than others.[74] Centuries after *Spencer's Case*, the King's Bench clarified in *Congleton v. Pattison* that a covenant, in order to touch and concern the land, must "directly affect[] the nature, quality, or value of the thing demised, [or] the mode of occupying it."[75] Rejecting this test as "vague" and "question-begging,"[76] American Professor Harry Bigelow endeavored to provide a "scientific method of approach" by measuring the "legal relations of the parties" as landowners.[77] According to Bigelow's articulation, the burden sufficiently touches and concerns if the covenant's performance renders the covenantor's legal interest in the land *less* valuable.[78] Conversely, the benefit sufficiently touches and concerns if the covenant's performance renders the covenantee's legal interest in the land *more* valuable.[79]

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71. *See* Ralph A. Newman & Frank R. Losey, *Covenants Running with the Land, and Equitable Servitudes; Two Concepts, or One?*, 21 HASTINGS L.J. 1319, 1332 (1970).

72. Stoebuck, *supra* note 2, at 866.

73. SERKIN, *supra* note 12, at 185; Tarlock, *supra* note 9, at 818.

74. *See* Stoebuck, *supra* note 2, at 874.

75. (1808) 103 Eng. Rep. 725, 727; 10 East 130, 136.

76. Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 639 (1914); CLARK, *supra* note 3, at 97.

77. CLARK, *supra* note 3, at 97. It is worth noting that Professor Bigelow was the Reporter for the *Restatement (First) of Property*. Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK. L. REV. 681, 683 (2014).

78. *See* Bigelow, *supra* note 76, at 645; POWELL, *supra* note 30, § 60.04.

79. *See* Bigelow, *supra* note 76, at 645; POWELL, *supra* note 30, § 60.04.

Judge Charles E. Clark voiced approval of the Bigelow test but rephrased it in simpler terms: "Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in similar capacity, the [touch-and-concern] requirement should be held fulfilled."[80] While some commentators criticize these definitions as circular,[81] most courts and scholars cite the Clark-Bigelow test as an authoritative guide to a nebulous concept.[82] For example, a covenant requiring a home to be built no closer than twenty feet from the property line clearly affects the use of the land itself.[83] On the other end of the spectrum, a covenant requiring a tenant to paint his landlord's portrait has nothing to do with the land, and thus a future tenant could not be expected to incur that obligation by virtue of entering into the leasehold.[84]

The *Restatement (First) of Property*[85] also echoes the test, requiring that a covenant be a "promise respecting the use of the land," which consists of either "increasing or decreasing the usefulness of the land involved."[86] The *Restatement (First)* contextualizes the former criterion by noting that the usefulness of the property will increase "[i]f the performance of the promise benefits the beneficiary of the promise in the use of his land."[87]

As is made clear by the Clark-Bigelow test, the benefit of a covenant, i.e., the rights of the covenantee, may touch and concern the land while the burden, i.e., the duties imposed on the

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80. CLARK, *supra* note 3, at 99; Stoebuck, *supra* note 2, at 874. Judge Clark sat on the United States Court of Appeals for the Second Circuit and served on the drafter's committee for the *Restatement (First) of Property*. Norman P. Ho, *A Defense of Horizontal Privity in American Property Law*, 91 MISS. L.J. 109, 110 n.2 (2022).

81. Stake, *supra* note 1, at 929; Rose, *supra* note 51, at 1409.

82. Stoebuck, *supra* note 2, at 873; Stake, *supra* note 1, at 929-30; Neponsit Prop. Owners' Ass'n v. Emigrant Indus. Sav. Bank, 15 N.E.2d 793, 796 (N.Y. 1938).

83. *Cf.* SERKIN, *supra* note 12, at 185 ("A covenant to build only single-family residential housing, or to leave parts of the land undeveloped, undoubtedly touches and concerns the land.").

84. Stoebuck, *supra* note 2, at 869.

85. The *Restatement (Third)*, released in 2000, is the most current source on the subject. *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES Foreword (AM. L. INST. 2000). However, as will be detailed in Part II, the application of touch and concern in Arkansas caselaw borrows heavily from the *Restatement (First)*.

86. RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944).

87. *Id.*

covenantor, does not.[88] Alternatively, the burden may do so while the benefit does not.[89] Although it is an infrequent occurrence for only one side to satisfy the requirement,[90] courts test the benefit and burden separately.[91] The benefit typically runs if it alone touches and concerns, meaning that the burden is not evaluated.[92] However, because the burden encumbers the use of land, unlike the benefit, some courts treat their analyses of this side with greater scrutiny than others.[93] These attitudes can be distilled into a dyad of competing views: the English appurtenance requirement and the in-gross approach.[94]

Fundamentally, courts that adhere to the English appurtenance requirement scrutinize both the burden and the benefit in determining whether the burden runs.[95] Accordingly, for the burden of a covenant to bind successors, not only must the burden touch and concern the land, but so too must the benefit.[96] In other words, the appurtenance requirement does not permit the enforcement of a covenant where the benefit is held in gross, in that it is personal to the covenantee and does not affect his land.[97] As the name suggests, this rule stems from English courts' historic aversion to land use restrictions and invalidation of covenants in gross.[98]

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88. POWELL, *supra note* 30, § 60.04.

89. *Id.*

90. *See* KURTZ ET AL., *supra* note 31, at 358.

91. *Id.*; *see also* Stoebuck, *supra* note 2, at 869.

92. *See* Franzese, *supra* note 50, at 239; POWELL, *supra* note 30, § 60.04; RESTATEMENT (FIRST) OF PROP. div. V, pt. III, intro. note (AM. L. INST. 1944).

93. *See* Margot Rau, Note, *Covenants Running with the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 143 (1978).

94. *See* POWELL, *supra* note 30, § 60.04.

95. James L. Winokur, *Ancient Strands Rewoven, or Fashioned Out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes*, 27 CONN. L. REV. 131, 142 n.66 (1994) [hereinafter *First Impressions*].

96. *See id.* However, the benefit need not touch and concern the land that is burdened. *See id.* at 145 ("[T]he appurtenance principle of the touch and concern rule would require a showing that some land was benefitted, whether or not technically owned by the servitude enforcer.").

97. Rau, *supra* note 93, at 143; Thomas E. Roberts, *Promises Respecting Land Use—Can Benefits Be Held in Gross?*, 51 MO. L. REV. 933, 934 (1986).

98. Roberts, *supra* note 97, at 934.

The appurtenance requirement has generated controversy,[99] and, according to Judge Clark, is unsupported by caselaw.[100] Others have reached different conclusions, with one scholar claiming that only the state of New York recognizes benefits in gross,[101] another noting that jurisdictions are more divided on the issue,[102] and still another positing that most courts *do* enforce personal benefits.[103] These contrasting views are perhaps a product of references in many opinions to the running of "the covenant" rather than that of a specific side, as in many cases the distinction is unnecessary for adjudication.[104]

Courts adopting the in-gross approach, on the other hand, hold that a burden that touches and concerns the land binds successors even if the benefit is personal to the covenantee.[105] Proponents of this laissez-faire position, including Judge Clark, find the hostility toward benefits in gross to be unwarranted and without policy justification, arguing that the burden side of many covenants promotes social utility and upholds freedom of contract.[106]

C. The Birth of the Equitable Servitude

In practice, horizontal privity proved to be the most difficult rule for English landowners to satisfy.[107] Specifically, the requirement that both parties must possess *simultaneous* legal interests in the same parcel, which typically only exists in landlord-tenant relationships, prevented landowners from creating common-interest communities needed to preserve their

99. *See First Impressions*, *supra* note 95, at 131.

100. CLARK, *supra* note 3, at 141.

101. Newman & Losey, *supra* note 71, at 1337.

102. *See Design Proposal*, *supra* note 7, at 1216 n.11.

