A TOUCHY SUBJECT: HAS THE RESTATEMENT REPLACED THE TOUCH AND CONCERN DOCTRINE WITH AN EQUALLY TROUBLESOME TEST?

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I. INTRODUCTION

Restrictive covenants are one of the most common ways to impose land-use limitations.1 These devices popularly appear as deed restrictions, governing issues such as what property owners can do on their land, how the land can be used, and what structures can be built on the land.2 The restraints placed on land by the use of restrictive covenants “are almost limitless in character.”3 Restrictions regulate everything from the size of a fence to the ability to make improvements on the land to yard requirements and architectural styles.4 Purportedly, restrictive covenants protect the value of property and make the property more attractive to homebuyers.5 However, restrictive covenants may in fact decrease land value by chasing away potential buyers if the covenant no longer serves a useful purpose or is overly restrictive.6

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1 Howard R. Williams, Restrictions on the Use of Land: Covenants Running with the Land at Law, 27 TEX. L. REV. 419, 419–20 (1949).

2 Id. at 420. See also Judon Fambrough & Cindy Dickson, Living with Deed Restrictions, TIERRA GRANDE, 1983 at 16, available at http://recenter.tamu.edu/pdf/410.pdf (“Deed restrictions are an established means of regulating land use.”).

3 Williams, supra note 1, at 420.

4 Fambrough & Dickson, supra note 2, at 16.

5 Id. See also Susan F. French, Toward a Modern Law of Servitudes: Reweaving the Ancient Strands, 55 S. CAL. L. REV. 1261, 1262 (1982) [hereinafter French, Ancient Strands] (“These private arrangements are used extensively to secure a whole variety of economic, aesthetic, and personal advantages to the owners and occupiers of land.”).

Of course, the restrictive covenant must be enforceable to have effect. Herein lie many of the problems. Property transactions are frequent. Property is regularly conveyed, divided, partitioned, and condemned. Consequently, issues often arise regarding the ownership and title to the land. When two parties enter into a transaction to create a restrictive covenant, the next issue concerns the implications that arise “when a third party wishes to acquire an ownership interest in the subject property.” What is the state of the title? Are there encumbrances? With regards to restrictive covenants, who is liable, and who must comply with the rules? This is where the doctrine that the covenant must “run with the land” comes into play.

The following requirements are necessary for a covenant to run with the land:

1. The covenant must relate to something in esse, or else assigns must be named if they are to be bound or are to obtain the benefit of the running of the covenant.
2. The covenant must touch or concern the land.
3. There must be privity of estate between the covenaniting parties.
4. The requirements of the Statute of Frauds must be satisfied.
5. It must be the intention of the original covenaniting parties that the covenant run with the land.

In Texas, the rule necessitates the same requirements:

In Texas, a covenant runs with the land when it touches and concerns the land; relates to a thing in existence or specifically binds the parties and their assigns; is intended by the original parties to run with the land; and when the successor to the burden has notice.

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8 See id.
10 See Williams, supra note 1, at 419–20 (citing CHARLES E. CLARK, REAL COVENANTS AND OTHER INTERESTS WHICH “RUN WITH LAND” INCLUDING LICENSES, EASEMENTS, PROFITS EQUITABLE RESTRICTIONS AND RENTS 93 (2d ed. 1947) (“[a] covenant so connected with reality that either the right to enforce or the duty to perform passes to assigns of the land.”)).
11 Id. at 423 (citation omitted); See also Spencer’s Case, (1583) 77 ENG. REP. 72 (K.B.) 72; 5 Co. Rep. 16 a., 16 a.
12 Inwood N. Homeowners’ Ass’n v. Harris, 736 S.W.2d 632, 635 (Tex. 1987).
This Article is concerned with the touch and concern requirement. Traditionally, restrictive covenants must touch and concern the land in order to attach to the land or “run with the land.” The touch and concern doctrine is substance-based: there is no one concrete definition, but the inquiry is whether the promise impacts the land itself rather than being solely a personal promise between parties. Along with increasing the fair market value of the land by necessitating proper upkeep and conformity with specific rules and standards, the touch and concern requirement originally provided the courts with a flexible means of invalidating obsolete or overly burdensome covenants. Without a concrete definition, courts could manipulate the vague doctrine.

The touch and concern requirement has been a source of confusion and criticism for many years. Historically, courts used the touch and concern requirement to invalidate affirmative covenants that required the payment of fees or club dues. The doctrine is still often used to refuse to enforce servitudes that involve “monetary obligations or tying arrangements.” Many commentators believe that court opinions purporting to be based on the doctrine actually focus on other factors: fairness of the arrangement, impact on alienability and marketability, interference with property owners, etc. While the doctrine allegedly operates to increase the fair market value of property, it has been widely criticized for its vagueness and because

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13 Id.
14 See WILLIAM B. STOEBUCK & DALE A. WHITMAN, THE LAW OF PROPERTY § 8.15, at 475 (3d ed. 2000) (“Touch and concern is a concept, and like all concepts has space and content that can be explored and felt better than defined.”).
15 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a (2000). See also French, Ancient Strands, supra note 5, at 1289 (citations omitted) (“Because its meaning is unclear, the courts have been able to use the touch and concern requirement to terminate covenants and servitudes that have become obsolete or that present potential for creating unreasonable restraints on alienation.”).
16 See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. b (2000).
18 RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. e (2000).
19 Id. § 3.2 cmt. d.
20 Id. § 3.2 cmt. b (“[Courts] look to the legitimacy and importance of the purposes to be served by the servitude in the particular context, the fairness of the arrangement, its impact on alienability and marketability of the property, its impact on competition, and the degree to which it interferes with the fundamental rights and expectations of property owners.”).
certain covenants may become so restrictive that the value of the property actually goes down.\textsuperscript{21}

The Restatement (Third) of Property: Servitudes (hereinafter “Restatement”) purports to abandon the common law touch and concern doctrine in favor of a new inquiry.\textsuperscript{22} Section 3.2 abolishes the touch and concern requirement: “Neither the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a servitude.”\textsuperscript{23} According to the Restatement, restrictive covenants that were held invalid under the touch and concern doctrine will be held invalid if the covenants unreasonably restrain alienation or trade, are unconscionable, violate public policy, or are illegal or unconstitutional.\textsuperscript{24} Unfortunately, the Restatement replaces one broad test with another, perhaps broader, test for invalidating restrictive covenants.\textsuperscript{25}

This Article will point out that most courts, including Texas courts, continue to employ the touch and concern doctrine.\textsuperscript{26} The Restatement claims to replace the touch and concern doctrine.\textsuperscript{27} However, this article will argue that the Restatement makes no substantive impact on the law regarding the validity of servitudes because it replaces the vague touch and concern with an equally vague test for the courts to employ. Thus, even if Texas courts began adopting the approach of the Restatement, the detrimental remnants of the touch and concern doctrine will remain.

