ARTICLES

"OUT OF TOUCH:" THE DIMINISHED VIABILITY OF THE TOUCH AND CONCERN REQUIREMENT IN THE LAW OF SERVITUDES

*by Paula A. Franzese**

In the law of real property, the term "servitude" refers rather generically to any privately created, nonpossessory interest in the land of another, which binds successive owners or occupiers.[1] This somewhat simple construct, however, belies the infamous complexity and analytical confusion to typically attend application of the various species of servitudes,[2] principally,[3] the

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[1] *See, e.g.*, R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, THE LAW OF PROPERTY § 8.1, at 435 (1984); J. DUKEMINIER & J. KRIER, PROPERTY 825 (2d ed. 1988); 2 THOMPSON ON REAL PROPERTY § 315, at 2-14 (1980); Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1181 (1982).

[2] *See, e.g.*, E. RABIN, FUNDAMENTALS OF REAL PROPERTY LAW 480 (2d ed. 1982) (deeming servitudes law "an unspeakable quagmire"); French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982) (describing the law of servitudes as "the most complex and archaic body of American law remaining in the twentieth century."); Reichman, *supra* note 1, at 1179 (servitudes law "remains a murky subject burdened with obsolete forms and rules that have caused confusion and uncertainty"); *see also* J. DUKEMINIER & J. KRIER, *supra* note 1, at 826 ("[I]t is far easier to understand this disorderly law from the perspective of history than as a logical system.").

[3] The law of servitudes includes two minor forms: the license and the profit. Typically, the license is a freely revocable entitlement to enter the land of another for some limited purpose. *See* RESTATEMENT OF PROPERTY § 512 (1944). The profit permits one to remove from another's land those resources, such as timber and minerals, deemed a natural incident of the land. *See* RESTATEMENT OF PROPERTY § 450, special note (1944). In the United States, profits are subject to the same rules as easements. *Id.*

easement,[4] the real covenant[5] and the equitable servitude.[6] The evolution and present-day construction of the so-called touch and concern requirement,[7] long a classic prerequisite to a given covenant's enforceability by and against successors,[8] offers a ready illustration of this antiquated quagmire.

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[4] The RESTATEMENT OF PROPERTY § 450 (1936) defines the easement as follows:

> § 450 Easement
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> An easement is an interest in land in the possession of another which
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> (a) entitles the owner of such interest to a limited use or enjoyment of the land in which the interest exists;
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> (b) entitles him to protection as against third persons from interference in such use or enjoyment;
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> (c) is not subject to the will of the possessor of the land;
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> (d) is not a normal incident of the possession of any land possessed by the owner of the interest, and
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> (e) is capable of creation by conveyance.

Id.

[5] The real covenant is a promise pertaining to land use that is enforceable as a matter of law, in a suit for damages. *See* O. BROWDER, R. CUNNINGHAM & A. SMITH, BASIC PROPERTY LAW 610 (4th ed. 1984). If certain requirements are satisfied, the covenant is enforceable by or against successors to the originally contracting parties. *See* R. MEGARRY & H. WADE, THE LAW OF REAL PROPERTY 764-67 (5th ed. 1984); 5 R. POWELL, THE LAW OF REAL PROPERTY, §§ 670-79 (P. Rohan, rev. ed. 1990); *See infra* notes 15-54 and accompanying text.

[6] According to the *Restatement of Property*, the equitable servitude results "solely from the enforceability in equity of a promise respecting the use of land." RESTATEMENT OF PROPERTY § 539 (1944). The promise may not satisfy all of the stringent prerequisites to enforceability as a real covenant (typically, the requisite privity is absent), but nonetheless, under certain circumstances, may be upheld in a court of equity, where injunctive relief would be decreed. As a matter of fundamental fairness, the equitable servitude could bind successors who took with notice. The doctrine was created in the celebrated case of Tulk v. Moxhay, 41 Eng. Rep. 1143 (Ch. 1848). *See* 2 AMERICAN LAW OF PROPERTY § 9.26 (A. Casner 1952); C. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH RUN WITH THE LAND 171-72 (2d ed. 1947); 3 H. TIFFANY, REAL PROPERTY § 861, at 489 (3d ed. 1939); Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 217 (1970); McLoone, *Equitable Servitudes - A Recent Case and Its Implications for the Enforcement of Covenants Not to Compete*, 9 ARIZ. L. REV. 441 (1968). As a general matter, it has been aptly observed that "[n]otoriously vague boundary lines" separate the three categories of servitudes. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 883 (1988).

[7] *See generally* C. CLARK, *supra* note 6, at 99 (to touch and concern, promise must be "intimately bound up with the land"); RESTATEMENT OF PROPERTY § 537 (1944) (promise must affect physical use or enjoyment of the property); *see infra* notes 5-50 and accompanying text.

[8] *Spencer's Case*, 77 Eng. Rep. 72 (Q.B. 1583) (covenant concerning land use will not be enforceable against successors unless requisite intent is present and promise touches and concerns the land); McLoone, *supra* note 6, at 447 (touch and concern test explicitly or implicitly applies to all servitudes, insofar as "any restrictive easement necessitates some relation between the restriction and the land itself"); *see infra* notes 5-50 and accompanying text.

As a general matter, the value of any given servitude resides primarily in its ability to bind successors, thereby enduring changes in ownership without the need for renegotiation or assignment.[9] This permanence, which facilitates interests of certainty and stability, also inspired considerable judicial ambivalence.[10] Servitudes can hinder free alienability of land, distort development or unduly cloud title. In part, these risks prompted nineteenth century English courts to create a series of confining prerequisites to the particular covenant's ability to bind successors,[11] including bewildering rules about privity[12] and touching and concerning the land.[13] American courts modified some of the English doctrine, but retained a host of restrictions that, at least in theory and in rhetoric, valued unencumbered marketability of land more than private land use restrictions.[14]

Thus, in the morass of servitudes law, it has been axiomatic

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9 French, *Design Proposal for the New Restatement of Property - Servitudes*, 21 U.C. DAVIS L. REV. 1213, 1215 (1988). *See also* Berger, *supra* note 6, at 168 ("It was early apparent that unless agreements . . . respecting the use of land were binding not only upon the promisor . . . who entered into them but also upon purchasers from him, such undertakings would be worthless, since otherwise they could be avoided by a mere transfer to a third party.").

10 For a concise and compelling discussion of the law of servitudes' historical development, see Reichman, *supra* note 1, at 1184-90; French, *supra* note 9, at 1214-21.

11 *See* Reichman, *supra* note 1, at 1189-90 ("English courts feared that recognition of new types of servitudes would result in a heavy encumbrance of titles, which in turn would impede assignability."); French, *supra* note 9, at 1215 (in part because of various economic and social risks, and "[i]n part . . . because of an inadequate public land records system in England, nineteenth century courts responded ambivalently toward servitudes"); *see generally* R. MEGARRY & H. WADE, *supra* note 5, at 725; Comment, *Real Covenants in Restraint of Trade - When Do They Run With the Land?*, 20 ALA. L. REV. 114, 115 (1967) (English courts sought "to effectuate a policy against encumbrances on land use by limiting and discouraging covenants running with land").

12 For the burden of a covenant to bind successors, there must be "privity," in other words, some legally meaningful relationship between the originally contracting parties ("horizontal privity") as well as between the original promisor or promisee and his successor in interest ("vertical privity"). *See* RESTATEMENT OF PROPERTY § 534 (1944) (horizontal privity); *id.* at § 535 (vertical privity); *infra* note 31 and accompanying text. Privity of estate is not a prerequisite to the equitable servitude's enforceability by and against successors. *Id.* at § 539 comment i.

13 The celebrated *Spencer's Case* first articulated in *dicta* the rule that a covenant cannot run with the land at law or in equity unless it touches and concerns the land. *Spencer's* Case, 77 Eng. Rep. 72 (Q.B. 1583) (to run, covenant must "touch or concern the thing demised"). *See infra* notes 14-47 and accompanying text.