103. POWELL, *supra* note 30, § 60.04.

104. Stoebuck, *supra* note 2, at 881.

105. Rau, *supra* note 93, at 143-44.

106. POWELL, *supra* note 30, § 60.04; Roberts, *supra* note 97, at 949.

107. *See* Russell R. Reno, *The Enforcement of Equitable Servitudes in Land: Part II*, 28 VA. L. REV. 1067, 1067 (1942) [hereinafter *Equitable Servitudes: Part II*]; Tarlock, *supra* note 9, at 814.

neighborhoods' livability as cities expanded.[108] This, in effect, undercut the primary purpose of the real covenant, which was to protect and encourage investments in property.[109] Fortunately, England's chancery court found occasion to innovate in the landmark decision of *Tulk v. Moxhay*, where it dispensed with the privity requirement and enforced a promise in a deed requiring the purchaser to leave Leicester Square, one of London's last greenspaces, free from any structures.[110] Although no landlord-tenant relationship existed between the buyer and the covenantor, the court opined that it would be inequitable for a purchaser with notice of a restriction to avoid enforcement due to a technicality.[111]

Thus was born the equitable servitude, which quickly replaced the real covenant as the land use device of choice.[112] An equitable servitude differs from a covenant in that it is a land use restriction enforceable in equity, whereas the latter is enforceable only at law.[113] Equitable servitudes dominate modern land use planning in large part because property owners intuitively prefer injunctive relief to monetary damages.[114] After all, damages would do little to quell the obscene stench emanating from a new neighbor's backyard hog farm, for instance. However, *Tulk*, much like *Spencer's Case*, failed to set forth rules governing the enforcement of equitable servitudes, and the requirements have likewise evolved in piecemeal fashion through centuries of English and American common law.[115] To complicate matters, as law and equity have merged, Americans courts have blurred the boundaries between covenants and equitable servitudes, with

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108. *Equitable Servitudes: Part I*, *supra* note 39, at 970; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); *see also* TIFFANY, *supra* note 54, § 850; SERKIN, *supra* note 12, at 181.

109. *See supra* note 12 and accompanying text.

110. (1848) 41 Eng. Rep. 1143, 1143-45; 2 Ph. 774, 774-79.

111. *Id.* at 1144, 2. Ph. at 777-78.

112. SPRANKLING, *supra* note 38, at 575; *see also* CLARK, *supra* note 3, at 170 (remarking that the advent of equitable servitudes marks "[o]ne of the best examples of the expansion of modern property law to accommodate the demands of the realty market"); Stoebuck, *supra* note 2, at 889 ("[Equitable servitudes] have nearly replaced real covenants in the courts today.").

113. POWELL, *supra* note 30, § 60.01.

114. *See id.*; SERKIN, *supra* note 12, at 185.

115. POWELL, *supra* note 30, § 60.01.

some choosing to grant either form of relief regardless of the type of promise that is enforced.[116] Even so, despite the efforts of many scholars toward simplification, the two doctrines remain somewhat distinct in modern law and thus warrant separate discussion.[117]

To create an enforceable equitable servitude, nearly all courts require that the parties intend the promise to run with the land and that the successor covenantor have actual or constructive notice of the restriction, which is usually satisfied when the servitude is reduced to writing.[118] While there exists some disagreement as to whether *Tulk* applied the touch-and-concern doctrine,[119] the majority of courts find sufficient support for extending the requirement to equity.[120]

Ultimately, though, how a court rules on the touch-and-concern question boils down to which of the two underlying theories of enforcement the jurisdiction follows.[121] Adherents to the contract theory assert that the *Tulk* court simply mandated specific performance of a contractual obligation, in that equity will enforce an agreement against any covenantor with notice regardless of whether the restriction comports with the traditional requirements governing covenants at law.[122] However, the vast

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116. SPRANKLING, *supra* note 38, at 575; POWELL, *supra* note 30, § 60.07.

117. POWELL, *supra* note 30, § 60.01.

118. SERKIN, *supra* note 12, at 184-85; POWELL, *supra* note 30, § 60.04. These requirements are identical to those discussed in Section I.B. *See* John J. McLoone, Jr., Comment, *Equitable Servitudes—A Recent Case and Its Implications for the Enforcement of Covenants Not to Compete*, 9 ARIZ. L. REV. 441, 445-47 (1968).

119. *Compare* Stoebuck, *supra* note 2, at 892 ("To run, equitable restrictions must touch and concern benefited and burdened land . . . ."), *and* James L. Winokur, *The Mixed Blessings of Promissory Servitudes: Toward Optimizing Economic Utility, Individual Liberty, and Personal Identity*, 1989 WIS. L. REV. 1, 93 n.400 [hereinafter *Mixed Blessings*] ("[P]rivity requirements have been the only traditional real covenant requirements actually eliminated in deciding enforceability of equitable servitudes."), *with* TIFFANY, *supra* note 53, § 858 ("In equity, the question whether such a covenant runs with the land is material on the question of notice only . . . .").

120. POWELL, *supra* note 30, § 60.01; *see also Unified Concept*, *supra* note 12, at 1179 n.5 ("Most courts reject the idea that equitable servitudes can be held 'in gross.'"). However, as an equitable servitude is usually proscriptive, in that the restriction specifies how the land cannot be used, most courts find it unnecessary to apply touch and concern as a separate requirement because the doctrine is readily satisfied. *Integration of Servitudes*, *supra* note 60, at 362.

121. McLoone, *supra* note 118, at 443.

122. Stoebuck, *supra* note 2, at 887-89; *Equitable Servitudes: Part I*, *supra* note 39, at 971.

majority of courts follow the equitable easement theory,[123] which posits that the restriction in *Tulk* created an equitable property interest in the burdened land itself rather than the estate.[124] As a property interest that binds all subsequent possessors,[125] the touch-and-concern doctrine was a necessary criterion.[126] Of course, in jurisdictions that enforce the equitable easement theory, the touch-and-concern requirement is, at least in principle, identical to that of real covenants.[127] As such, the English appurtenance requirement and the in-gross approach also exist in equity.[128]

D. Commercial Anticompetition Covenants

The historical disparate treatment of covenants at law and equity intended to limit business competition, which was the type of restriction at issue in *Bernard Court*,[129] is a direct outgrowth of the more fundamental divide regarding the enforcement of benefits in gross and the touch-and-concern requirement generally.[130] Today, most courts hold that these covenants, in which the covenantor promises not to engage in the same type of business that the covenantee conducts on his own property, adequately touch and concern the land and are enforceable at law.[131] These jurisdictions interpret the touch-and-concern doctrine more liberally and find the rule satisfied even though anticompetition covenants tend only to economically benefit the covenantee's business on the dominant estate.[132]

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123. McLoone, *supra* note 118, at 443 n.4; *see also Unified Concept*, *supra* note 12, at 1226. It must be noted that many courts have historically fluctuated between the two theories through decades (and centuries) of rulings, which likely reflects implicit concerns regarding the social desirability of the outcome that a particular theory would mandate. *Equitable Servitudes: Part I*, *supra* note 39, at 978.

124. Stoebuck, *supra* note 2, at 889.

125. *Id.* at 898.

126. *See id.* at 898; McLoone, *supra* note 118, at 447.

127. Stoebuck, *supra* note 2, at 892.

128. *See* Browder, *supra* note 14, at 42; SPRANKLING, *supra* note 38, at 598.

129. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 2, 2020 WL 7251256, at *1.