Part II discusses the prevalence of restrictive covenants today, including a case study of how restrictive covenants impact land values. Part III outlines the Restatement, including what it purports to do and what it actually does, and also examines cases that have employed or declined to employ the reasoning of the Restatement. Part IV outlines the law in Texas

\textsuperscript{21}McLinden, \textit{supra} note 6 and accompanying text.
\textsuperscript{22}\textsc{Restatement (Third) of Prop.: Servitudes} § 3.2 cmt. a (2000) (“The appropriate inquiry is whether the servitude arrangement violates public policy and the burden is on the person claiming invalidity to establish that the arrangement is one that should not be allowed to run with the land.”).
\textsuperscript{23}\textit{Id.} \textsc{Restatement (Third) of Prop.: Servitudes} § 3.2 (2000).
\textsuperscript{24}\textit{Id.} § 3.2 cmt. a.
\textsuperscript{26}See, e.g., Inwood N. Homeowners’ Ass’n, v. Harris, 736 S.W.2d 632, 635 (Tex. 1987); Stern v. Metro. Water Dist., 274 P.3d 935, 945 (Utah 2012) (finding that a covenant must touch and concern the land); Dunning v. Buending, 247 P.3d 1145, 1149 (N.M. Ct. App. 2010) (finding that a covenant must touch and concern the land to be enforceable).
\textsuperscript{27}See \textsc{Restatement (Third) of Prop.: Servitudes} § 3.2 (2000).
regarding restrictive covenants and discusses whether adopting the Restatement’s approach would change the law in Texas. Part V concludes that the touch and concern doctrine no longer serves its original purpose. Therefore, the courts should abolish the doctrine or allow parties to use the changed circumstances doctrine to invalidate covenants that do not provide practical benefits or substantial increase in value.

II. THE PREVALENCE OF RESTRICTIVE COVENANTS TODAY

Restrictive covenants, generally put in place by the developer, property owner, or homeowners’ association, stipulate land use; the kind, character, and location of structures to be built on the land; and may involve payment of fees or dues. Generally, restrictive covenants are designed to promote conformity with rules and to protect property values. If the covenant runs with the land, then successor owners will continue to be liable for breaches of the promise. If the covenant does not specify a period of duration or give the grantor authority to amend the covenant, the restriction will last as long as it continues to influence the value of the property.

Again, in order to run with the land, the restrictive covenant much touch and concern the land. Scholars have attempted to define a test for the touch and concern requirement, but without much success. Early cases explained that a covenant needs to directly “affect[] the nature, quality, or value of the thing demised . . . .” Professor Harry Bigelow found this articulation of the test vague and unsatisfactory, and he declared covenants touch and concern the land if “they operate either to make more valuable some of the rights, privileges, or powers possessed by the covenantee or to relieve him in whole or in part of some of his duties.” To put it more simply, “the act called for must operate to the benefit of the holder for the

28 Fambrough & Dickson, supra note 2, at 16.
29 See French, Ancient Strands, supra note 5, at 1262.
30 Williams, supra note 1, at 420 (citing Oliver S. Rundell, Judge Clark on the American Law Institute’s Law of Real Covenants: A Comment, 53 YALE L.J. 312, 318 (1944)).
31 See Fambrough & Dickson, supra note 2, at 17.
32 Williams, supra note 1, at 423 (citing Oliver S. Rundell, Judge Clark on the American Law Institute’s Law of Real Covenants: A Comment, 53 YALE L.J. 312, 312 n.2 (1944)).
33 Note, supra note 17, at 939.
35 Harry A. Bigelow, The Content of Covenants in Leases, 12 MICH. L. REV. 639, 645 (1914).
time being of the lease or reversion as the case may be.\textsuperscript{36} Later, Dean Charles Clark formulated a new test:

If the promisor’s legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee’s legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land.\textsuperscript{37}

These articulations of the test may not be perfect, but they have been cited frequently.\textsuperscript{38} Still, scholars have not agreed upon a definitive test for the touch and concern requirement, and the courts have not articulated one. Consequently, courts applying the touch and concern doctrine to invalidate restrictive covenants have wide reign to manipulate the rationale.

Courts have used the touch and concern doctrine to invalidate restrictive covenants that mandate the payment of fees or assessments.\textsuperscript{39} Still, courts have found that many promises to pay do touch and concern the land, such as homeowners’ association fees or dues to a club membership.\textsuperscript{40} In \textit{Neponsit Property Owners’ Association, Inc. v. Emigrant Industrial Savings Bank}, the court considered whether a covenant touched and concerned the land when the covenant created an obligation to pay a sum of money devoted to maintenance and other public purposes.\textsuperscript{41} The property owners paid the fee to the homeowners’ association.\textsuperscript{42} The court agreed that “a covenant to pay a sum of money is a personal affirmative covenant which usually does not concern or touch the land.”\textsuperscript{43} Nonetheless, the court reasoned that property owners gained access to public roads, beaches, and public parks, and the public places must be maintained for the property owners to enjoy them.\textsuperscript{44} Therefore, “the burden of paying the cost should be