14 *See* French, *supra* note 9, at 1216 (American courts recognized the need for enforceable land use agreements, but "maintained a facade of restrictive rules and grudging rhetoric").

that a promise or covenant[15] respecting real property will not "run with the land"[16] at law or in equity, *i.e.*, it will not bind successors in interest, unless it touches and concerns the land.[17] This rule, firmly rooted for centuries,[18] is applicable to real covenants as well as to equitable servitudes.[19] Today, in most jurisdictions, the requirement is deemed satisfied if the value of the given party's legal interest in land is affected by the covenant's performance.[20] In the parlance of real covenant analysis, the doctrine requires that the "benefit" and the "burden"[21] of the

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15 In this setting, the words "promise" and "covenant" are used interchangeably.

16 *See generally* Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 353-54 ("[W]hen it is said that the benefit runs to a new owner or possessor, it means that that new party can enforce the servitude even though he has received no express agreement that he may. Likewise, when it is said that the burden runs to the new owner or possessor, it means that he is bound to obey or perform the servitude just as if he had expressly agreed to do so.").

17 As construed in *Spencer's Case*:

> [I]f the thing to be done be merely collateral to the land, and doth not touch and concern the thing demised in any sort, there the assignee shall not be charged. As if the lessee covenants for him and his assignees to build a house upon the land of the lessor which is no parcel of the demise, or to pay any collateral sum to the lessor, or to a stranger, it shall not bind the assignee, because it is merely collateral, in no manner touches or concerns the thing that was demised, or that is assigned over, and therefore in such case the assignee of the thing demised cannot be charged with it, no more than any other stranger.

Spencer's Case, 77 Eng. Rep. 72, 74 (Q.B. 1583). *See supra* notes 14-16 and *infra* notes 18-47 and accompanying text.

18 *See supra* notes 13-17 and *infra* notes 19-50 and accompanying text.

19 *See generally* Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 927 n.16 (touch and concern requirement pertains to real covenants and to equitable servitudes).

20 R. POWELL, *supra* note 5, at § 673[2] ("The majority of courts and writers now accept the test for the 'touching and concerning of covenants' proposed by Dean Harry Bigelow." (citations omitted)); Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645-46 (1914) (covenant's benefit touches and concerns when it renders promisee's interest in land more valuable; attendantly, covenant's burden touches and concerns when promisor's interest in land is rendered less valuable as a consequence of covenant's performance); *cf.* C. CLARK, *supra* note 6, at 99 (to touch and concern, promise must be "intimately bound up with the land"); RESTATEMENT OF PROPERTY § 537 (1944) (promise must affect physical use or enjoyment of the property); Stake, *supra* note 19 (suggesting efficiency justification for touch and concern requirement); Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 661 (1985) (advocating retention of some formulation of touch and concern doctrine, as "modest check against externalities, inadequate foresight and intergenerational imposition").

21 The "benefit" of the covenant denotes the promisee's rights and entitlements. The promisor's duties are known as the "burden." *See* R. POWELL, *supra* note 5, at § 673[2] n.30.

given promise be analyzed separately.[22]

Accordingly, the benefit of a covenant will not run unless it touches and concerns the land,[23] a condition typically construed to require that the covenant's performance render the promisee's interest in land more valuable.[24] The rule is sometimes expressed as satisfied if the covenant confers "a direct benefit on the owner of land by reason of his ownership,"[25] or if, in layperson's sensibilities, the given promise would be viewed as aiding "the promisee as landowner."[26] Attendantly, the burden of a covenant will not bind successors unless it too touches and concerns the land.[27] This is generally interpreted to mean that the covenant's performance renders the promisor's interest in land less valuable.[28] If the standard is satisfied as to both the benefit and the burden, and if the requisite intent,[29] notice[30] and privity[31] are established, the covenant is enforceable against

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22 2 AMERICAN LAW OF PROPERTY § 9.13, at 374 (A. Casner ed. 1952); Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 874 (1977); Note, *Covenants Running With the Land: Viable Doctrine or Common-Law Relic?*, 7 HOFSTRA L. REV. 139, 142 (1978).

23 *See* R. BOYER, SURVEY OF THE LAW OF PROPERTY 516 (3d ed. 1981).

24 Bigelow, *supra* note 20, at 645; *see supra* note 20 and accompanying text.

25 National Bank at Dover v. Segur, 39 N.J.L. 173, 186 (Sup. Ct. 1877).

26 C. CLARK, *supra* note 6, at 99.

27 *Id.* at 111.

28 *See* Bigelow, *supra* note 20, at 645; *see, e.g.*, Dick v. Sears Roebuck & Co., 115 Conn. 122, 160 A. 432 (1932) (burden of anticompetition covenant touched and concerned when it restrained "use to which the land may be put in the future as well as in the present, and which might very likely affect its value"); Singer v. Wong, 35 Conn. Supp. 640, 404 A.2d 124 (1978) (restrictive covenant to materially influence value of parcel satisfies touch and concern test).

29 The covenanting parties must intend that their promise bind successors in interest. The requisite intent may be gleaned from express language such as, "[p]romisor hereby covenants, on behalf of himself, his successors and assigns. . . ." However, in many instances, the parties fail to specify explicitly whether or not they intend the covenant to run. *See* Berger, *supra* note 6, at 173-79. In the absence of express stipulation, courts typically will impute the requisite intent, so long as to do so seems reasonably consistent with the parties' general understanding. *See* Berger, *Integration of the Law of Easements, Real Covenants and Equitable Servitudes*, 43 WASH. & LEE L. REV. 337, 359 (1986). *But see* Note, *supra* note 22, at 156 n. 105 (noting that successor must be expressly bound in at least six jurisdictions: Georgia, Texas, California, Montana, North Dakota and South Dakota).

30 To be bound, *bona fide* purchasers of the burdened parcel must have had notice of the encumbrance. R. POWELL, *supra* note 5, at § 673[2][d]; Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 901 (1977). Notice may be actual or constructive, with constructive notice imputed as a consequence of proper recordation of the covenant (record notice) or as a result of the "lay of the land" or such other factors as would lead a reasonable person to conduct an investigation which would reveal the restriction (inquiry notice). R. POWELL, *supra* note 5, at § 673[2][d].

31 In order for the burden of the covenant to run to successors, horizontal as

assignees.[32]

The touch and concern requirement yielded anomalous results in the early American jurisprudence pertaining to covenants not to compete.[33] Judicial hostility towards encumbrances on unfettered marketability and free trade[34] sometimes precipitated the conclusion that agreements restricting competition do not touch and concern the land.[35] A number of cases, including,

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well as vertical privity is required. Broadly stated, horizontal privity depends on the existence of either a succession of estate between the original covenanting parties or some "mutual and simultaneous" interest other than the covenant itself that is shared by them. *See* R. POWELL, *supra* note 5, at § 673[2][c] n.113 (noting that most jurisdictions endorse succession of estate interpretation, requiring that deed between promisor and promisee, transferring title to affected land, recite the covenant); Shade v. M. O'Keeffe, Inc., 260 Mass. 180, 156 N.E. 867 (1927) (espousing so-called "Massachusetts rule," requiring that parties share some other "mutual and simultaneous interest," such as an easement in the same parcel); RESTATEMENT OF PROPERTY § 534 (1944) (attempting to synthesize two views by concluding that horizontal privity contemplates *either* a mutual *or* successive relationship between promisor and promisee). Vertical privity requires privity of estate between one of the originally covenanting parties and a party to the lawsuit, and is present if, for example, the successor received title to the affected parcel by *inter vivos* transfer or devise. *See* 2 AMERICAN LAW OF PROPERTY § 9.18 (A. Casner ed. 1952); J. DUKEMINIER & J. KRIER, *supra* note 1, at 894-95; RESTATEMENT OF PROPERTY, §§ 530, 541 (1944). The benefit of the covenant will run so long as there is vertical privity. The *Restatement of Property* declares, with some authority, that horizontal privity is not required for the benefit to run. RESTATEMENT OF PROPERTY § 548 (1944). *See generally* C. CLARK, *supra* note 6, at 94, 95 (elaborating on technical requirements necessary for covenant to run with land); R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 1, at § 8.18 (discussing horizontal privity requirement as applied to real covenants); R. POWELL, *supra* note 5, at § 673[2][c] (noting confusion in many jurisdictions as to what type of privity is required).