130. POWELL, *supra* note 30, § 60.06.

131. Roberts, *supra* note 97, at 955; POWELL, *supra* note 30, § 60.06.

132. Roberts, *supra* note 97, at 955.

Some courts go so far as to ignore the requirement and instead evaluate these restrictions for their effect on competition in an analysis akin to that conducted in the employment context.[133] Those courts will enforce the covenant provided that it is reasonable in scope and constitutes only a partial restraint of trade.[134] In equity, whether a court requires a reasonable covenant to also touch and concern the land depends, again, on the underlying theory of enforcement to which the court adheres.[135] Under the contract theory, reasonableness is sufficient; under the equitable easement theory, the touch-and-concern requirement reigns supreme, and the reasonableness of a restriction will not in itself render an anticompetition covenant enforceable.[136]

Traditionally, courts were troubled by a landowner's ability to prevent a competing business from operating on a neighboring parcel because doing so could stifle development and depress property values.[137] Given the newfound freedom that *Tulk v. Moxhay* afforded in creating servitudes and the concomitant concern that landowners would impose a host of burdensome restrictions, many nineteenth-century courts held that anticompetition covenants did not touch and concern the land and were thus unenforceable.[138]

Justice Oliver Wendell Holmes, then serving on the Massachusetts Supreme Court, echoed this deep suspicion of anticompetition covenants in the famous case of *Norcross v. James*.[139] In *Norcross*, the court confronted the question of whether a covenant not to use the land as a quarry in competition with the covenantee's adjoining operation ran with the land, allowing the successor covenantee to enforce the burden against

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133. 20 AM. JUR. 2D *Covenants, Conditions, and Restrictions* § 32 (2022); Warren E. Banks, Comment, *Covenants Not to Compete*, 7 ARK. L. REV. 35, 40 (1952-53).

134. Robert L. Potts, Commentary, *Real Covenants in Restraint of Trade—When Do They Run with the Land?*, 20 ALA. L. REV. 114, 119 (1967).

135. *Id.*

136. *Id.*

137. Susan F. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with Land? Comparing Results Under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)*, 38 REAL PROP. PROB. & TR. J. 267, 280 (2003) [hereinafter *Covenants Against Competition*].

138. *Id.* at 280-81.

139. 2 N.E. 946, 949 (Mass. 1885); RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.6 cmt. a (AM. L. INST. 2000).

the successor covenantor who had violated the restriction.[140] The court refused to enforce the covenant, finding that the benefit was held in gross.[141] Specifically, Justice Holmes noted that the touch-and-concern requirement is satisfied only when the covenant "extend[s] to the support of the thing" and is "for the benefit of the estate."[142] In this vein, he required that the benefit be tangible rather than one affecting merely the financial enjoyment of the land by enhancing its commercial value, stating:

> In what way does [the covenant] extend to the support of the plaintiff's quarry? It does not make the use or occupation of it more convenient. It does not in any way affect the use or occupation; it simply tends indirectly to increase its value, by excluding a competitor from the market for its products.[143]

Norcross soon became a lodestar for the traditional view that the benefit of an anticompetition covenant is personal to the covenantee because it affords only a financial advantage.[144] This case also espouses support for the equitable easement theory of enforcement, as the court required that the covenant touch and concern both at law and in equity.[145]

Expanding upon its adherence to the English appurtenance requirement, the *Restatement (First)* adopted the *Norcross* view, similarly finding that the burden does not run because the benefit fails to relate to the physical use or enjoyment of the land.[146] In doing so, it opined that "the risk of social harm involved in a possible monopoly" created by the covenantee "is sufficient to

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140. *Norcross*, 2 N.E. at 946.

141. *Id.* at 949. As the question presented pertained to the enforcement of the burden, the court necessarily followed the English appurtenance principle in requiring the benefit to touch and concern. *See supra* text accompanying notes 94-98.

142. *Norcross*, 2 N.E. at 949.

143. *Id.*

144. *See* Roberts, *supra* note 97, at 954.

145. *Norcross*, 2 N.E. at 948; D. Robb Ferguson, Case Comment, *Property Law—Anticompetitive Covenants—Redefinition of "Touch and Concern" in Massachusetts—*Whitinsville Plaza, Inc. v. Kotseas, *79 Mass. Adv. Sh. 1262, 390 N.E.2d 243 (1979)*, 14 SUFFOLK U. L. REV. 117, 127 (1980); *Equitable Servitudes: Part II*, *supra* note 107, at 1069 & n.97.

146. *See* RESTATEMENT (FIRST) OF PROP. § 537 cmt. f (AM. L. INST. 1944); Mablum, *supra* note 59, at 139-40.

induce the refusal to extend the 'running of promises' to such cases."[147]

Today, the traditional view no longer carries the force of law in Massachusetts, as the state supreme court overturned *Norcross* with its decision in *Whitinsville Plaza, Inc. v. Kotseas* by enforcing an anticompetition covenant on the basis of reasonableness.[148] Although most courts today hold that such covenants touch and concern,[149] the *Norcross* doctrine clings to life in some states,[150] and accordingly, this case, along with many of the positions advanced by the *Restatement (First)*, provides a window into the covenants caselaw of Arkansas.

II. THE LAW IN ARKANSAS

The law in Arkansas on real covenants and equitable servitudes is, as Chief Judge Harrison aptly noted, "underdeveloped."[151] Notwithstanding this limitation, courts have applied many of the principles explored above, including writing,[152] privity,[153] intent,[154] and notice.[155] Most notable of all, however, is the touch-and-concern doctrine, which the court in *Bernard Court* concluded has never before been articulated in the state.[156] While the court was correct in stating that the words "touch and concern" have never been used,[157] a survey of the caselaw reveals that the principles underlying the doctrine have been applied time and again.

Perhaps the most explicit application of touch and concern can be found in *Savings, Inc. v. City of Blytheville*, a case in which

147. RESTATEMENT (FIRST) OF PROP. § 537 cmt. f (AM. L. INST. 1944).

148. 390 N.E.2d 243, 249-50 (Mass. 1979).

149. *Id.* at 249.

150. Roberts, *supra* note 97, at 957.

151. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 16, 2020 WL 7251256, at *8 (Harrison, C.J., dissenting).

152. Indeed, a restrictive covenant is required by statute to be in writing. ARK. CODE ANN. § 18-12-103 (2011); *see also* Knowles v. Anderson, 307 Ark. 393, 395, 821 S.W.2d 466, 467 (1991).

153. Ross v. Turner, 7 Ark. 132, 145, 1846 WL 638, at *4.

154. Fort Smith Gas Co. v. Gean, 186 Ark. 573, 577-78, 55 S.W.2d 63, 65-66 (1932).

155. Shelton v. Smith, 243 Ark. 721, 727, 421 S.W.2d 348, 351 (1967).

156. *Bernard Ct., LLC*, 2020 Ark. App. 563, at 13, 2020 WL 7251256, at *6.

157. *Id.* at 13, 2020 WL 7251256, at *6.

the Arkansas Supreme Court expressly incorporated the reasoning of *Norcross* into its own analysis of an anticompetition covenant almost a century later.[158] In *Savings, Inc.*, the owners of two lots which straddled the east and west sides of a highway leased a portion of the east lot to Savings, Inc. In the lease agreement was a covenant specifying in part that, should the owners sell the west lot, they would create an additional covenant prohibiting the property from being used as a competing service station.[159] The owners later sold the west lot but failed to include the restriction in the deed, and consequently, the new owners deeded part of the lot to Curt's Oil Company, which soon erected a gasoline service station.[160]

In more familiar terms, this case presented a scenario in which the original covenantee wished to enforce the restriction against a successor covenantor, arguing that the anticompetition covenant ran with the land.[161] The trial court found the covenant to be unenforceable because it was held in gross by the original lot owners.[162] The supreme court affirmed, dedicating most of its opinion to a discussion of *Norcross*,[163] which differs from *Savings, Inc.* in an important respect: whereas the former case concerned the enforcement of the benefit,[164] the latter case pertained to the enforcement of the burden, as the appellant was the original covenantee.[165]

Nonetheless, in its holding that the burden of the east lot covenant did not run, the court quoted extensively from Justice Holmes's language expressing that the benefit of an anticompetition covenant does not touch and concern the land.[166] Specifically, the court opined that the covenant in no way "affected" the east lot.[167] Recall the touch-and-concern test that the King's Bench applied in *Congleton v. Pattison*: the covenant

158. 240 Ark. 558, 562-63, 401 S.W.2d 26, 29 (1966).
159. *Id.* at 559, 401 S.W.2d at 27.
160. *Id.* at 560, 401 S.W.2d at 27.
161. *See id.* at 560-61, 401 S.W.2d at 28.
162. *Id.* at 561, 401 S.W.2d at 28.
163. *Sav., Inc.*, 240 Ark. at 562, 401 S.W.2d at 29.
164. *See supra* note 141 and accompanying text.
165. *Sav., Inc.*, 240 Ark. at 558-59, 401 S.W.2d at 27.
166. *Id.* at 563, 401 S.W.2d at 29.
167. *Id.* at 563, 401 S.W.2d at 29.