\textsuperscript{36}Id.
\textsuperscript{37}CLARK, supra note 10, at 97.
\textsuperscript{38}See, e.g., Williams, supra note 1, at 429 & nn.30–32.
\textsuperscript{39}See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. d (2000).
\textsuperscript{41}Id. at 795.
\textsuperscript{42}Id. at 794.
\textsuperscript{43}Id. at 795.
\textsuperscript{44}Id. at 797.
inseparably attached to the land which enjoys the benefit.” The Neponsit case stands for the premise that homeowners’ associations can enforce covenants to pay annual fees and charges for expenses for maintenance and upkeep of the common areas and that such affirmative covenants touch and concern the land. Since Neponsit, Texas courts have also found that covenants requiring owners to pay dues and assessments are reasonable. In Musgrave v. Brookhaven Lake Property Owners Association, homeowners had to pay fees to the property owners’ association under the obligation of a covenant to maintain common areas. The court found the covenant to maintain the roads, the lake, and recreational property undoubtedly touched and concerned the land. In Homsey v. University Gardens Racquet Club, homeowners in the neighborhood had to pay dues and assessments to a racquet club. The homeowners in the suit did not ever use the racquet club. The court stated that a covenant touches and concerns the land when it enhances the value of the land and confers a benefit upon it. The court found the covenant in question touched and concerned the land because the homeowners received automatic acceptance into the club by virtue of the assessment and obtained voting rights by virtue of being a landowner.

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45 Id.
46 Id.
47 See, e.g., Wilchester W. Concerned Homeowners LDEF, Inc. v. Wilchester W. Fund, Inc., 177 S.W.3d 552, 566 (Tex. App.—Houston [1st Dist.] 2005, pet. denied) (finding that deed restrictions requiring residents to pay fees to support recreational facilities were reasonable); Musgrave v. Brookhaven Lake Prop. Owners Ass’n, 990 S.W.2d 386, 396 (Tex. App.—Texarkana 1999, pet. denied) (“The covenant touches and concerns the land; relates to a thing in existence, that is, the roadways, lake, and recreational areas; was intended to run with the land . . . .”); Homsey v. Univ. Gardens Racquet Club, 730 S.W.2d 763, 764 (Tex. App.—El Paso 1987, writ ref’d n.r.e.) (finding that a covenant requiring a homeowner to pay dues and assessments to a recreational club was “reasonable and pursuant to a general scheme to benefit the land”).
48 990 S.W.2d at 391.
49 Id. at 396.
50 730 S.W.2d at 764.
51 Id.
52 Id.
53 Id. In similar cases, the result varies depending upon the nature of the property. Compare Streams Sports Club, Ltd. v. Richmond, N.E.2d 1226 (Ill. 1983) (finding that a covenant to pay fees for recreational facilities adjacent to condominium units touched and concerned the land because the sports club was part of a common building plan, and all the condominium owners could enjoy the benefits of the club), with Chesapeake Ranch Club, Inc. v. C.R.C. United
Cases such as *Homsey* illustrate the vagueness of the touch and concern doctrine and the uncertainty as to how the doctrine applies. Homeowners such as the ones in *Homsey* often fail to see how a covenant to pay dues to a recreational facility can run with the land.\(^{54}\) Scholars have noted that certain restrictive covenants, such as fencing requirements, have become so common that they must be upheld.\(^{55}\) However, if such covenants are upheld, “what grounds have we for singling out certain ones . . . to be arbitrarily prohibited?”\(^{56}\) In other words, where is the line?

In *Bridgewater v. Double Diamond-Delaware, Inc.*, property owners in the White Bluff Resort at Lake Whitney in Texas disputed covenants obligating owners to pay assessments for maintaining recreational facilities, which the White Bluff Property Owners’ Association did not even own.\(^{57}\) The property owners had to become members of the property owners’ association and pay various mandatory assessments.\(^{58}\) White Bluff had several resort amenities, including a golf course, a restaurant, a spa, an inn, and a marina.\(^{59}\) The White Bluff Property Owners’ Association did not own the amenities: Double Diamond, Inc., a private development corporation, independently owned them.\(^{60}\) Property owners brought suit challenging the use of assessments to fund these amenities.\(^{61}\) The court did not address whether the covenants at issue touched and concerned the land because the court did not grant the plaintiffs class certification, thereby denying the plaintiffs’ standing to bring the suit.\(^{62}\) There are covenants today that

\(^{54}\) *Homsey*, 730 S.W.2d at 764.

\(^{55}\) CLARK, *supra* note 10, at 133.

\(^{56}\) *Id.* at 134.


\(^{58}\) *Id.*

\(^{59}\) *Id.*

\(^{60}\) *Id.*

\(^{61}\) *Id.* at *2.*

\(^{62}\) *Id.* at *14.*
require property owners to pay dues to a homeowners’ association to fund amenities not owned by the association or located within the neighborhood. Finding that such covenants touch and concern the land unreasonably expands the application of the doctrine.

Additionally, the existence of certain restrictive covenants, such as those in the above cases, may actually decrease the value of the land. From a buyer’s perspective, many restrictive covenants negatively impact the decision to buy the property. For example, buyers have said that restrictions on paint colors, roofing materials, siding materials, height of bushes, and the types of vehicles allowed on the road will negatively impact the decision to buy the property. To be sure, buyers are likely to be averse toward restrictive covenants forcing the buyers to pay fees and dues for amenities located outside the neighborhood or amenities the buyer may never use. Consequently, the marketability of property decreases.

A. Villages At Twin Rivers, Waco, Texas

The Villages at Twin Rivers (Villages) is a master-planned community in Waco, Texas. Through the use of restrictive covenants and building guidelines, the Villages at Twin Rivers Community Association (Association) claims that the Villages “preserve[] property values and the quality of life.” Additionally, the City of Waco’s zoning and land-use regulations purportedly “protect both property values and the look of the land.”

The Association’s bylaws set forth the basic structure of the association and the rules and regulations for the community. The Association initially

63 Id. at *1.
64 Tarlock, supra note 25, at 817 (recognizing that encumbrances may decrease property value); French, Ancient Strands, supra note 5, at 1265.
66 Id.
68 Id.
has two classes of membership: Class “A” and Class “B.” Class “B” exists until the developer has sold all lots in the properties, and this period of time is designated the “Class B Control Period.” After the developer has sold all lots in the properties, the Class B Control Period expires. The demarcation between periods is significant because it determines how members of the Board of Directors are appointed and members of the Association can vote. During the Class B Control Period, the developer appoints the members of the Board and only those members vote. After the Class B Control Period expires, the existing members vote on new Directors.