[32] *See* R. POWELL, *supra* note 5, at § 673.

[33] In the land transactions setting, covenants not to compete may arise as follows:

> When A conveys Blackacre to B, A may wish to protect, against B's competition, a business conducted by A on retained land adjacent to Blackacre. Similarly, B may wish to protect, against A's competiton, a business B proposes to conduct on Blackacre. Anticompetitive covenants purport to restrict the way in which the covenantor might otherwise use the burdened land.

R. POWELL, *supra* note 5, at § 675[3][b] (citations omitted).

[34] *See infra* notes 40-42 and accompanying text. Noncompetition covenants were thought to promote monopolistic practices while impeding alienability. The early American judicial ambivalence, if not disdain, towards anticompetition covenants is traceable to the English common law. *See, e.g.*, Thomas v. Hayward, 4 Exch. 311 (1869) (holding that benefit of covenant not to compete would not run to promisee's assignee, insofar as covenant relates not to land, but to manner in which land could be occupied); *cf.* Norman v. Wells, 17 Wend. 136 (1837) (on similar facts, court found in favor of assignee).

[35] *See, e.g.*, Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885) (Holmes, J.) (covenant not to operate quarry does not touch and concern, since it does not benefit the land, but rather confers a personal benefit); Shade v. M. O'Keefe, Inc., 260

quite notably, those decided by New Jersey courts,[36] insisted that as to the burdened estate, the requirement was satisfied only if the given covenant affected the physical use of the land itself,[37] thereby "exercising direct influence on the occupation, use or enjoyment of the premises."[38] Noncompetition covenants were thought to impinge upon the promisor's financial or business concerns, but not his or her land.[39]

In New Jersey's early common law, then, a promise prohibiting business competition was deemed to enhance the value of the benefitted parcel; hence, as to the covenantee's interest, the touch and concern requirement would be met.[40] By contrast, the burden of such a promise was considered personal to the covenantor.[41] Thus, it would not, in literal understanding, touch and

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Mass. 180, 156 N.E. 867 (1927) (covenant prohibiting operation of grocery business fails to satisfy touch and concern standard); Brewer v. Marshall & Cheeseman, 10 N.J. Eq. 537 (N.J. 1868) (covenant prohibiting grantor from selling marl on retained parcel does not touch and concern burdened estate), *overruled by* Davidson Bros. v. Katz, 121 N.J. 196, 579 A.2d 288 (1990); Tardy v. Creasy, 81 Va. 553, 59 Am. Rep. 676 (1886) (deeming unenforceable a covenant precluding use of land for most commercial purposes), *overruled by* Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1 (1950); Shell Oil Co. v. Henry Ouellette & Sons Co., 352 Mass. 725, 227 N.E.2d 509 (1967) (covenant not to operate gasoline service station unenforceable at law), *overruled by* Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979); Savings, Inc. v. City of Blytheville, 240 Ark. 588, 401 S.W.2d 26 (1966) (covenant not to compete contained in lease agreement); Clear Lake City Water Auth. v. Clear Lake Utilities Co., 549 S.W.2d 385 (Tex. 1977) (covenant obliging landowner to confer exclusive franchise right to utility company held unenforceable, insofar as promise does not affect the use of land); RESTATEMENT OF PROPERTY § 537; *see generally* Bialkin & Bohannan, *Covenants Not to Establish a Competing Business - Does the Benefit Pass?*, 41 VA. L. REV. 675 (1955) (noting certain courts' use of touch and concern rule to invalidate covenants to convey "personal" commercial benefit).

[36] *See, e.g.*, Brewer v. Marshall & Cheeseman, 10 N.J. Eq. 537 (N.J. 1868); National Union Bank v. Segur, 39 N.J.L. 173, 186 (N.J. 1877); Alexander's Dep't Store v. Arnold Constable Corp., 105 N.J. Super. 14, 250 A.2d 792 (Ch. Div. 1969); *see infra* notes 53-73 and accompanying text.

[37] *See supra* note 20 and accompanying text; R. POWELL, *supra* note 5, at § 675[3][b].

[38] Stanley Stillwell & Sons v. Caullett, 67 N.J. Super. 111, 116, 170 A.2d 52, 54 (App. Div. 1961).

[39] *Id. See infra* note 41 and accompanying text.

[40] *See, e.g.*, National Bank at Dover v. Segur, 39 N.J.L. 173 (N.J. 1877) (only benefit of covenant not to compete runs with the land, as burden is personal to promisor).

[41] *Id. See also* RESTATEMENT OF PROPERTY §§ 543 comment e, 537 comment f (while benefit of covenant not to compete will run with promisee's land, burden is personal to the promisor, and will not bind promisor's successors). The benefit of a given covenant is personal when transfer of property by the benefitted party does not automatically confer upon the new owner or possessor entitlement to enforce the promise. Attendantly, a burden is personal when transfer by the burdened party does not automatically bind the transferee. *See generally* Berger, *Integration of*

concern the land,[42] and therefore could not bind successors, no matter that the original parties may have intended a contrary result.[43]

So rigid an interpretation effectively displaces bargained-for duties and entitlements[44] while stifling "any possibility of covenants relating to competition."[45] Moreover, it misguidedly, if not naively, suggests that one's fiscal interests exist wholly separate and apart from one's ownership interests, use and enjoy-

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the Law of Easements, Real Covenants and Equitable Servitudes, 43 WASH. & LEE L. REV. 337, 354 (noting that the question in real covenant or equitable servitude law of whether the "benefit runs with the land or is personal" is referred to in easement law as whether the easement is "appurtenant or in gross").

42 Similarly, covenants to pay money were traditionally deemed not to satisfy the touch and concern requirement. Over time, some courts, confronted with attempts to enforce against successors such promises to pay money, strained to devise increasingly liberal interpretations of the requirement that the covenant be "of and pertaining to" the land. For instance, in an oft-noted case, the New York Court of Appeals ruled that the test for ascertaining if a covenant to pay money touches and concerns is whether the promise alters the parties' legal relations as landowners. If the promisor's interest suffers a diminution in value as a consequence of the covenant, the burden touches the promisor's land. If the value of the promisee's interest is enhanced, the benefit touches and concerns the promisee's land. Thus, a covenant obliging homeowners to contribute sums into a common fund used for the maintenance of community roads, parks and other public places could satisfy the test, binding subsequent purchasers who took with notice. This sort of formulation does little to allay concerns of predictability and certainty, however, insofar as it fails to indicate which promises *do* touch and concern the land. Moreover, the standard itself is rather hollow, if not circular. If the given covenant affects the parties' legal entitlements as landowners, it touches and concerns. Conversely, the covenant touches and concerns if and when it affects the parties' legal relations. *Neponsit Property Owners' Assoc., Inc. v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 15 N.E. 2d 793 (1938).

43 For a recitation of various competing views on the propriety of judicial refusal to permit certain land use obligations to bind successors, compare Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358-60 (1982) (maintaining that economic or fundamental liberty justifications are inadequate to legitimize court-imposed restrictions on contractual freedom to create binding servitudes) with Reichman, *Judicial Supervision of Servitudes*, 7 J. LEGAL STUD. 139 (1978) and Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985) (arguing that existing restrictions safeguard against economic inefficiencies and compromise of personal liberties).