must "directly *affect*[] the nature, quality, or value of the thing demised."[168] Clearly then, the *Savings, Inc.* court invalidated the covenant because it failed to touch and concern. Indeed, it would defy logic to posit that even though the court explicitly applied the reasoning of *Norcross*—which was premised on the touch-and-concern doctrine—to its own decision to invalidate an anticompetition covenant, it did so without applying the requirement.[169]

To be sure, courts and scholars alike universally recognize *Savings, Inc.* as supporting the traditional view that an anticompetition covenant does not touch and concern the land.[170] This case is also noteworthy because it is demonstrative, albeit implicitly, of the court's application of the English appurtenance requirement.[171] That is, the court's adoption of Justice Holmes's proposition that the benefit of an anticompetition covenant is held in gross[172] and quotation of his language that such a covenant "simply tends indirectly to increase" the value of the benefited land[173] would have little application to the burden of the covenant unless the court adhered to the appurtenance principle by testing both sides of the restriction. Moreover, by opining that "*nothing* in this agreement . . . affected [the east lot] whatsoever,"[174] the court necessarily implied that neither the burden nor the benefit touched and concerned, as the analysis centered on a single parcel rather than on a dominant and servient estate in a traditional context.[175]

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168. (1808) 103 Eng. Rep. 725, 727; 10 East 130, 136 (emphasis added).

169. *See supra* notes 141-43 and accompanying text.

170. *See, e.g.*, Barton v. Fred Netterville Lumber Co., 317 F. Supp. 2d 700, 706 (S.D. Miss. 2004); Davidson Bros. v. D. Katz & Sons, 579 A.2d 288, 294 (N.J. 1990); *Mixed Blessings*, *supra* note 119, at 85 & n.364; *First Impressions*, *supra* note 95, at 137 & n.42; Ferguson, *supra* note 145, at 126 & n.38; Browder, *supra* note 14, at 42 & n.132; Mablum, *supra* note 59, at 137 & n.54; Stoebuck, *supra* note 2, at 872 & n.35; Franzese, *supra* note 50, at 240 & n.35. It must be noted that anticompetition covenants in this context differ from those imposed ancillary to the sale of a business: courts generally uphold such restrictions to the extent they are reasonably necessary for the buyer's protection. *See, e.g.*, Easley v. Sky, Inc., 15 Ark. App. 64, 66-67, 689 S.W.2d 356, 358 (1985).

171. *See supra* notes 95-98 and accompanying text.

172. *See Sav., Inc.*, 240 Ark. at 563, 401 S.W.2d at 29.

173. *Id.* at 563, 401 S.W.2d at 29.

174. *Id.* at 563, 401 S.W.2d at 29 (emphasis added).

175. *See id.* at 558, 561, 401 S.W.2d at 27, 28 (noting that only the east lot was the subject of litigation).

In other words, it appears that the court tested the covenant holistically by gauging its effect on the east lot as a whole.[176] Finding that it burdened the original owners personally and benefited Savings, Inc. only financially, the court refused to let the covenant run.[177] It is worth noting that the court of appeals cited *Savings, Inc.* as good law over forty years later in *Rooke v. Spickelmier*.[178] However, despite its wide recognition as embodying the traditional view of anticompetition covenants, the court in *Bernard Court* did not address *Savings, Inc.* even though both cases are factually similar. Specifically, the question presented in *Bernard Court*, like in *Savings, Inc.*, involved the running of the burden of the covenant, as Bernard Court was a successor in interest to the original covenantor.[179]

Savings, Inc. is not the only illustrative application of the principles inherent in the touch-and-concern doctrine in Arkansas. In the nineteenth-century decision of *St. Louis, I.M. & S. Railway v. O'Baugh*, the supreme court held that the benefit of a covenant ran because "it related to the particular land and was its benefit. It was not to do a thing collateral."[180] Years later, the court elaborated in *Bank of Hoxie v. Meriwether*, stating, "The distinction between real and personal covenants is that the former relate to the realty, having for their main object some benefit to the realty and inuring to the benefit of and becoming binding upon subsequent grantees, while the latter do not run with the land."[181] Moreover, the court in *Fort Smith Gas Co. v. Gean* noted that running covenants "affect the land itself and confer a benefit on the grantor."[182] However, "where the covenant imposes a burden on real estate for the benefit of the grantor personally[,] it does not follow the land into the possession of an assignee."[183]

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176. *See id.* at 563, 401 S.W.2d at 29; *see also* Ferguson, *supra* note 145, at 121 n.21 (citing *Savings, Inc.* in support of the proposition that both the benefit and burden of a covenant must touch and concern the land).

177. *Sav., Inc.*, 240 Ark. at 563, 401 S.W.2d at 29.

178. 2009 Ark. App. 155, at 6, 314 S.W.3d 718, 721.

179. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 2 n.2, 2020 WL 7251256, at *1 n.2.

180. 49 Ark. 418, 423, 5 S.W. 711, 713 (1887).

181. 166 Ark. 39, 47, 265 S.W. 642, 645 (1924).

182. 186 Ark. 573, 577, 55 S.W.2d 63, 65 (1932).

183. *Id.* at 577, 55 S.W.2d at 65.

The application of the doctrine is further demonstrated in *Lawhon v. American Cyanamid & Chemical Co.*, where the court articulated: "If a covenant is of value to the covenantee by reason of his occupation of the land, ordinarily it is regarded as running with the land."[184] Conspicuously cited as support for this proposition is section 854 of *Tiffany on Real Property*, titled "'Touching and concerning' the land."[185] The court further noted that statements made in previous cases defining a running covenant as "one that benefits the land itself" are "entirely harmonious" with Tiffany's definition, "for a covenant that may be said to benefit the land itself is of value to the covenantee primarily because he is entitled to occupy the land and enjoy the benefit."[186]

In a more tangible illustration of these principles, the court in *Kell v. Bella Vista Village Property Owners Ass'n* imposed the touch-and-concern requirement and found that covenant assessments created for the maintenance of facilities in a planned community satisfied the rule.[187] In support, the court cited to *Neponsit Property Owners' Ass'n v. Emigrant Industrial Savings Bank*,[188] recognized by many to be a "classic" leading decision adopting the Clark-Bigelow touch-and-concern test.[189] Finally, in *Nordin v. May*, the Eighth Circuit Court of Appeals provided a distillation of state caselaw when it stated in part that:

> The general rule in Arkansas appears to be that a covenant which is beneficial or essential to the use of the land conveyed . . . runs with the land. . . . There is no reason to believe that the applicable law of Arkansas differs from the law which is *generally applied* to covenants such as that in suit.[190]

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184. 216 Ark. 23, 26, 223 S.W.2d 806, 808 (1949).

185. *Id.* at 26, 223 S.W.2d at 808; TIFFANY, *supra* note 54, § 854.

186. *Lawhon*, 216 Ark. at 26, 223 S.W.2d at 808.

187. *See* 258 Ark. 757, 760, 528 S.W.2d 651, 653 (1975); *see also* Rau, *supra* note 93, at 154 n.94 (citing *Kell* for its imposition of the touch and concern doctrine).

188. *Kell*, 258 Ark. at 760, 528 S.W.2d at 653.

189. *See, e.g.*, *Mixed Blessings*, *supra* note 119, at 86 n.373; Potts, *supra* note 134, at 120.

190. 188 F.2d 411, 414-15 (8th Cir. 1951) (emphasis added).