As this particular Association was created, until the developer has sold the very last lot in the properties, the developer retains control over rules, regulations, restrictions, and decisions that impact the property. However, the Texas Property Code has changed the requirements regarding voting power.

Voting power should be determined by the economic interest in the development, “much like a corporation.” By statute, the Texas Property Code has changed the law regarding the amount of time a developer can retain control, making it so that a developer cannot retain control for as long a period of time. The statute is sensible. Developers have an interest in

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71 Id.
72 Id.
73 Id.
74 Id.
75 Id.
77 Id.
78 See TEX. PROP. CODE ANN. § 209.00591(c) (West Supp. 2012).
80 See PROP. CODE § 209.00591(c). The Property Code provides that a board will run the property owners’ association and the declaration may provide for a period of “declarant control of the association.” Id. However, the law limits the time that the declarant may control the board:

Regardless of the period of declarant control provided by the declaration, on or before the 120th day after the date 75 percent of the lots that may be created and made subject to the declaration are conveyed to owners other than a declarant, at least one-third of the board members must be elected by owners other than the declarant.
maintaining property values until the homes are sold in order to decrease the risk on the investment; however, after a certain period of time, the developer should not retain all of the voting rights.\textsuperscript{81} If the property owners hold more or much more than fifty percent of the interests in real property in the neighborhood, the developer should not retain control over rules and decisions impacting the use and character of the land. Once the developer has sold more than half of the lots, the property owners have a greater personalized interest in the value of their individual lots.\textsuperscript{82} The property owners should therefore gain more voting rights to control decisions regarding their property.

The Villages have a “Declaration of Protective Covenants,” listing countless restrictive covenants “for the purpose of protecting the value and desirability” of the real property in the subdivision.\textsuperscript{83} The Association is responsible for maintaining the “Area of Common Responsibility” by repairing and replacing landscaping, structures, and private streets.\textsuperscript{84} The cost associated with such maintenance is allocated to the property owners as part of a Base Assessment.\textsuperscript{85} Each individual owner is responsible for maintaining his or her own structures and parking area “in a manner consistent with the Community-Wide Standard.”\textsuperscript{86} By accepting title to the property, each landowner agrees to pay three assessments: (1) Base Assessments for common expenses; (2) Neighborhood Assessments for those expenses benefiting only particular parcels; and (3) Special Assessments as the Association deems necessary.\textsuperscript{87}

The specificities regarding architectural standards and use restrictions are voluminous. The properties may only be used for residential and recreational purposes.\textsuperscript{88} All vehicles must be parked in the garage or driveway, with the limitations that only two vehicles may be parked outside of the garage, and “commercial vehicles . . . tractors, mobile homes, recreational vehicles, trailers . . . campers, camper trailers, boats and other

\textsuperscript{81} Rogers, supra note 79, at 506.
\textsuperscript{82} See id.
\textsuperscript{83} Declaration of Protective Covenants for Villages of Twin Rivers Community Association, Inc., supra at note 76.
\textsuperscript{84} Id. IV MAINTENANCE § 1.
\textsuperscript{85} Id.
\textsuperscript{86} Id. IV MAINTENANCE § 2.
\textsuperscript{87} Id. X ASSESSMENTS § 1.
\textsuperscript{88} Id. XII USE RESTRICTIONS.
watercraft” may only be parked in enclosed areas.\textsuperscript{89} Pets are allowed in the Villages, but no unit may have more than two pets.\textsuperscript{90} No above-ground swimming pools are allowed.\textsuperscript{91} The Association does not allow jungle gyms or playground equipment, and homeowners may not conduct garage sales.\textsuperscript{92} These are merely examples of the restrictive covenants in the Villages; this list is by no means exhaustive.

The Association has a Modifications Committee that has “exclusive jurisdiction over modifications, additions, or alterations made on or to existing Units or structures.”\textsuperscript{93} The Modifications Committee approves the shape, color, size, material, and location of any modifications as well as the quality of the workmanship and the “harmony of external design with existing structures.”\textsuperscript{94} Homeowners are duty-bound to comply with all of the provisions, and “failure to comply shall be grounds for an action to recover sums due, for damages or injunctive relief, or for any other remedy available at law or in equity.”\textsuperscript{95}

While the Association claims that these restrictions preserve the value of the properties, it is worth recognizing that certain covenants may actually decrease the value of the property.\textsuperscript{96} Again, buyers have said that restrictions on fencing, restrictions on architectural materials, and restrictions on bushes may negatively impact the decision to buy the property.\textsuperscript{97} This negativity potentially decreases the marketability of the property.

This Article compares the value history of two properties located within the Villages (subject to the extensive list of restrictive covenants) to the

\textsuperscript{89} Id. XII USE RESTRICTIONS § 2.
\textsuperscript{90} Id. XII USE RESTRICTIONS § 4.
\textsuperscript{91} Id. XII USE RESTRICTIONS § 11.
\textsuperscript{92} Id. XII USE RESTRICTIONS § 22.
\textsuperscript{93} Id. XI ARCHITECTURAL STANDARDS § 2.
\textsuperscript{94} Id.
\textsuperscript{95} Id. XIII GENERAL PROVISIONS § 13.
\textsuperscript{96} Tarlock, supra note 25, at 817 (recognizing that encumbrances may decrease property value).
value history of two properties located just across the street, in a neighborhood without such restrictions. The property A in the Villages at Camden Court in Waco, Texas, had an appraised value of $288,684 in 2012. In 2008, the value of the property was $302,091. The value has been decreasing since 2008, except for a slight increase between 2011 and 2012. Similarly, Property B in the Villages at Camden Court in Waco, Texas, has decreased in value. The property had an appraised value of $327,963 in 2012. The value of the property has decreased since 2008 when the value was $365,261.

Right across the street from the Villages, Property C had an appraised value of $150,448 in 2012. That value has increased since 2008 when the value was $136,134. In fact, the value has only been increasing since 2008. Similarly, Property D, also right across the street from the Villages, has increased in value since 2008. In 2008, the value of the property was $140,074 in 2009, $141,458 in 2010, and $144,286 in 2011. The value of the property was $285,304 in 2009, $278,399 in 2010, and $278,752 in 2011. The value of the property was $288,684 in 2012.