44 Attendantly, judicial refusal to permit anticompetition covenants to bind successors works unjust enrichment.

> To obtain a promise not to compete, the promisee-grantee must pay the promisor-grantor a greater consideration than if he purchased the land without such a promise. If the promisor is allowed to remove the effect of the covenant by a mere transfer of the servient tenement, he, in effect, has given nothing in return for the price of the promise.

McLoone, *supra* note 6, at 449-50 (citations omitted).

45 R. POWELL, *supra* note 5, at § 675[3][b].

ment of his or her land.[46] Most fundamentally, it misuses the touch and concern requirement as a means to avoid covenants thought to restrain trade. At bottom, thinly disguised public policy concerns (and not some failure of the covenant to touch and concern the burdened parcel), oftentimes precluded the burden of an anticompetition covenant from running.[47]

In an attempt to vindicate reasonable expectation and reliance interests while accommodating the realities of present-day land conveyancing, modern courts to address the matter within the confines of traditional real covenant analysis have concluded that both the benefit and the burden of noncompetition covenants are capable of touching and concerning the land.[48] Most other cases have departed from strict touch and concern formulations,[49] holding instead that reasonable anticompetition covenants binding on the originally contracting parties likewise bind successors who take with notice.[50] In a bold and recent departure from its own firmly rooted precedent, the New Jersey

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[46] A similar point is made in the context of criticizing the conclusion, reached in Norcross v. James, 140 Mass. 188, 2 N.E. 946 (1885), and its progeny, that the benefit of a noncompetition covenant confers a financial advantage alone. *See* McLoone, *supra* note 6, at 449, where the author notes:

> It is naive to hold that financial values are totally divorced from one's use and enjoyment of his land. But the *Norcross* rationale purports to do just that. It ignores the fact that if one's business can be operated at a greater profit because the adjoining landowner is precluded from engaging in a similar type of business, then the market value of the land for business purposes has been enhanced.

Id.

[47] *See infra* notes 63-68 and accompanying text.

[48] *See, e.g.*, Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E.2d 128 (1955) (covenant restraining manufacture of pulpwood); Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1 (1950) (covenant prohibiting operation of grocery store); Singer v. Wong, 35 Conn. Supp. 640, 404 A.2d 124 (1978) (covenant forbidding use as shopping center); Whitinsville Plaza, Inc. v. Kotseas, 390 N.E.2d 243 (Mass. 1978) (covenant not to operate specified retail enterprises); *see generally* McLoone, *supra* note 6, at 442-43 and cases cited therein (noting that "the great majority of jurisdictions enforce as an equitable servitude both the benefit and the burden of a covenant restricting business uses by and against those who succeed to the estates of the original covenantee and covenantor with notice of the restriction); *see also* C. CLARK, *supra* note 6, at 106; R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 1, at 474-75; R. POWELL, *supra* note 5, at § 675[3][b].

[49] *See, e.g.*, Doo v. Packwood, 71 Cal. Rptr. 477, 265 Cal. App. 2d 752 (Dist. Ct. App. 1968) (covenant not to sell groceries on conveyed parcel); Hall v. Amercian Oil Co., 504 S.W.2d 313 (Mo. Ct. App. 1973) (covenant to refrain from operating automobile service station); Quadro Stations Inc. v. Gilley, 7 N.C. App. 227, 172 S.E.2d 237 (1970) (covenant not to sell or advertise petroleum related products); Hercules Powder Co. v. Continental Can Co., 196 Va. 935, 86 S.E.2d 128 (1955) (covenant not to operate a manufacturing plant).

[50] *Id.* The proposed *Restatement (Third) of Property* aims to replace, if not elimi-

Supreme Court has merged aspects of each of these approaches, retaining the touch and concern test while crafting an elaborate standard of "reasonableness" for determining whether a given restrictive covenant runs to successors.[51]

Cutting "the gordian knot" which had bound New Jersey's jurisprudence respecting covenants running with the land, *Davidson Bros. v. Katz*[52] overrules outmoded decisional authority which had insisted that the burden of a covenant not to compete is personal and does not touch and concern the land.[53] Rather than conclude its analysis there, however, the court holds that the touch and concern criterion is now but one in a series of extensive factors to be applied in determining whether the noncompetition covenant is reasonable, and therefore, able to bind successors.[54] The contours and propriety of this approach will be explored in the materials that follow.

COMMON LAW ANTECEDENTS: NEW JERSEY CASELAW

Historically, anticompetition covenants were not easily accommodated within the confines of the New Jersey courts' strict touch and concern analysis. New Jersey's rigid adherence to its own variant of the touch and concern requirement is readily reflected in *Brewer v. Marshall & Cheeseman*,[55] where the state's Court of Errors and Appeals[56] emphatically declared that the

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nate, the touch and concern restriction. Professor Susan French, as Reporter acting under express commission of the American Law Institute, has noted:

> The American Law Institute's new servitudes restatement project is designed to shake servitudes law free from the old controls and forms. . . .The touch and concern doctrine provides a prime example. It identifies neither the problems addressed nor the value choices that must be made in determining whether to apply it.

French, *Servitude Reform and the New Restatement of the Law of Property*, 73 CORNELL L. REV. 928, 930 (1988); *accord* French, *supra* note 2; *see also* Epstein, *supra* note 43, at 1358-60 (urging abolition of touch and concern doctrine, insofar as insistence on requirement "denies the original parties their contractual freedom by subordinating their desires to the interests of future third parties, who by definition have no proprietary claim to the subject property"). *But see* Reichman, *supra* note 1, at 1233 (supporting retention of touch and concern requirement, insofar as rule preserves freedom of choice and protects private intentions).

51 Davidson Bros. v. Katz, 121 N.J. 196 579 A.2d 288 (1990)); *see infra* notes 55-117 and accompanying text.

52 121 N.J. 196, 579 A.2d 288 (1990).

53 *Id.* at 207, 210, 579 A.2d at 293, 295; *see infra* notes 55-72 and accompanying text.

54 *Id.* at 210, 579 A.2d at 295.

55 19 N.J. Eq. 537 (N.J. 1868).

56 The Court of Errors and Appeals served as New Jersey's high court until 1947, when the state ratified its present constitution. *See* B. RICH, THE GOVERN-

burden of a covenant will not run with the land unless it quite literally affects the physical use of the parcel.[57] There, the court refused to enforce against successors in interest the burden of a promise not to compete,[58] ruling that the burden of such a covenant is personal to the promisor.[59] Significantly, the court proceeded to declare that noncompetition covenants are impermissible restraints on trade and illegal *per se*, "absolutely void" as a matter of public policy.[60]

Several years later, in *National Bank at Dover v. Segur*,[61] the court ruled that the benefit of a covenant to refrain from competitive land practices does touch and concern the promisee's land.[62] The court explained that "[a] covenant touches and concerns land when its performance confers a direct benefit on the owner of land by reason of his ownership; and tested by such a definition, the covenant sued on clearly has such a capacity."[63] Nonetheless, the court confirmed its position that the burden of a noncompetition covenant is personal to the promisor, and does not touch and concern the land.[64] Hence, the burden of the promise would not run.[65]

This insistence is traceable in considerable part to the historical judicial distaste for restraints on alienation.[66] As an encumbrance on the title to a given parcel of land, a restrictive covenant could hamper alienability.[67] While this concern was shared by other jurisdictions of the day,[68] relative to other state court inter-

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MENT AND ADMINISTRATION OF NEW JERSEY (1957); G. TARR & M. PORTER, STATE SUPREME COURTS IN STATE AND NATION 188-89 (1988).

57 *Brewer*, 19 N.J. Eq. at 545.

58 *Id.* At issue in *Brewer* was whether the burden of a restrictive covenant precluding a real estate vendor from selling "marl" on the parcel of land adjoining the tract conveyed to vendor's purchaser was enforceable against that purchaser. *Id.*

59 *Id. See supra* notes 36-47 and accompanying text.