This "general rule" was also articulated by the court in *Bernard Court*.[191]

Quite simply, the language that the supreme court employed in each of these cases could not more closely mirror that used in the various iterations of the touch-and-concern doctrine.[192] Just as *Spencer's Case* declared that no real covenant will run if it is "merely collateral to the land,"[193] the court in *O'Baugh* premised its enforcement of a restriction on the fact that it was not merely "collateral" to the covenantee's property.[194] Statements in subsequent cases that the covenant must inure a benefit to the realty tracks with both Judge Clark's requirement that the covenant be "intimately bound up with the land, aiding the promisee as landowner,"[195] and Justice Holmes's admonition in *Norcross v. James* that the covenant must "extend to the support of the thing" and function "for the benefit of the estate."[196] Furthermore, *Lawhon*'s reasoning that the covenant must be of value to the covenantee as a landowner by benefiting the land is synonymous with the language of the *Restatement (First)* stating that the promise must increase the usefulness of the land by benefiting the covenantee in the use of the property.[197] In other words, that a covenant must be "beneficial or essential to the use of the land" echoes the *Restatement (First)*'s "usefulness" metric.[198] *Gean*, however, is perhaps most telling: Judge Clark, the preeminent authority on real covenants and the namesake of the Clark-Bigelow touch-and-concern test, stated that the Arkansas Supreme Court explicitly applied the doctrine in that case.[199]

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191. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 12, 2020 WL 7251256, at *6.

192. *See* discussion *supra* Section I.B.4.

193. (1583) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b.

194. St. Louis, I.M. & S. Ry. v. O'Baugh, 49 Ark. 418, 423, 5 S.W. 711, 713 (1887).

195. Bank of Hoxie v. Meriwether, 166 Ark. 39, 47, 265 S.W. 642, 645 (1924); *supra* note 80 and accompanying text.

196. *See supra* note 142 and accompanying text.

197. Lawhon v. Am. Cyanamid & Chem. Co., 216 Ark. 23, 26, 223 S.W.2d 806, 808 (1949); *supra* note 85-87 and accompanying text.

198. Nordin v. May, 188 F.2d 411, 414-15 (8th Cir. 1951); *supra* note 87 and accompanying text.

199. Charles E. Clark, *The American Law Institute's Law of Real Covenants*, 52 YALE L.J. 699, 724 n.89 (1943).

Kell, like *Savings, Inc.*, also demonstrates an implicit affirmation of the English appurtenance requirement. The *Kell* court found that both the burden and the benefit of a covenant to pay annual property owners association ("POA") assessments touched and concerned the members' properties because the community facilities to be maintained by the assessments increased the value of each lot.[200] In an in-gross jurisdiction that recognized benefits personal to the covenantee, the court's inquiry would not encompass the benefit side of the covenant. [201]

On the other hand, ascribing a general theory of equitable servitude enforcement to the caselaw has proven more challenging.[202] Taking after *Norcross*, [203] the court in *Savings, Inc.* applied the touch-and-concern doctrine in equity,[204] which, of course, is a hallmark of the equitable easement theory.[205] The *Meriwether* court similarly required that the covenant in that case touch and concern after agreeing with the chancery court's characterization of the promise as an "equitable charge, easement, and servitude" upon the land.[206]

These examples, nevertheless, must be reconciled with other cases that appear to support the contract theory of enforcement, under which a restriction may be equitably enforced on the basis of notice alone.[207] In *Arkansas State Highway Commission v. McNeill*, the court found that landowners were not entitled to compensation for the alleged breach of a residential use covenant when the State planned to construct a roadway close to their home.[208] One commentator cites the decision as evidence of the court's holding that a covenant is not a property interest,[209] which

200. Kell v. Bella Vista Vill. Prop. Owners Ass'n, 258 Ark. 757, 760, 528 S.W.2d 651, 653 (1975).

201. *See* discussion *supra* Section I.B.4.

202. *See* discussion *supra* Section I.C.

203. *See supra* note 150 and accompanying text.

204. Indeed, a chancery court heard the case below. *See* Sav., Inc. v. City of Blytheville, 240 Ark. 558, 560-61, 401 S.W.2d 26, 28 (1966). Arkansas did not formally merge law and equity until 2000. ARK. CONST. amend. 80 § 19.

205. *See supra* notes 123-26 and accompanying text.

206. Bank of Hoxie v. Meriwether, 166 Ark. 39, 47, 265 S.W. 642, 645 (1924).

207. *See supra* note 122 and accompanying text.

208. 238 Ark. 244, 244-45, 247, 381 S.W.2d 425, 425-27 (1964).

209. KURTZ ET AL., *supra* note 31, at 357 & n.13.

discords with the equitable easement theory.[210] But this conclusion fails to take into account the court's acknowledgement: "We do not deny the existence of a property right in the appellees."[211] Instead, the construction of the roadway, rather than the breach of the covenant, was the "proximate cause" of the injury.[212]

There also exists a line of decisions involving restricted districts in residential use planning; in many of these cases, courts have stated that "one taking title to land with notice that it is subject to an agreement restricting its use will not, in equity and good conscience, be permitted to violate its terms."[213] In this area of covenant law, courts will allow for the creation of implied reciprocal servitudes on subdivision lots if there exists a general plan of development, which is "based on the contractual relationship between the common grantor and his grantees."[214]

The issue is the apparent dissonance between the language used in these cases and that used in *Savings, Inc.*, as the language employed here seems to implicate the contract theory. Notably, however, scholars recognize the general plan theory as a separate doctrine that is narrow in scope and is intended to serve as a gap filler to protect purchasers who have reasonably relied on the belief that all lots in a subdivision are governed by a like set of restrictions.[215] As such, landowners are entitled to the protection of this equitable remedy only when a developer fails to record a declaration of servitudes applicable to the entire development.[216] If anything, the doctrine serves as a relaxation of the writing requirement.[217]

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210. *See supra* note 125 and accompanying text.

211. *McNeill*, 238 Ark. at 248, 381 S.W.2d at 427.

212. *Id.* at 247, 381 S.W.2d at 427.

213. *E.g.*, Holaday v. Fraker, 323 Ark. 522, 526, 920 S.W.2d 4, 6 (1996); Holmesley v. Walk, 72 Ark. App. 433, 435-36, 39 S.W.3d 463, 465 (2001); *see also* McGuire v. Bell, 297 Ark. 282, 290, 761 S.W.2d 904, 909 (1988) (using nearly identical language).

214. Knowles v. Anderson, 307 Ark. 393, 397, 821 S.W.2d 466, 468 (1991). *See generally* POWELL, *supra* note 30, § 60.03.

215. SERKIN, *supra* note 12, at 191; TIFFANY, *supra* note 54, § 867.50.

216. TIFFANY, *supra* note 54, § 867.50.

217. SERKIN, *supra* note 12, at 190.

The court of appeals recognized the distinction between the general plan theory and garden-variety covenants in *Rooke v. Spickelmier*, in which a landowner argued that a covenant prohibiting the use of a mobile home on the servient parcel was unenforceable because it was not issued as part of a general plan.[218] The court agreed that no subdivision existed but stated that a development was unnecessary for the covenant to run with the land, as the covenantor simply imposed the restriction as part of a conveyance for the benefit of his adjacent property.[219] In doing so, the court opined that the landowner's argument applied in the context of a restricted district setting rather than that of a general covenant.[220]

Accordingly, the court in *Bernard Court* did not cite to the language of these general plan cases. Yet, rather remarkably, in its evaluation of whether the anticompetition covenant at issue was enforceable as an equitable servitude, the court relied on conflicting authorities: to support its statement that covenants that do not run with the land may nonetheless be enforced in equity, the court cited to a case from California that adhered to the contract theory.[221] However, the court then quoted a case from Oregon, stating:

> The general rule is that "even if all technical requirements for a covenant to run with the land are not met, a promise is binding as an equitable servitude if (1) the parties intend the promise to be binding; (2) the promise *'concern[s] the land or its use in a direct and not a collateral way*;' and (3) 'the subsequent grantee [has] notice of the covenant.'"[222]

The second prong that the court quotes very plainly imposes the touch-and-concern requirement in equity, consistent with the equitable easement theory.[223] If the use of the term "concern[s]" is an insufficient basis for this conclusion, recall once more the

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218. 2009 Ark. App. 155, at 1-2, 314 S.W.3d 718, 719-20.