For purposes of this Article, the properties located within the Villages will be referred to as “Property A” and “Property B,” and the two properties located across the street will be referred to as “Property C” and “Property D.”

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$195,232. In 2012, the property had an appraised value of $200,648. The properties located across the street from the Villages are not subject to the same restrictive covenants, as evidenced by the fact that the owners of Property D built a swimming pool and a fence in 1993, neither of which were subject to approval.

The types of covenants attached to the properties in the Villages have been upheld by courts applying the touch and concern doctrine, explaining that the restrictions preserve property values. However, this data shows the real properties subject to extensive restrictive covenants have decreased in value, while the properties without the same restrictions have increased in value. Of course, correlation does not equal causation, but scholars have gathered empirical data regarding the impact of restrictions on property values.

One scholar studied four categories of pet restrictions, ordering them from the most restrictive to the least restrictive. The study showed an optimal restriction level at “cats only.” William H. Rogers conducted his own study comparing the impact of use restrictions, building restrictions, and voting rules on property values. Rogers noted that “buyers may not be interested in restrictions on the degree of roof pitch or other such items.” He concluded that use restrictions may add to the value of the property but building restrictions do not. This could indicate “over regulated” building restrictions.

Notably, the median price of home sales in Waco has increased since 2008. New homeowners who recently purchased property in the Villages

\begin{footnotes}
\footnotetext[100]{Id.}
\footnotetext[101]{Id.}
\footnotetext[102]{Id}
\footnotetext[103]{Supra Part I.}
\footnotetext[104]{Supra notes 99, 102, 106, and 109.}
\footnotetext[105]{Rogers, supra note 79, at 501.}
\footnotetext[106]{Id. at 502.}
\footnotetext[107]{Id.}
\footnotetext[108]{Id. at 50001. Rogers conducted his study in Greeley, Colorado. Id.}
\footnotetext[109]{Id. at 511.}
\footnotetext[110]{Id. at 510.}
\footnotetext[111]{Id.}
\end{footnotes}
will be disappointed to find that the market value of their home has decreased at a time when property values are generally increasing.\textsuperscript{123} While all empirical studies are limited in scope and subject to uncontrolled variables, the above findings support the thesis that overly restrictive covenants may actually reduce the value and the marketability of real property.\textsuperscript{124} Courts use the touch and concern doctrine to uphold many such covenants based on the reasoning that the covenants protect property values.\textsuperscript{125} The expansive application of the doctrine has led to courts upholding overly restrictive covenants that actually decrease the value of the land.\textsuperscript{126}

III. RESTATEMENT (THIRD) OF PROPERTY: SERVITUDES

The Restatement purports to abandon the touch and concern doctrine, suggesting the doctrine is vague and easily manipulated.\textsuperscript{127} The Restatement reformulates the inquiry: Does the servitude threaten public welfare such that it should not be allowed to run with the land?\textsuperscript{128} The Restatement contains various provisions designed to replace the touch and concern doctrine and allow courts to invalidate restrictive covenants on similar grounds.\textsuperscript{129} Section 3.1 is the basic rule, stating that a servitude is not valid if it is illegal, unconstitutional, or violates public policy.\textsuperscript{130} Section 3.4 is the rule against unreasonable restraints on alienation;\textsuperscript{131} section 3.5 invalidates servitudes that indirectly restrain alienation;\textsuperscript{132} section 3.6 prohibits unreasonable restraints on trade;\textsuperscript{133} and section 3.7 invalidates unconscionable servitudes.\textsuperscript{134} Supposedly, “these rules invite, if not require,
an explanation of the real reasons why a court is justified in interfering with the parties’ freedom of contract,” thereby preventing courts from manipulating and relying upon a vague doctrine without providing sound reasoning.\footnote{French, Touch and Concern, supra note 125, at 661. Arguably, “freedom of contract” does not accurately describe the relationship between a developer and a property owner. Commonly, the developer has greater bargaining power than the property owner. Humber v. Morton, 426 S.W.2d 554, 560–61 (Tex. 1968).}

The Restatement attempts to articulate a new test for courts to invalidate restrictive covenants;\footnote{See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (2000).} however, the new rules do not provide any more guidance for courts. Moreover, the very fact that the Restatement has “earmarked certain provisions as replacements for the touch and concern requirement” highlights the fact that the rationales behind the doctrine survive.\footnote{Note, supra note 17, at 942.} Accordingly, the impact of the doctrine survives.

The lack of substantive revision and the vagueness of the new provisions may be why, to date, there are few cases in which courts have adopted the approach of the Restatement.\footnote{See Note, supra note 17, at 948.} In Bennet v. Commissioner of Food and Agriculture, the Supreme Judicial Court of Massachusetts adopted the reasoning of the Restatement.\footnote{576 N.E.2d 1365, 1367 (Mass. 1991).} In that case, the Bennetts sought to build a farmhouse on a hilltop on their property.\footnote{Id. at 1365.} However, the Bennetts’ property was subject to an agricultural preservation restriction that prohibited property owners from constructing certain dwellings.\footnote{Id. at 1366.} The commissioner held that the farmhouse would cause soil erosion, eliminate farmland, and change the nature of the estate, thereby undermining the purpose of preserving the land for future farmers.\footnote{Id.} On appeal, the court declined to apply the common law rules regarding privity and benefit to a particular parcel of land.\footnote{Id. at 1367.} Instead, the court specifically stated, “the appropriate question is whether the bargain contravened public policy when it was made and whether its enforcement is consistent with public policy and is reasonable.”\footnote{Id.} The court looked at the public policy expressed in the
agricultural preservation restriction and enforced the restriction against the Bennetts because it complied with the reasonability requirements of the Restatement.\textsuperscript{145}

The Bennett case is one of few cases in which the Restatement approach is employed, and the court arguably abolished the touch and concern requirement.\textsuperscript{146} However, the court may not have done so knowingly.\textsuperscript{147} The court called the agricultural preservation restriction an easement in gross.\textsuperscript{148} An easement in gross, however, does not have to touch and concern the land in order to be transferred to successors.\textsuperscript{149} If the agricultural preservation restriction were an easement in gross, the fact that the court did not mention the touch and concern requirement would make sense.\textsuperscript{150} But the restriction was actually a restrictive covenant, which is a promise that serves to either benefit or burden the land and limit the permissable use of the land.\textsuperscript{151} While Bennett has the potential to serve as precedent for adopting the Restatement’s approach, courts have only followed this reasoning in cases that are analogous to Bennett.