60 *Brewer*, 19 N.J. Eq. at 546. *See supra* notes 42-47 and accompanying text.

61 39 N.J.L. 173 (Sup. Ct. 1877).

62 *Id.* at 186.

63 *Id.*

64 In *National Bank*, the plaintiff sought to enforce against the promisor's successor a covenant not to engage in the banking business. *Id.* at 173-74.

65 *Id.* at 181.

66 *See supra* notes 33-36 and accompanying text. As a general matter, the covenant not to compete, unrelated to some "legitimate transaction," is viewed as contrary to public policy and presumptively unlawful, insofar as it is "inimical to the interests of society in a free competitive market and to the interests of the person restrained in earning a livelihood." J. CALAMARI & J. PERILLO, CONTRACTS §§ 16-19, at 683 (3d ed. 1987) (citations omitted).

67 *See* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 1, § 2.2, at 35.

68 *See supra* note 34 and accompanying text.

pretations both *Brewer* and *National Bank* embraced a noticeably uncompromising and prosaic vision of the touch and concern requirement as it pertained to covenants not to compete.[69]

The New Jersey courts' wholesale refusal to permit enforcement of anticompetition covenants against the promisor's successors was relaxed, if not ignored, in subsequent lower court rulings.[70] Still, the rule remained that the covenant had to "exercise direct influence on the occupation, use or enjoyment of the premises"[71] before it could bind successors, and that the burden of a promise not to compete fails to satisfy this standard.[72] Meanwhile, most jurisdictions had steadily liberalized the touch and concern requirement, lifting wholesale prohibitions on the running at law of the burden of noncompetition covenants.[73] More than a decade ago, facts began to unfold which ultimately would present the New Jersey Supreme Court with a meaningful opportunity to re-examine and then refashion the state's touch and concern doctrine.

NEW JERSEY'S RE-EMERGENCE: *DAVIDSON BROS. V. KATZ*

Salient Facts

In September of 1980, plaintiff Davidson Bros. closed one of two supermarkets which it had been operating within the city of

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69 *See generally* R. POWELL, *supra* note 5, at § 675[3][b] (both cases reflect an "unnecessarily strict" position). Other courts would find the requirement satisfied by deeming the given restriction a regulation of the burdened land's potential uses. *See, e.g.*, Dick v. Sears-Roebuck & Co., 115 Conn. 122, 160 A. 432 (1932); Natural Products Co. v. Dolese & Shepard Co., 309 Ill. 239, 140 N.E. 840 (1923); *see* R. CUNNINGHAM, W. STOEBUCK & D. WHITMAN, *supra* note 1, § 8.15, at 471. A restrictive covenant would run with the land if it produced a benefit for the promisee's land, thereby justifying the burden placed on the use of the promisor's parcel. Reichman, *supra* note 1, at 1229.

70 *See, e.g.*, Alexander's v. Arnold Constable Corp., 105 N.J. Super. 14, 28, 250 A.2d 792, 799 (Ch. Div. 1969) (enforcing against successor a promise made by predecessors not to operate department store); Renee Cleaners, Inc. v. Good Deal Supermarkets, 89 N.J. Super. 186, 195-96, 214 A.2d 437, 442-43 (App. Div. 1965) (enforcing against subsequent purchaser promise not to lease property for dry-cleaning business.) *But see* Caullett v. Stanley Stillwell & Sons, 67 N.J. Super. 111, 116, 170 A.2d 52, 54-55 (App. Div. 1961) (restrictive covenants must touch and concern burdened and benefitted parcel in order to run with land).

71 *Caullett*, 67 N.J. Super. at 116, 170 A.2d at 54-55.

72 *See supra* notes 33-39 and accompanying text.

73 *See, e.g.*, Oliver v. Hewitt, 191 Va. 163, 60 S.E.2d 1 (1950) (overruling Tardy v. Creasy, 81 Va. 553 (1886)); Whitinsville Plaza, Inc. v. Kotseas, 378 Mass. 85, 390 N.E.2d 243 (1979) (overruling Shell Oil Co. v. Henry Ouellette & Sons Co., 352 Mass. 725, 227 N.E.2d 509 (1967)); *see supra* notes 48-49 and accompanying text.

New Brunswick.[74] According to Davidson, the store was closed because competition between the two enterprises had resulted in diminished profitability.[75] Davidson conveyed the property, located in an urban renewal area, to defendant D. Katz & Sons, Inc., by deeds[76] which contained a restrictive covenant precluding operation of a supermarket on the parcel for a period of forty years.[77] Subsequently, Davidson's remaining store allegedly enjoyed a twenty percent rise in sales and profitability.[78]

The sale to Katz, with its attendant restriction, purportedly caused hardship to area residents, who were relegated to shopping at local and considerably more expensive convenience stores or, alternatively, at Davidson's remaining supermarket, situated two miles away.[79] Acting on citizens' complaints, the New Brunswick Housing Authority endeavored to attract a new food outlet to the area in which Katz's burdened parcel was situated.[80] After entering into preliminary negotiations with a supermarket chain,[81] the Housing Authority purchased Katz's encumbered parcel for valuable consideration and with actual notice of the covenant not to compete.[82] C-Town, a division of the supermarket chain, then acquired at public auction a leasehold interest in the property.[83]

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74 Davidson Bros. v. Katz, 121 N.J. 196, 199, 579 A.2d 288, 289 (1990).

75 *Id.* The store had operated at a loss for nearly eight months. *Id.*

76 Davidson ostensibly shared an interest in the property with a related corporation, Irisondra, Inc. Plaintiff and Irisondra conveyed the property to defendant by separate deeds which contained the same restrictive covenant. *See id.*

77 The deeds from Davidson and from Irisondra contained the identical anticompetition covenant:

> The lands and premises described herein and conveyed hereby are conveyed subject to the restriction that said lands and premises shall not be used as and for a supermarket or grocery store of a supermarket type, however designated, for a period of forty (40) years from the date of this deed. This restriction shall be a covenant attached to and running with the lands.

Id.

78 *Id.*

79 *Id.* at 199-200, 579 A.2d at 289-90. Senior citizens and other residents of nearby housing units were forced to rely on public and other transportation to purchase food and related provisions from Davidson's remaining store. *Id.*

80 *Id.* at 200, 579 A.2d at 290.

81 *Id.* Representatives of the supermarket chain sought economic assistance from the City in developing the proposed store. *Id.*

82 *Id.* Indeed, the contract for sale executed by the Housing Authority explicitly referred to both the restrictive covenant and Davidson's intention to seek its enforcement. *Id.*

83 *Id.* After the Housing Authority purchased the burdened parcel from Katz, it "invited proposals for the lease of the property to use as a supermarket. C-Town was the only party to submit a proposal at a public auction." *Id.* The lease agree-

Thereafter, Davidson brought suit against C-Town, the City of New Brunswick and Katz, later amending its complaint to name the Housing Authority as an additional defendant.[84] Plaintiff sought, *inter alia*, a declaratory judgment that the restrictive covenant contained in its deed to Katz bound successors to the burdened estate.[85] In response to plaintiff's motion for summary judgment, defendants produced evidence probative of the need for a food retailer in the vicinity of the subject parcel.[86]

The Lower Courts' Rulings

The trial court, relying on *Brewer v. Marshall & Cheeseman*,[87] concluded in an unreported opinion that the anticompetition covenant failed to touch and concern the burdened parcel.[88] Hence, the burden did not run with the land to bind assignees.[89] Moreover, the trial court noted that established principles of public policy typically precluded the enforcement of restrictive covenants not to compete.[90] However, in denying plaintiff's motion for summary judgment, the court ruled that a factual hearing would be necessary to discern whether the instant covenant is reasonable and therefore comports with public policy.[91]

On appeal, the appellate division affirmed the trial court's ruling, yet rejected *Brewer*'s strict insistence that the burden of an anticompetition covenant cannot run with the land.[92] Instead,

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ment provisioned a term of five years at a rent of one dollar per year, contingent on the lessee's undertaking $10,000 in improvements to the premises. *Id.* Subsequently, this arrangement was challenged unsuccessfully as violative of the state constitutional prohibition on public gifts to private parties. *See infra* notes 85 and 91.