219. *Id.* at 5, 314 S.W.3d at 721.

220. *Id.* at 5, 314 S.W.3d at 721.

221. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 13, 2020 WL 7251256, at *7 (citing Taormina Theosophical Cmty., Inc. v. Silver, 190 Cal. Rptr. 38, 43 (Cal. Ct. App. 1983)).

222. *Id.* at 13-14, 2020 WL 7251256, at *7 (emphasis added) (quoting Nordbye v. BRCP/GM Ellington, 266 P.3d 92, 102 (Or. Ct. App. 2011)).

223. *See supra* notes 123-26 and accompanying text.

language of *Spencer's Case*, stating that a covenant does not touch and concern if it is "merely collateral to the land."[224] Moreover, the Oregon court drew the above quote from a prior decision in which the sole inquiry was whether a covenant to pay a POA initiation fee touched and concerned the land so as to be enforceable as an equitable servitude.[225] That the court in *Bernard Court* cited this case in a decision that expressly rejected the touch-and-concern doctrine is puzzling.

In sum, the caselaw demonstrates that Arkansas is a touch-and-concern state. Courts espouse the English appurtenance requirement in their analyses by requiring both the burden and the benefit of a covenant to touch and concern the land in order for the burden to bind successors;[226] in accord with this principle, a commercial anticompetition covenant does not touch and concern the land because it confers only a personal, financial benefit to the covenantee.[227] As further demonstrated by *Savings, Inc.*'s adoption of the reasoning from *Norcross v. James*, anticompetition covenants are unenforceable even in equity.[228] In this vein, courts adhere to the equitable easement theory of enforcement by extending the touch-and-concern requirement to equitable servitudes.[229]

That courts in Arkansas impose the touch-and-concern doctrine is congruous with the state judiciary's attitude toward restrictions on land in general. The language employed in a myriad of decisions involving the use of covenants evinces a strong inclination toward the unencumbered use of land: "Restrictions upon the use of land are not favored in law.";[230] "Restrictive covenants are to be strictly construed against limitations on the free use of property.";[231] "[A]ll doubts are resolved in favor of the unfettered use of land."[232] These

224. (1583) 77 Eng. Rep. 72, 74; 5 Co. Rep. 16 a, 16 b.

225. Ebbe v. Senior Ests. Golf & Country Club, 657 P.2d 696, 701-02 (Or. Ct. App. 1983).

226. *See supra* notes 199-201 and accompanying text.

227. *See supra* note 166 and accompanying text.

228. *See supra* notes 203-04 and accompanying text.

229. *See supra* notes 203-06 and accompanying text.

230. White v. McGowen, 364 Ark. 520, 522, 222 S.W.3d 187, 189 (2006).

231. Forrest Constr., Inc. v. Milam, 345 Ark. 1, 9, 43 S.W.3d 140, 145 (2001).

232. Acuna v. Watkins, 2012 Ark. App. 564, at 9, 423 S.W.3d 670, 675-76.

sentiments embody the traditional views of English courts and the *Restatement (First)*, both of which were hostile to land use restrictions.[233] Indeed, one commentator opines that it is "difficult to articulate a policy justifying" the refusal to permit anticompetition covenants to run with the land unless the court relies on the *Restatement (First)*'s reasoning that such restrictions are undesirable.[234]

III. POLICY IMPLICATIONS OF TOUCH AND CONCERN

Now that it has been ascertained that Arkansas is a touch-and-concern state, the question becomes whether the doctrine constitutes sound judicial policy. Is it wise to test covenants using a rule first conceived in the sixteenth century?[235] If the Arkansas Supreme Court were to dispense with the requirement, which doctrine would take its place? To answer these questions, it is worth pondering in greater detail the purpose for which courts have traditionally used the touch-and-concern requirement. As a preliminary matter, it must be noted that this judicially imposed constraint on covenants materializes only when land is transferred; a covenant need not touch and concern the land to bind the original parties to the transaction.[236]

Rather, concerns arise when a successor in interest takes title to a parcel only to be surprised when a covenant that appears to be in gross actually runs with the land to dictate its use.[237] In this regard, some scholars posit that touch and concern is a tool to effectuate the intent of the parties rather than to protect land use, and yet it is distinct from the intent requirement because it is objective in nature.[238] Specifically, it ensures that parties will be bound only to those promises that a reasonable purchaser would expect to assume, which promotes notions of fairness and marketability.[239] If the expressed intent of the parties that a

233. *See supra* notes 38, 146-47 and accompanying text.
234. *Policy Analysis*, *supra* note 33, at 214.
235. *See supra* note 68 and accompanying text.
236. *Judicial Supervision*, *supra* note 6, at 150.
237. *See id.* at 163.
238. *See, e.g.*, *Policy Analysis*, *supra* note 33, at 208-09, 219-20.
239. *Ancient Strands*, *supra* note 5, at 1290.

covenant runs with the land accords with what the court[240] believes the community would expect to run under the circumstances, then the court will give effect to that intent.[241]

Adherents to the traditional approach, which include the authors of leading treatises on the subject, disagree with the intent effectuation assessment and argue that the doctrine evolved from English land protection policies, in which some encumbrances were held unenforceable regardless of the parties' intent.[242] In this sense, touch and concern serves as a "judicial screening" tool that allows courts to invalidate unreasonable covenants, which reflects the common law's historical distrust of land use restrictions and their potential effect on property values.[243] In reality, these contrasting views are merely a product of the evolving use and treatment of an inherently flexible doctrine over time.[244]

On occasion, courts have used touch and concern to ascertain intent, while in other instances, the requirement has been employed to test the substantive effects of a covenant, with courts invalidating those restrictions that have become economically undesirable by unduly restraining alienation, for example.[245] These shifting attitudes are the source of much of the vigorous debate surrounding touch and concern today.[246] Opponents argue that the doctrine is vague and confusing because it allows courts to void covenants without articulating why the arrangement is defective.[247] In turn, this opacity affords courts the discretion to unpredictably strike those restrictions that seem inconvenient or to give effect to the judiciary's beliefs as to which restrictions

240. Whether a covenant touches and concerns is uniformly viewed as a question of law. *Judicial Supervision*, *supra* note 6, at 143. There is a rich irony inherent in the intent effectuation view that a judge must deduce the probable understandings of the community rather than jurors drawn from that very community. *Policy Analysis*, *supra* note 33, at 212.

241. *Integration of Servitudes*, *supra* note 60, at 360.

242. *First Impressions*, *supra* note 95, at 139-40; *see also* TIFFANY, *supra* note 54, § 850; POWELL, *supra* note 30, § 60.04 (positing that the intent of the parties does not control in the analysis).

243. Tarlock, *supra* note 9, at 814, 817.

244. *See supra* note 72 and accompanying text; *Design Proposal*, *supra* note 7, at 1220.

245. *Ancient Strands*, *supra* note 5, at 1289-1291.

246. SPRANKLING, *supra* note 38, at 590.

247. *Id.* at 590; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. b (AM. L. INST. 2000).

should bind successors and which ones should not.[248] These opponents assert that the prevalence of touch and concern has declined in recent years as more courts have chosen to address underlying policy goals directly, rather than tangentially, through the use of protective rules found outside the scope of traditional covenant law.[249]

At its core, the criticism lobbed at the touch-and-concern doctrine stems from the argument that a covenant is indistinguishable from a contract, as prospective purchasers have notice through the land records of the obligations they will incur and thus may refrain from taking title if conditions dictate.[250] Because of the "take it or leave it" principle inherent in the freedom of contract, the choice of whether an encumbrance runs with the land should rest with property owners rather than with the courts.[251] As such, if a covenant proves to be especially onerous, market forces will dictate that the owners work out a termination transaction.[252]

The latest *Restatement (Third) of Property* joins the chorus of criticisms but acknowledges the role that touch and concern has played in land protection, noting that courts, in an effort to "protect the social interest in preventing land from becoming unusable and unmarketable," developed the doctrine "to protect landowners from requirements akin to the feudal incidents of providing labor or other services to an overlord."[253] However, it remarks that despite "appear[ing] to retain more currency than the other traditional doctrines," touch and concern "poorly identif[ies]" those restrictions which create a risk of harm.[254] Thus, the *Restatement (Third)* dispenses with touch and concern in its entirety but ostensibly seeks to retain the spirit of the defunct

248. SPRANKLING, *supra* note 38, at 590-91; KURTZ ET AL., *supra* note 31, at 418.

249. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); *see also* Roberts, *supra* note 97, at 958 (noting that modern courts prefer not to "hide behind running covenant and servitude theory" in the context of anticompetition covenants).