When the facts are similar to those of Bennett, such as in Murphy v. Town of Hopkinton Planning Board, courts have followed the Restatement’s approach.\textsuperscript{152} In Murphy, the court considered the validity of an “Approval Not Required” Plan (APR), which limited physical access and egress on the property.\textsuperscript{153} The court upheld a land-use restriction after determining the restriction served a valid public purpose and reasonably

\begin{itemize}
  \item \textsuperscript{145}Id. at 1368.
  \item \textsuperscript{146}Note, supra note 17, at 943.
  \item \textsuperscript{147}Id. ("[T]he court appeared to be entirely unaware that it abolished the touch and concern requirement.").
  \item \textsuperscript{148}Bennett, 576 N.E.2d at 1367. An easement creates a nonpossessory right to enter and use the land. \textit{Restatement (Third) of Prop.: Servitudes} § 1.2 (2000). An easement in gross “means that the benefit or burden of a servitude is not tied to ownership or occupancy of a particular unit or parcel of land.” \textit{Id.} § 1.5(2).
  \item \textsuperscript{149}Note, supra note 17, at 943 (citing \textit{Restatement (Third) of Prop.: Servitudes} § 5.8 (2000)).
  \item \textsuperscript{150}Id. An easement in gross benefits an individual and is not tied to the land. \textit{Restatement (Third) of Prop.: Servitudes} §§ 1.2, 1.5(2) (2000).
  \item \textsuperscript{151}Note, supra note 17, at 943; \textit{Restatement (Third) of Prop.: Servitudes} § 1.3 (2000).
  \item \textsuperscript{153}Id. at *1.
\end{itemize}
restricted the use of the land. Similarly, in Weston Forest and Trail Association, Inc. v. Fishman, the court considered whether to enforce a conservation restriction that prohibited property owners from building structures on the land. The court cited Bennett and upheld the property restriction for the public benefit. These opinions followed Bennett’s precedent, but such opinions are few and far between.

Courts have more commonly ignored the Restatement’s approach or found technical reasons not to apply the approach. In Calabrese v. McHugh, a 2001 case, the court did not even address the Restatement. The court examined a release in a recorded warranty deed whereby a property owner agreed not to make a claim against a manufacturing company for contamination. The court relied upon the touch and concern doctrine, stating that the covenant must touch and concern the land in order to run with the land. The Calabrese court stated that to touch and concern the land, “the promises made [must] substantially alter[] the legal relations of the parties with respect to the land.”

Other courts have refused to follow Bennett by distinguishing fact patterns. In Fruchtman v. Kitras, the court refused to extend Bennett, stating that the enforcement of the restrictive covenant at issue was “unworthy of any special dispensation to take it outside the ordinary and long-standing rules limiting enforcement of restrictions.”

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154 Id. at *8. The court found that the restriction was similar to the agricultural preservation restriction in Bennett because the APR “advanced the goal of orderly land development in the town.”
156 Id. at *4 (“When a property restriction is for the public benefit, the beneficiary, however, has the right to enforce the restriction.”).
157 Note, supra note 17, at 944–45; see also Calabrese v. McHugh, 170 F. Supp. 2d 243, 254 (D. Conn. 2001); Garland v. Rosenshein, 649 N.E.2d 756, 758 (Mass. 1995) (declining to decide whether to abolish the touch and concern requirement per the Restatement because the lower court rested its holding on statutory rather than common law grounds, although “[e]ven under traditional common law principles, the restriction fails”).
158 Calabrese, 170 F. Supp. 2d at 254.
159 Id. at 249.
160 Id. at 254.
161 Id.
163 Id. at 10.
the deed included a covenant restricting the grantee from opposing any permit application for parking or use of access roads made by the grantor for a period of twenty years. The grantor later filed a Notice of Intent to build a house, a septic system, and a driveway on lots that the grantee owned, and the grantee filed an appeal to enjoin the grantor from so doing. The grantor sought a declaration that the restrictive covenant prevented the grantee from bringing the appeal. Finding that the “benefit to be derived by [the grantor] . . . was personal to him,” the court did not enforce the covenant. The _Fruchtman_ court did acknowledge the Restatement, but the court concluded that the common law rules “should continue to be applied.” The court reasoned that the common law rules focus on the optimal use of land. The court found no reason to follow _Bennett_ and consider public policy violations when the common law rules established that the covenant personally benefited an individual and did not run with the land.

In _Garland v. Rosenhein_, the court did not mention the Restatement and distinguished the facts of _Bennett_. The covenant at issue purported to prohibit the development of property with an adjoining parcel of land. After foreclosure, new owners purchased the property and the adjoining land and wished to develop the adjoining land. The court stated that the restrictive covenant failed to run with the land, and the benefit did not relate to any parcel of land. The court used common law rules.

In _Kaanapali Hillside Homeowners’ Association v. Doran_, the court relied on section 2.14 of the Restatement to suggest that a restrictive covenant ran with the land pursuant to a general plan of development. In

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164 _Id._ at 4.
165 _Id._ at 5–6.
166 _Id._ at 6.
167 _Id._ at 11.
168 _Id._
169 See _id._ at 11–12.
170 See _id._
172 _Id._ at 757.
173 _Id._
174 _Id._ at 758.
175 _Id._
regards to the touch and concern doctrine; however, the court applied the common law rule that the restrictive covenant must touch and concern the land in order to run with the land. The court seemingly followed the rule that in order to touch and concern the land the restriction must relate to the use of the land. The court upheld the declaration because restrictions relating to land use, permissible architecture, and landscaping clearly satisfied the touch and concern requirement. Likewise, in Jeremiah 29:11, Inc. v. Seifert, the court mentioned the Restatement and the requirements for an indenture deed; however, the court still applied the common law rules for covenants to run with the land, including the requirement that the covenant touch and concern the land. The restrictive covenant at issue prohibited the grantee from using the property “for other than strictly residential purposes.” The covenant did touch and concern the land, but the court found the covenant did not bind the new owner who did not have notice of the covenant. These two cases show that the courts “know the content of the Restatement—but do not mention it when conducting a touch and concern analysis.”