84 *Id.* at 200-01, 579 A.2d at 290.

85 *Id.* In a second count, Davidson sought an injunction preventing the leasing of the parcel on the rent-free basis as violative of the New Jersey Constitution's proscription on public gifts to private beneficiaries. *Id.* at 201, 579 A.2d at 290. *See* N.J. CONST. art. 8, § 3, paras. 2-3 (1947); *see infra* note 91.

86 *Davidson*, 121 N.J. at 201, 579 A.2d at 290. Defendants produced affidavits from the president of the local tenants' council, the Executive Director of the Housing Authority and the Director of the city's Department of Policy and Economic Development. *Id.*

87 Brewer v. Marshall & Cheeseman, 19 N.J. Eq. 537 (N.J. 1868).

88 *Davidson*, 121 N.J. at 201, 579 A.2d at 290.

89 *Id.*

90 *Id.*

91 *Id.* The trial court also rejected plaintiff's challenge to the lease agreement, finding that the lease advanced an appropriate "public purpose." *Id.* at 202, 579 A.2d at 290 (quoting Roe v. Kervick, 42 N.J. 191, 207, 199 A.2d 834, 842 (1964)).

92 *Davidson* , 121 N.J. at 202, 579 A.2d at 291. The appellate division stated that covenants not to compete could run with the land, and that the two miles separating the interests of the covenantee and the covenantor were not, *ipso facto*, a bar to

the court focused on whether the benefit of the covenant would run, irrespective of the burden's enforceability.[93] Questioning *Brewer's* applicability, the appellate division rather incongruously posited that the subsequent grantee of defendant Katz's burdened property was not bound by the restriction, because the benefit of the anticompetition covenant had failed to touch and concern the parcel retained by plaintiff Davidson.[94] Because the covenant merely restricted competition from one parcel within a two mile radius, the court concluded that the value of Davidson's estate was not enhanced sufficiently to satisfy the court's conception of the touch and concern standard.[95]

While the appellate division's ruling laudably moved beyond *Brewer*'s dubious confines, the court failed to delineate the contours of the new standard it seemingly attempted to set. Indeed, the court unnecessarily clouded its position on the touch and concern requirement with an unwarranted analysis of whether the benefit of Davidson's noncompetition covenant could run with the land.[96] Perhaps ironically, the appellate division's holding reflects the anachronism that *Brewer* and its progeny had come to typify in American common law. Against this troubled backdrop, the New Jersey Supreme Court granted certification.[97]

The New Jersey Supreme Court's Pronouncement

Writing for the majority of the court, Justice Garibaldi first examined the law of servitudes' historical and theoretical origins, noting the subsequent evolution, if not erosion, of many of these antecedents.[98] Finding no contemporary support for New Jersey's blanket prohibition on the enforcement against successors of covenants not to compete, the court overruled the princi-

enforcement. *Id.* Under the appellate division's approach, considerable spatial distance between the involved parcels is not a bar to a finding that the given noncompetition covenant touches and concerns the benefitted estate. *Id.*

93 *Id.*

94 *Id.*

95 *Id.* Curiously, the appellate division acknowledged that operation of a grocery store on the burdened parcel would affect adversely the profits reaped by Davidson's supermarket. *Id.*

96 The question of whether the benefit of the covenant ran was not before the court. Conceivably, that inquiry would have been germaine if Davidson had transferred his interest in the benefitted parcel by *inter vivos* conveyance, or if title to the land had passed from Davidson by devise or intestacy. Still, even if such a successor had brought suit, in the instant case the issue of whether the burden of the covenant ran would remain dispositive.

97 Davidson Bros. v. Katz, 113 N.J. 655, 552 A.2d 177 (1988).

98 *Davidson*, 121 N.J. at 203-05, 579 A.2d at 291-92.

ple, articulated in *Brewer*, that anticompetition covenants cannot "touch and concern" the promisor's interest as landowner.[99] Mindful of other jurisdictions' liberalizing interpretations,[100] the court discerned that the touch and concern rule was largely a juristic answer to the early public policy disfavoring restraints on the alienation of land.[101] That disdain has since yielded to the realities of modern-day land conveyancing.

Significantly, rather than discard the touch and concern requirement, the court deemed it one in a series of considerations now relevant to the determination of the aggregate reasonableness of the given covenant,[102] and hence, whether the covenant will bind successors. As crafted by the court, the reasonableness approach requires consideration of 1) the originally covenanting parties' intent; 2) the covenant's impact on the consideration exchanged at the time that the covenant was executed; 3) whether the covenant clearly recited the restrictions; 4) whether the covenant was reduced to writing and properly recorded; 5) whether the covenant's area, time or duration restrictions are reasonable; 6) whether the covenant works an unreasonable restraint on trade; 7) whether the covenant offends public policy imperatives and 8) whether the covenant, reasonable at the time it was executed, is now rendered unreasonable as a consequence of changed circumstances.[103]

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99 *Id.* at 205-07, 579 A.2d at 292-93. The majority noted that lower court decisions in New Jersey had ignored the wholesale restriction against anticompetition covenants' running with the land. *Id.* at 206, 579 A.2d at 293 (citing Renee Cleaners, Inc. v. Good Deal Supermarkets, 89 N.J. Super. 186. 214 A.2d 437 (App. Div. 1965); Alexander's v. Arnold Constable Corp., 105 N.J. Super. 14, 250 A.2d 792 (Ch. Div. 1969)); *see supra* note 9 and accompanying text.

100 *Id.* at 208-09, 579 A.2d at 294. The court observed that many jurisdictions have rejected strict touch and concern analysis in favor of a broader assessment of the given covenant's overall reasonableness. *Id.* (citations omitted). Further, the majority asserted that those jurisdictions to continue to utilize the "touch and concern" test do so in a fashion that permits noncompetition covenants to run with the land. *Id.* at 209, 579 A.2d at 294 ("Even the majority of courts that have retained the 'touch and concern' test have found that noncompetition covenants meet the test's requirements.") (citations omitted). *See supra* notes 48-50 and accompanying text.

101 *Id.* at 210, 579 A.2d at 295.

102 *Id.* The court stressed, "We do not abandon the 'touch and concern' test, but rather [hold] that the test is but one of the factors a court should consider in determining the reasonableness of the covenant." *Id.*

103 *Id.* In a concurring opinion, Justice Pollock extensively critiqued the majority's approach, finding much of the reasonableness test irrelevant to the threshold determination of the covenant's validity. Rather, the concurrence would deem considerations of reasonableness pertinent only when a court is asked to fashion the appropriate remedy (i.e., injunctive relief as opposed to an award of money dam-

Curiously, the touch and concern standard does not appear within the court's recitation of the salient factors now operative in this context.[104] This omission suggests several competing explanations. It could be that the court did in fact abandon the touch and concern standard (notwithstanding its perfunctory reference to the contrary),[105] or so subrogated the traditional formulation as to render it largely incidental. Alternatively, the court may have intended that the touch and concern requirement remain a threshold test, to be followed by an evaluation of overall reasonableness.[106] Perhaps most plausibly, insofar as the touch and concern archetype is linked to the material value of the affected parcels, the standard may be built implicitly into the second of the factors listed by the court, which asks whether the covenant had an impact on the "considerations exchanged."[107]

The majority analogized its "fact sensitive" reasonableness

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ages). *Id.* at 220-23, 579 A.2d at 300-02 (Pollock, J., concurring). *See infra* notes 133-38 and accompanying text.