250. *Judicial Supervision*, *supra* note 6, at 149.

251. *Id.*

252. *Id.*

253. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. e (AM. L. INST. 2000).

254. *Id.* § 3.1 cmts. a-b.

doctrine by adopting the head-on approach of addressing potential harms directly.[255]

It must be noted, however, that the *Restatement (Third)*'s approach is but a piece of a much more significant overhaul of its conception of private land use arrangements.[256] Indeed, in its pursuit of eliminating the "baroque facade" of this area of the law,[257] the *Restatement (Third)* merges the real covenant, equitable servitude, and easement into a single category: the servitude.[258] As part of this reconceptualization, the common law requirements that traditionally served as prerequisites to the running of covenants are "unceremoniously tossed aside."[259] Instead, in an endorsement of the intent-effectuation approach[260] and freedom of contract, any agreement between parties now creates an enforceable obligation that runs with the land so long as it comports with public policy.[261] Accordingly, an anticompetition servitude is evaluated to determine whether it imposes an unreasonable restraint on trade or competition in violation of common or statutory law.[262]

Proponents of touch and concern, however, view the doctrine's vagueness not as a bug but as a feature because it allows "courts to pour new meaning into the old 'touch and concern' bottle as changing conditions warrant."[263] This flexibility, in turn, has allowed courts to protect the expectations of purchasers and finite land resources by limiting the enforcement of covenants to those that serve land planning functions.[264] By premising the inquiry into the validity of a covenant on a rule distinctly rooted in property law rather than employing a wholesale public policy approach that sounds in contract, courts recognize land ownership as an indispensable

255. *Id.* § 3.2 cmts. a-b; Tarlock, *supra* note 9, at 810.
256. SPRANKLING, *supra* note 38, at 610.
257. Tarlock, *supra* note 9, at 810.
258. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.1 (AM. L. INST. 2000).
259. Merrill & Smith, *supra* note 77, at 694.
260. *First Impressions*, *supra* note 95, at 139.
261. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (AM. L. INST. 2000); *Covenants Against Competition*, *supra* note 137, at 283; SPRANKLING, *supra* note 38, at 610.
262. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.6 cmt. a (AM. L. INST. 2000).
263. *Ancient Strands*, *supra* note 5, at 1289 n.149.
264. *Tribute*, *supra* note 4, at 659, 661; *First Impressions*, *supra* note 95, at 138.

asset that "uniquely advance[s] the important social values of liberty and personal identity."[265] In other words, the touch-and-concern doctrine recognizes that ownership and possession allow for individual choice and "serve as one of several guardians of the 'troubled boundary between individual man and state.'"[266] Accordingly, these rights deserve protection and recognition as unique benefits offered by property law. [267]

This Comment echoes these sentiments and posits that the touch-and-concern doctrine continues to occupy an invaluable role in the law of covenants. Although opponents are correct in asserting that a covenant is nothing more than a contract as it applies to the original parties to the transaction, this position fails to account for the fact that real covenants are wholly distinct from garden-variety promises.[268] While many contracts are temporally dictated and specify single acts of performance, an encumbrance on land has staying power and may linger in perpetuity.[269] The public policy approach is also problematically ironic: by espousing a belief that judicial supervision of servitudes should retreat so that parties may enjoy contractual freedom restricted only by the bounds of public policy, proponents actually create grounds for more intrusive intervention, as this view imposes an open-ended standard that expands the basis on which a court may invalidate a covenant.[270]

Supporters of the contract approach, including a leading scholar who submits that freedom of contract should not be subordinate to the interests of future third parties,[271] similarly fail to account for the unique role that property law plays in asset allocation. This argument does not acknowledge that the common law has evolved around the reality that land is a scarce

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265. *See First Impressions*, *supra* note 95, at 139.

266. *Judicial Supervision*, *supra* note 6, at 144 (quoting Charles A. Reich, *The New Property*, 73 YALE L.J. 733, 733 (1964)).

267. *See id.* at 139-40.

268. *See supra* note 31 and accompanying text; 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, 1528 (2007).

269. *Judicial Supervision*, *supra* note 6, at 149; Korngold, *supra* note 268, at 1528.

270. Tarlock, *supra* note 9, at 810-11.

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

and non-fungible resource[272] and accordingly frowns upon possessors who create waste or do not efficiently steward their property at the expense of subsequent takers.[273] For instance, the rule against perpetuities, as well as the doctrines of adverse possession and prescription, exemplifies the consideration of "intergenerational fairness" and a concomitant reluctance to allow dead-hand control.[274]

Often is the case that land transfers occur between parties who are relatively inexperienced in real estate transactions.[275] Mistakes are bound to occur, and a covenantor who underestimates the extent to which a burden will reduce the value of his property may accept consideration for the promise that is inadequate.[276] The lack of standardization in land sales leads to difficulties in assessing a covenant's impact on the future market price of a subject parcel, which can make wealth-reducing miscalculations such as these commonplace.[277] The associated costs, however, are not absorbed entirely by the covenantor but are externalized because new generations of owners will assuredly take title to the burdened land.[278] Moreover, market forces may serve as an insufficient catalyst for removing onerous restrictions because the transaction costs of doing so, especially in the case of a parcel that has fallen into multiple ownership, may make the effort futile, as parties naturally seek to maximize their end of the bargain.[279] Courts, on the other hand, need not grapple with this inherent difficulty, as "[t]he stroke of a judicial pen can detach a covenant" from the land if it does not touch and concern.[280]

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272. *See* Korngold, *supra* note 268, at 1529.

273. *See* Nadav Shoked, *Who Needs Adverse Possession?*, 89 FORDHAM L. REV. 2639, 2655 (2021); RESTATEMENT (FIRST) OF PROP. div. IV, pt. I, intro. note (AM. L. INST. 1944).

274. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. e (AM. L. INST. 2000); Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 615-17, 634 (1985) [hereinafter *Servitude Restrictions*].

275. Stake, *supra* note 1, at 939.

276. *Id.* at 935.

277. *Id.* at 934, 940.

278. *Id.* at 934-35 ("[M]istakes reduce the wealth of those surrounding the mistake-maker.").

279. *Id.* at 937-38; *Servitude Restrictions*, *supra* note 274, at 619.

280. Stake, *supra* note 1, at 941.

The touch-and-concern doctrine is necessary because parties lack the foresight to fully contemplate the implications of their promise on distant successors.[281] Indeed, "the individual who today makes a decision with future impact may differ significantly from the individual who reaps the benefits or suffers the consequences of those decisions in the future."[282] Quite simply, humans are not clairvoyant, and instances of land use planning that adequately anticipate future needs are rare enough that successful attempts are celebrated.[283] Because covenants essentially function as "private legislation" that affects a line of future possessors, touch and concern provides a tool for courts to simply shift the burden of negotiation where a promise serves no land planning function but instead regulates only the behavior of the parties to the transaction.[284] Rather than force a successor to incur high transaction costs in seeking release from the covenant, the burden falls on the other party to renegotiate with subsequent owners.[285] In effect, the doctrine ensures that "[p]ersonal contracts remain the subject of personal bargains."[286]

In Arkansas, the language used almost canonically in covenant cases that the unencumbered use of land is to be championed[287] seems to give effect to the notion that touch and concern, and by extension judicial supervision of land use restrictions, "safeguard[s] individual freedom."[288] To this end, the *Restatement (Third)*'s reconceptualization of the law of servitudes has had little demonstrable effect in caselaw,[289]

281. Stewart E. Sterk, *Foresight and the Law of Servitudes*, 73 CORNELL L. REV. 956, 958 (1988).

282. *Id.*

283. Korngold, *supra* note 268, at 1531; *see, e.g.*, REM KOOLHAAS, DELIRIOUS NEW YORK: A RETROACTIVE MANIFESTO FOR MANHATTAN 18-19 (Monacelli Press 1994) (1978) (remarking that New York City's street grid plan first implemented in 1807 was "the most courageous act of prediction in Western civilization: the land it divides, unoccupied; the population it describes, conjectural; the buildings it locates, phantoms; the activities it frames, nonexistent").