IV. TEXAS LAW REGARDING RESTRICTIVE COVENANTS

The Texas Property Code defines a restrictive covenant as “any covenant, condition, or restriction contained in a dedicatory instrument, whether mandatory, prohibitive, permissive, or administrative.” In Texas, a restrictive covenant should be liberally construed to give effect to its

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177 Id. at 1289.
178 See id. (citing Waikiki Malia Hotel, Inc. v. Kinkai Props. Ltd. P’ship, 862 P.2d 1048, 1057 (Haw. 2007) (“Clearly, the covenant meets the touch-and-concern requirement because it relates to the use of the land and the ownership interest in it.”)).
179 Id.
180 161 P.3d 750, 753 (Kan. 2007). An indenture deed, unlike a standard deed, is signed by both the grantor and the grantee. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.7 cmt. g (2000).
181 Seifert, 161 P.3d at 753 (“[T]he grantor and grantee must intend that the covenant run with the land; the covenant must touch and concern the land; and there must be privity of estate between the original parties to the covenant . . . .”).
182 Id. at 751.
183 See id. at 755.
184 Note, supra note 17, at 944–45 & n.43.
There is, however, some debate in Texas as to whether restrictive covenants should be construed liberally in accordance with statutory guidelines or construed strictly to favor the free alienability of land. While this debate impacts the law regarding restrictive covenants in Texas, a detailed discussion of the debate is outside the scope of this article.

Texas courts continue to apply the common law requirements to determine whether a covenant runs with the land: (1) covenants must touch and concern the land; (2) covenants must relate to a thing in existence or bind the parties and their successors; (3) the original parties must intend for the covenant to run; and (4) the notice requirement must be fulfilled. As recently as 2008, Texas courts have used the touch and concern doctrine.

In *Supkis v. Madison Place*, the court considered whether a homeowners’ association could foreclose a lien based on a member’s failure to pay a maintenance fee. The defendant homeowner purchased a home in Madison Place Townhomes in Harris County in 1985. The deed contained a provision subjecting the conveyance to all restrictive covenants recorded in Harris County. In 1979, a declaration had been filed in Harris County, stipulating that the properties of Madison Place Townhomes were subject to certain restrictions and covenants “for the purpose of enhancing and protecting the value, desirability, and attractiveness of said real property.” The Homeowners’ Association brought suit to recover fees...
and foreclose a lien against the defendant’s property. The defendant argued that the covenant to pay maintenance fees did not run with the land. The court determined that a covenant to pay maintenance fees touches and concerns the land because it promotes recreation, health, safety, and general welfare of the members as well as providing for maintenance of the property. A maintenance fee is a valid restrictive covenant.

Notably, the court in Supkis did not follow the Restatement’s approach. The court did not even mention the Restatement. In fact, the court also considered whether the covenant at issue violated the common-law rule against perpetuities, and the court found that the covenant did not violate the rule because the title to the property vested immediately. The court considered the constitutionality of the restrictive covenant under the common-law rule against perpetuities without even mentioning the Restatement, which specifically states that the common-law rule against perpetuities does not apply to servitudes. The comment to section 3.3 explains “servitudes are immune from invalidation under the rule against perpetuities, even though they create specifically enforceable contingent rights to acquire land or interests in land in the future.” The court employed the complex common-law rule against perpetuities instead of the simple approach of the Restatement, and the court also used the touch and concern doctrine. This signals a marked decision not to follow the Restatement.

Additionally, the Fifth Circuit expressly declined to follow the Restatement’s approach. In Refinery Holding Company, the Fifth Circuit...
cited Inwood to explain when a restrictive covenant runs with the land and binds subsequent owners.\textsuperscript{207} The court specifically made a determination as to whether covenants precluding future liability and lawsuits touched and concerned the land.\textsuperscript{208} Following a test applied by the Supreme Court of Texas, the Fifth Circuit said a restrictive covenant “touches and concerns when it affects the ‘nature, quality or value of the thing demised, independently of collateral circumstances.’”\textsuperscript{209} In Refinery Holding Company, the Fifth Circuit found that restrictive covenants that prevent future remedial actions and environmental liabilities do not touch or concern the land because the covenants only affect parties personally.\textsuperscript{210} Such promises have no direct impact on the real property.\textsuperscript{211} “A personal contractual arrangement does not qualify as a covenant.”\textsuperscript{212} Personal promises that do not relate to or concern the use and enjoyment of real property are exactly the types of promises the touch and concern doctrine intended to prevent.\textsuperscript{213}

These cases show that Texas has not adopted the Restatement’s approach.\textsuperscript{214} Even if Texas courts did adopt the Restatement’s approach, however, it would make little impact.\textsuperscript{215} The Restatement merely gives courts another broad test for invalidating restrictive covenants.\textsuperscript{216}

\textbf{V. CONCLUSION}

Restrictive covenants are a popular way to protect the value of property.\textsuperscript{217} In order to be enforceable, the covenants must run with the land.\textsuperscript{218} Traditionally, the covenants must touch and concern the land to run

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\textit{Restatement of Property} promulgated by the American Law Institute has abandoned the ‘touch and concern’ requirement . . . . Because Texas has not yet adopted this approach, we do not address in this opinion the numerous policy arguments advanced by both parties.”\textsuperscript{).}
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\textsuperscript{207} Id. at 355.
\textsuperscript{208} Id. at 356.
\textsuperscript{209} Id. (citing Westland Oil Dev. Corp. v. Gulf Oil Corp., 637 S.W.2d 903, 911 (Tex. 1982)).
\textsuperscript{210} Id. at 355–58.
\textsuperscript{211} Id.
\textsuperscript{212} Id. at 357.
\textsuperscript{213} See id. at 356–57.
\textsuperscript{214} See supra Part IV.
\textsuperscript{215} See supra Part III.
\textsuperscript{216} See supra Part III.
\textsuperscript{217} Fambrough & Dickson, supra note 2, at 16.
\textsuperscript{218} Williams, supra note 1, at 423.
with the land. 219 What does that really mean? “Restrictions on the use of the land, such as a promise to use the land only for residential purposes or a promise not to sell liquor on the land, clearly satisfy the test.” 220 But the “trend in American courts has been and is to move away from any requirement of physical touching.” 221 The courts have used the touch and concern requirement to uphold restrictive covenants on the basis that the covenants preserve property values. 222 However, many restrictive covenants are overly burdensome or require the payment of fees for facilities that homeowners do not even use. 223 Thus, the courts are manipulating the doctrine to uphold covenants that actually decrease the marketability of the land. 224