104 *Davidson*, 121 N.J. at 196, 579 A.2d at 288. In the court's words, the eight factors deemed relevant to the determination of reasonableness are:

> 1. The intention of the parties when the covenant was executed, and whether the parties had a viable purpose which did not . . . . interfere with existing commercial laws. . . .
> 2. Whether the covenant had an impact on the considerations exchanged. . . .
> 3. Whether the covenant clearly and expressly sets forth the restrictions.
> 4. Whether the covenant was in writing, recorded, and . . . . [whether], the subsequent grantee had actual notice of the covenant.
> 5. Whether the covenant is reasonable concerning area, time or duration. . . .
> 6. Whether the covenant imposes an unreasonable restraint on trade or secures a monopoly for the covenantor. . . .
> 7. Whether the covenant interferes with the public interest. . . .
> 8. Whether . . . 'changed circumstances' now make the covenant unreasonable. . . .

Id. at 211-12, 579 A.2d at 295 (citations omitted).

105 *See id.* at 210, 579 A.2d at 295 (citations omitted); *see supra* note 102 and accompanying text..

106 *See id.* at 209-210, 579 A.2d at 294-95 (noting that "[c]ourts have decided as an initial matter that covenants not to compete do touch and concern the land. The courts then have examined explicitly the more important question of whether covenants are reasonable enough to warrant enforcement.").

107 *See id.* at 211, 579 A.2d at 295 (citing as second factor "whether the covenant had an impact on the considerations exchanged when the covenant was originally executed."). *See also id.* at 205, 579 A.2d at 292 (noting that other jurisdictions "contend that 'touch and concern' is always, at the very least, an implicit element in any analysis regarding enforcement of covenants because any restrictive easement necessitates some relation between the restriction and the land itself.") (citations omitted).

test[108] to the inquiry applied in the assessment of the enforceability of employee noncompetition covenants.[109] Justice Garibaldi opined that in both settings considerations relevant to the determination of reasonableness afford the flexibility necessary to weigh the interests of the originally contracting parties, their successors, and the public against an inherently changing commercial environment.[110] The court thus remanded the case for trial to resolve numerous outstanding questions of fact[111] and to apply the newly promulgated factors.

In an opinion concurring with the majority's decision to remand, Justice Pollock, joined by Justice Clifford, pointedly disagreed with the resort to a reasonableness standard for determining whether a covenant not to compete is enforceable against successors.[112] In the concurring justices' estimation, concerns of reasonableness, relevant to the determination of the covenant's initial validity and enforceability as between the originally contracting parties,[113] unnecessarily (and perhaps dangerously) clutter resolution of the separate question of the covenant's ability to bind successors.[114] As to the latter issue, the concurrence would have overruled *Brewer*, thereby concluding that noncompetition covenants do touch and concern the land, without adding a supplementary and, in their assessment, untenable reasonableness test.[115]

IMPLICATIONS

Judicial Activism and the Court's Departure from Precedent

The *Davidson* case joins the New Jersey Supreme Court's

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108 *Id.* at 210, 579 A.2d at 295.

109 *Id.* at 212, 579 A.2d at 296. An employee covenant not to compete will be deemed reasonable if it "simply protects the legitimate interests of the employer, impose [sic] no undue hardship on the employee, and is not injurious to the public." *Id.* (quoting Solar Indus. v. Malady, 55 N.J. 571, 576, 264 A.2d 53, 56 (1970)).

110 *Id.*

111 *Id.* at 215, 579 A.2d at 297. The court noted that while the intention of the parties was clear, the consideration tendered by Katz was unknown. *Id.* at 213, 579 A.2d at 296. Further, the majority indicated that allegations made by the defendants regarding the City of New Brunswick's dense population could be probative of the reasonableness of the covenant's area-based restriction. *Id.* at 214, 579 A.2d at 297. Finally, the court posited that if changed circumstances precluded an award to plaintiff of injunctive relief, damages for breach could be factored into the equitable calculus. *Id.* at 215, 579 A.2d at 297.

112 *Id.* at 220-22, 579 A.2d at 300-01 (Pollock, J., concurring).

113 *Id.* at 223, 579 A.2d at 302 (Pollock, J., concurring).

114 *Id.* at 223-24, 579 A.2d at 302 (Pollock, J., concurring).

115 *Id.* at 222, 223, 579 A.2d at 301, 302 (Pollock, J., concurring).

well-documented tradition of progressive decision-making.[116] The majority's willingness to abandon antiquated constructs in favor of standards thought better-equipped to vindicate fundamental fairness reflects in some measure the court's nationally recognized reputation for principled judicial activism.[117] The decision's ready departure from dated and strained precedent, coupled with its thorough and creative approach, demonstrates a larger readiness on the part of the court to effect change by abandoning doctrines that no longer "represent notions of rightness or fairness."[118]

Attendantly, the case's departure from the norm of *stare decisis*[119] is consistent with certain of those jurisprudential considerations that are involved when a state court of last resort announces new law. Adherence to precedent promotes the important aims of predictability,[120] efficiency[121] and stability in the law.[122] However, the likely absence of widespread reliance on a given doctrine, coupled with the intervening erosion of its theo-

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116 In diverse categories of actions, the court has departed from established common law doctrine, thereby instituting change. Indeed, the court's common law jurisprudence is replete with illustrations of progressive, if not landmark, pronouncements. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 32 N.J. 358, 161 A.2d 69 (1960) (privity no longer a bar to automobile manufacturer liability); Borough of Neptune City v. Borough of Avon-by-the-Sea, 61 N.J. 296, 294 A.2d 47 (1972) (recreating public trust precepts, transforming doctrine obligating sovereign to use land covered by navigable waters for public interest); O'Keeffe v. Snyder, 83 N.J. 478, 416 A.2d 862 (1980) (overruling established precedent which had applied adverse possession doctrine to actions involving personalty and announcing instead imposition of "discovery rule"); Kelly v. Gwinell, 92 N.J. 374, 476 A.2d 1219 (1984) (imposing liability on social host for injuries caused by guest who becomes intoxicated and drives). *See* Franzese, *"Georgia on My Mind": Reflections on O'Keeffe v. Snyder*, 19 SETON HALL L. REV. 1, 19-22 (1989) (discussing court's tradition of reform in context of its common law jurisprudence). For analysis of the New Jersey Supreme Court's progessive and innovative tradition in the arena of state constitutional adjudication, see Franzese, *Mount Laurel III: The New Jersey Supreme Court's Judicious Retreat*, 18 SETON HALL L. REV. 30 (1988).

117 *See* G. TARR & M. PORTER, *supra* note 56, at 225.

118 Collopy v. Newark Eye & Ear Infirmary, 27 N.J. 29, 34, 141 A.2d 276, 278-79 (1958). In *Collopy*, the court abrogated the doctrine of charitable immunity. Subsequently, the state legislature reinstated the doctrine. *See* N.J. STAT. ANN. §§ 2A:53A-7 to -11 (West 1986)). *See also supra* note 115 and accompanying text.

119 *Stare decisis*, an abbreviation of the Latin maxim *stare decisis non quieta movere*, has been construed to mean "[w]hen a rule has been once deliberately adopted and declared, it ought not to be disturbed . . . ." 1 J. KENT, COMMENTARIES ON AMERICAN LAW 477 (Lacy ed. 1889).

120 *See generally* R. WASSERSTROM, THE JUDICIAL DECISION: TOWARD A THEORY OF LEGAL JUSTIFICATION (1961); Loughran, *Some Reflections on the Role of Judicial Precedent*, 22 FORDHAM L. REV. 1, 4 (1953).

121 *See generally* B. CARDOZO, THE NATURE OF THE JUDICIAL PROCESS 149 (1921).