284. *Unified Concept*, *supra* note 12, at 1232-33.

285. *Id.* at 1233.

286. *Id.*

287. *See supra* notes 230-33 and accompanying text.

288. *Unified Concept*, *supra* note 12, at 1233.

289. Rosenberg, *supra* note 6, at 191; Merrill & Smith, *supra* note 77, at 694 ("To date, the courts have largely ignored the reforms urged by the *Restatement (Third) of Servitudes* . . . .").

although the court in *Bernard Court* did take note of the source's departure from the touch-and-concern doctrine.[290]

But it must be emphasized once more that the court in *Bernard Court* articulated no alternative rule through which to test the covenant at issue. Thus, following the court's holding that the touch-and-concern doctrine is not a fixture of Arkansas property law, there appears to be no external constraint to protect successors from incurring burdens of even the most personal nature, or at least those that are highly tailored to the needs of only the original parties, because the court did not adopt the *Restatement Third*'s public policy approach to test the covenant directly. Since parties cannot fully predict the needs of future generations, those unbounded by any real constraints are free to exert dead-hand control and high transaction costs on third parties, which are the very evils that property law seeks to prevent.[291]

As a result, the troubling reality under *Bernard Court*'s interpretation of the law is that one may impose a covenant on a piece of property unbounded by any limits as to the novelty or personalization of the promise.[292] Suppose that *A* sells Blackacre to *B* but creates a deed covenant requiring *B* to pay *A* $2,000 per year in addition to the purchase price. The source of the surcharge is a personal agreement between the two concerning a subject that is completely unrelated to the sale of the parcel. *A* is aware that running covenants have staying power and places language in the deed expressing the parties' intent for the covenant to run with the land. Years later, *C*, an unsophisticated purchaser acting without the assistance of counsel, or perhaps even a real estate agent, takes title to Blackacre and is surprised to learn that the seemingly personal promise between *A* and *B* now requires him to also pay $2,000 per year. Consequently, the covenant creates a cloud on

290. Bernard Ct., LLC v. Walmart, Inc., 2020 Ark. App. 563, at 13 n.6, 2020 WL 7251526, at *6 n.6.

291. *See* Note, *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 951 (2009); *supra* note 278 and accompanying text.

292. To be sure, the covenantee would continue to be constrained by state and federal constitutional limits, e.g., racially restrictive covenants clearly violate the Equal Protection Clause of the Fourteenth Amendment. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. d (AM. L. INST. 2000).

title that devalues the property.[293] Such a covenant clearly does not touch and concern the land, but under the *Bernard Court* holding, what is to stop this absurdity from occurring?[294]

Indeed, in the wake of *Bernard Court*, a timeshare owner could be forced to pay amenity fees for recreational facilities that share only a diminutive connection with his property;[295] a commercial landlord could be obligated to uphold a promise made by its distant predecessor to return security deposits to tenants;[296] and a landowner who suffers a condemnation action could be compelled to award the compensation for the taking to the original owner of the parcel.[297] The covenants in all three of these cases were held unenforceable for want of the touch-and-concern requirement. Yet, these promises would likely find safe harbor in the *Bernard Court* holding.

Importantly, "[t]ouch and concern continues to be diligently, if incoherently, applied by courts because it has a function, although courts often have trouble articulating it."[298] Even "progressive" courts that have tested covenants using more modern doctrines have found themselves unable to shake touch and concern's roots.[299] In *Davidson Brothers v. D. Katz & Sons,* a leading case on the issue,[300] the court adopted a reasonableness test to evaluate an anticompetition covenant but chose not to abandon touch and concern, holding that the doctrine is a factor to be considered in determining the reasonableness of a restriction.[301] Likewise, in *Whitinsville Plaza, Inc. v. Kotseas*, the case that overturned *Norcross v. James*, the court validated an anticompetition covenant on the basis of reasonableness but similarly did not dispense with the doctrine, noting that it is a "prerequisite" for the enforcement of both real covenants and

293. *Cf.* SERKIN, *supra* note 12, at 186 (exploring a similar hypothetical).

294. *See id.*

295. *Contra* Midsouth Golf, LLC v. Fairfield Harbourside Condo. Ass'n, 652 S.E.2d 378, 389 (N.C. Ct. App. 2007).

296. *Contra* Mullendore Theatres, Inc. v. Growth Realty Invs. Co., 691 P.2d 970, 971 (Wash. Ct. App. 1984).

297. *Contra* Caulk v. Orange Cnty., 661 So. 2d 932, 933-34 (Fla. Dist. Ct. App. 1995).

298. Tarlock, *supra* note 9, at 810.

299. *See id.* at 811.

300. *Id.* at 811-12.

301. 579 A.2d 288, 295 (N.J. 1990).

equitable servitudes.[302] In other words, the court enforced the covenant at issue because it was reasonable in scope *and* it touched and concerned the land.[303] Many states have gone so far as to codify the underlying function served by the doctrine by statutorily prohibiting the running of covenants in gross.[304] In sum, while its application has been messy, touch and concern remains a viable doctrine and one that constitutes sound judicial policy.

CONCLUSION

With its decision in *Bernard Court, LLC v. Walmart, Inc.*, the Arkansas Court of Appeals has imparted additional uncertainty onto an already opaque corner of the law. The touch-and-concern doctrine is not dead, however, as the court's holding failed to accord with relevant precedent from the Arkansas Supreme Court. If presented with another apposite case, the supreme court should resolve this incongruity by reaffirming the existence of touch and concern under Arkansas law and the protections the doctrine provides to landowners in the state. Alternatively, the General Assembly should follow the lead of other states by codifying the function embodied by the rule.

Ultimately, touch and concern recognizes that "[l]and is altogether different."[305] It is a static, finite commodity of which future generations will assume control.[306] As ownership of this permanent resource is a keystone right that is interwoven with the American identity,[307] the law responds by "order[ing] property in response to societal needs."[308] In this vein, the touch-and-concern

302. 390 N.E.2d 243, 246, 250 (Mass. 1979).

303. *Id.* at 250 ("[A]n enforceable covenant will be one which is consistent with a reasonable overall purpose to develop real estate for commercial use. In addition, the ordinary requirements for creation and enforcement of real covenants must be met.").

304. *See, e.g.*, MONT. CODE ANN. § 70-17-203 (2011); N.D. CENT. CODE § 47-04-26 (1943); S.D. CODIFIED LAWS § 43-12-2 (1939); CAL. CIV. CODE § 1462 (West 1872). These statutes all require that a covenant directly benefit property.

305. Korngold, *supra* note 268, at 1528.

306. *Id.* at 1529.

307. Carol M. Rose, *Property as the Keystone Right?*, 71 NOTRE DAME L. REV. 329, 333 (1996); Korngold, *supra* note 268, at 1535-36.

308. Abraham Bell & Gideon Parchomovsky, *A Theory of Property*, 90 CORNELL L. REV. 531, 547 (2005).

doctrine ensures that the personal promises of generations past do not linger to infringe on the individual liberties of subsequent owners and their concomitant ability to meet the demands of an inexorably changing world.[309] To be sure, touch and concern poses no real barrier to the vast majority of covenants that landowners create.[310] It merely serves as a bulwark against the dangers that property law has evolved to guard against.

309. *Mixed Blessings*, *supra* note 119, at 87; Korngold, *supra* note 268, at 1540-41.
310. *Servitude Restrictions*, *supra* note 274, at 649.