The Restatement purports to abandon the touch and concern doctrine in favor of a different inquiry. 225 But the Restatement’s approach effectively replaces one broad doctrine with another. 226 Moreover, Texas courts continue to employ the touch and concern doctrine. 227 In fact, very few courts to date have adopted the Restatement. 228

The touch and concern doctrine no longer serves the purpose for which it was originally created: limiting the types of promises parties could enforce. 229 With the development of subdivisions and planned communities, it is now clear that covenants to pay homeowners’ association fees touch

219 Id.
220 JOSEPH WILLIAM SINGER, PROPERTY § 6.3.1 (3d ed. 2010).
221 STOEBUCK & WHITMAN, supra note 14, at 479.
222 See supra Part I.
223 See supra Part I.
224 See supra Part I.
225 See RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. b (2000).
226 See supra Part II; see also SINGER, supra note 220, § 6.3.1 (noting that the Restatement attempts to “reintroduce the touch and concern element through the back door . . .”); STOEBUCK & WHITMAN, supra note 14, at 480 (stating that the Restatement attempts to abolish the touch and concern element but “it retains, if in different language, a requirement that is at least as restrictive” as the common law concept).
227 See supra Part IV.
228 See supra Part IV.
229 See STOEBUCK & WHITMAN, supra note 14, at 475 (stating that “[t]he clearest example of a covenant that meets the requirement is one calling for the doing of a physical thing to land”). Traditionally, covenants “not to plow the soil, not to build a structure, or not to build multifamily dwellings” easily fit into the category of covenants that touch and concern the land. Id. However, “[i]f there ever was a rule that a running covenant had to touch and concern land in a physical sense, it has long since been abandoned . . .” Id.
and concern the land. Lawyers are often celebrated for challenging legal boundaries to accomplish certain things; however, the expansion of the touch and concern doctrine has muddled any useful purpose the doctrine once served. Many restrictive covenants do not substantially benefit property values, and homeowners are left without an effective remedy to challenge restrictive covenants that are outdated, overly restrictive, or no longer serve a useful purpose. The best solution may be to abolish the doctrine completely.

Unfortunately, the Restatement, purporting to abolish the touch and concern concept, does not provide an adequate inquiry to solve the problems created by the expansion of the doctrine. Thus, the doctrine lives on. Parties seeking to nullify restrictive covenants must prove either:

1. [T]he property owners have acquiesced in violations of the residential restriction so as to amount to an abandonment of the covenant or a waiver of the right to enforce it; or
2. there has been “such a change of conditions in the restricted area or surrounding it that it is no longer possible to secure in a substantial degree the benefits sought to be realized through the covenant.”

Parties trying to void a restrictive covenant based on changed circumstances must prove, however, that changed conditions are “radical.” The courts consider:

1. [T]he size of the restricted area; (2) the location of the restricted area with respect to where the change has occurred; (3) the type of change or changes that have occurred; (4) the character and conduct of the parties or their predecessors in title; (5) the purpose of the

\[\text{SINGER, supra note 220, \S 6.3.1 ("Today both anticompetitive covenants and covenants to pay dues to a homeowners’ association are universally understood to touch and concern the land.").}\]

\[\text{See Note, supra note 17, at 939–40; McLinden, supra note 6.}\]

\[\text{See supra Part II.}\]

\[\text{See Epstein, supra note 9, at 1368.}\]

\[\text{Davis v. Canyon Creek Estates Homeowners Ass’n, 350 S.W.3d 301, 309 (Tex. App.—San Antonio 2011, pet. denied) (internal citations omitted).}\]

\[\text{Id.}\]
restrictions; and (6) to some extent, the unexpired term of the restrictions.\textsuperscript{236}

The changed circumstances doctrine should be expanded so that courts consider whether the covenant still serves to protect or increase the property value of the land. Those covenants that are so outdated or overly restrictive that they actually decrease the marketability of the property should be voided based on changed circumstances.

Under this approach, the court could invalidate covenants such as the assessments for recreational facilities at issue in \textit{Bridgewater}. The property owner would not have to meet the threshold requirement of proving “radical” changed circumstances. Instead, the court would evaluate the mandatory assessments as they relate to the value of the real property itself. In \textit{Bridgewater}, all of the revenue from the assessments went to Double Diamond, the private development corporation, while the homeowners paid all of the maintenance expenses for the recreational entities.\textsuperscript{237} These maintenance fees represent exactly those promises the law tried to invalidate in the first place with the touch and concern doctrine: promises that personally benefit an individual and have no relation to the use or enjoyment of the land.\textsuperscript{238} In \textit{Bridgewater}, the court cited a related case, \textit{Double Diamond, Inc. v. Saturn}, where the court found no evidence of increased property values based on the presence of certain amenities and hospitality operations.\textsuperscript{239} An expansive changed circumstances doctrine would allow the courts to invalidate such assessments based on the lack of increased property values. The approach would give property owners a more viable legal avenue for challenging excessive fees that go toward the maintenance of recreational facilities owned by private developers, benefitting owners who gain no right of ownership or right to enjoy such facilities.

This Article sought to address the modern day usefulness of the touch and concern doctrine while investigating the impact of restrictive covenants on land values and marketability. Ultimately, abolishing the doctrine or, alternatively, expanding the changed circumstances doctrine, will allow

\textsuperscript{236} Id.
\textsuperscript{238} REAL\textsuperscript{STEMENT (THIRD) OF PROP.: SERVITURES § 3.2 cmt. e (2000).}
\textsuperscript{239} 339 S.W.3d 337, 345 (Tex. App.—Dallas 2011, pet. denied).
parties to invalidate covenants that do not provide practical benefits or substantial increases in the value of real property.