122 *See generally* Douglas, *Stare Decisis*, 49 COLUM. L. REV. 735 (1949) ("Stare deci-

retical and policy foundations, suggests a ready context for deviating from *stare decisis*.[123]

The perception that *Brewer* had become an isolated relic, coupled with the *Davidson* lower courts' confused rulings,[124] clearly facilitated the New Jersey Supreme Court's decisive departure from precedent.[125] Indeed, *Brewer* itself may have been decided on then prevalent notions of public policy,[126] with the court's resort to the touch and concern requirement a gratuituous, if not misguided, subterfuge. Those policies have since yielded to the economies and realities of contemporary patterns of land conveyancing.[127]

The Viability of the Multi-Factored Approach

While the decision to overrule *Brewer* represents a sound and welcome pronouncement, the court's imposition of a "reasonableness test" in its place is troublesome. As aptly observed by the concurrence, resort to a multi-tiered formula of the sort contemplated by the *Davidson* majority runs the risk of adding unnecessary complexity and unpredictability to an area which has long been unduly murky.[128]

> The need for certainty in conveyancing, like that in estate planning, is necessary for people to structure their affairs. Covenants that run with the land can affect the value of real property not only at the time of sale, but for many years thereafter. Consequently, vendors and purchasers, as well as their successors, need to know whether a covenant will run with the land. . . . [T]he majority's reasonableness test generates confusion that threatens the ability of commercial parties and their lawyers to determine the validity of such covenants. This, in

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sis serves to take the capricious element out of law and to give stability to a society.").

123 *See* B. CARDOZO, *supra* note 121, at 151:

> There should be greater readiness to abandon an untenable position when the rule to be discarded may not reasonably be supposed to have determined the conduct of the litigants, and particularly when in its origin it was the product of the institutions or conditions which have gained a new significance or development with the progress of the years.

Id.

124 *See supra* notes 55-97 and accompanying text.

125 *See supra* notes 44-47 and accompanying text.

126 The *Brewer* court noted rather strenuously that noncompetition covenants, as impermissible "restraints of trade," are "absolutely void." Brewer v. Marshall & Cheeseman, 19 N.J. Eq. 537, 546-47 (N.J. 1868).

127 *See supra* notes 49-50, 100 and accompanying text.

128 *Davidson*, 121 N.J. at 225, 579 A.2d at 302 (Pollock, J., concurring).

> turn, impairs the utility of noncompetition covenants in real estate transactions.[129]

The court's all-inclusive reasonableness standard is inherently amorphous, rendering it susceptible to crafty manipulation, if not abuse, as one or the other party to a seemingly binding exchange seeks out of a no longer advantageous bargain.

In this regard, the matter of the appropriate allocation of the burden of proof is not addressed by the court. Presumably, the proponent of the given covenant's running to burden successors must demonstrate the "reasonableness" of such a conclusion. More problematically, the court does not distinguish the given covenant's enforceability at law from its enforceability as a servitude in equity. Could a covenant that fails the reasonableness test be enforced nonetheless as an equitable servitude?

Certainly, as the majority points out, a judicial approach grounded in considerations of reasonableness affords courts the flexibility and latitude to interpose notions of fairness and rightness when asked to determine the propriety of privately bargained-for rights and duties. Query, however, whether such expectancies ought to be disturbed. Equally sophisticated parties bargaining at arms-length seem the best arbiters of the reasonableness of their undertakings and entitlements. Similarly, successors to the benefit or burden of a covenant are freely contracting entities who, in any event, had to have taken with actual or constructive notice of the restriction in order to be bound thereby.

Davidson's aggressive formulation, wherein discretionary considerations of public policy and changed circumstances, for example, are pertinent not only during the relief phase of litigation[130] but also factor largely in the threshold determination of the given covenant's lawfulness as against successors, portends unpredictability as well as the potential for compromise of principles of freedom of contract. Interestingly, the court's standard merges elements of property law with the affirmative defenses of contract law,[131] thereby relinquishing, as the concurrence notes, the traditional pre-

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129 *Id.* (Pollock, J., concurring).

130 *See id.* at 220-21, 579 A.2d at 300 (Pollock, J., concurring). Justice Pollock maintained that these factors should be relegated exclusively to the relief phase of litigation, relevant to the determination of the propriety of injunctive relief or damages. *Id.* (Pollock, J., concurring).

131 As promulgated by the court, factors one and four address, respectively, the traditional property law requirements of intent, notice and a sufficient writing. *Id.* at 211, 579 A.2d at 295. *See supra* notes 29-30 and accompanying text. The remaining factors include considerations relevant, for instance, to reformation of a contract. 121 N.J. at 211, 579 A.2d at 295.

cept that the "[i]nitial validity [of a covenant] is a question of contract law; enforceability against subsequent parties is one of property law."[132] While this sort of merger is not presumptively destined to foster uncertainty, when coupled with so comprehensive a calculus as is posited by the court, the potential for misuse seems manifest.

Ultimately, the concurrence should have carried the day. The court could have found the covenant at issue enforceable against the successors in interest (C-Town and the Housing Authority) because it touched and concerned the burdened property and satisfied the traditional requirements of intent, a writing and notice.[133] Transplanting these factors into a larger reasonableness test,[134] which invites consideration of matters such as "changed circumstances" and "public policy," unnecessarily encumbers the inquiry while blurring the distinction between the covenant's enforceability on the one hand and the appropriate remedy for its enforcement on the other. The newly introduced criteria, such as whether changed circumstances warrant the refusal to uphold an otherwise enforceable covenant,[135] or "whether the covenant interferes with the public interest,"[136] are best factored into the relief phase of the adjudication, when the court is called upon to assess the propriety of injunctive relief as opposed to an award of damages.[137] By contrast, rendering these considerations relevant to the determination of threshold "reasonableness" offers a license for unwarranted judicial intrusion into private affairs, and represents a hazy amalgamation of property and contract law.[138]

CONCLUSION

Against a backdrop of confounding and antiquated precedent, *Davidson Bros. v. Katz* presented an opportunity for the New Jersey Supreme Court to clarify, simplify and modernize a rather disjunctive and out-dated methodology for determining the enforceability of noncompetition covenants. The court rightly concluded that noncompetition covenants can touch and concern the

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132 *Davidson*, 121 N.J. at 221, 579 A.2d at 300 (Pollock, J., concurring).

133 *Id.* at 223, 579 A.2d at 302 (Pollock, J., concurring).

134 As the concurrence observed, the majority's reasonableness test embraced the elements of intent, writing and notice typically required for a covenant to run. *Id.* at 227-28, 579 A.2d at 304 (Pollock, J., concurring).

135 *Id.* at 212, 579 A.2d at 295.

136 *Id.*

137 *Id.* at 220-21, 579 A.2d at 300 (Pollock, J., concurring).

138 *Id.* at 229, 579 A.2d at 305 (Pollock, J., concurring).

land, thereby appropriately overruling stubborn precedent to the contrary. Consistently applied, the touch and concern formulation fosters predictability, honors expectation interests and vindicates concerns of reasonableness.

However, *Davidson*'s imposition of a comprehensive, eight-pronged reasonableness test for determining whether the restrictive covenant will indeed run with the land unnecessarily clutters the inquiry. The all-inclusive examination ordained by the court threatens to add confusion and uncertainty as, for example, participants to a land transaction attempt to determine the validity and subsequent enforceability of bartered-for covenants not to compete or, alternatively, seek to manipulate the standard's various components as a way out of a bad bargain. Indeed, the test's invitation to assess such factors as the covenant's compatibility with the public interest[139] or whether, even if initially reasonable, it is now unreasonable as a consequence of "changed circumstances,"[140] creates the potential for less than merited judicial displacement of privately allocated risks and expectancies.

The court's pronouncement, then, while comprehensive and comprehensible, is unlikely to facilitate the important interests of predictability and certitude. Inevitably, future litigation will attempt to mold the intrinsically malleable and imprecise parameters of the new test.

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139 *Id.* at 211, 579 A.2d at 295.
140 *Id.*