

TOWARD AN ECONOMIC UNDERSTANDING OF TOUCH AND CONCERN†

JEFFREY E. STAKE*

O, what men dare do! What men may do!
What men daily do, not knowing what they do!¹

INTRODUCTION

X promises *A* that Homeacre will be used for residential purposes only. *X* sells Homeacre to *Y*. Does *X*'s promise bind *Y*?² *X* promises *A* to operate a first-class department store on Macyacre. After *X* sells Macyacre to *Y*, must *Y* also operate a first-class department store?³ *X* promises *A* to pay for Greenacre. If *X* sells Greenacre to *Y* before paying *A*, does the debt pass to *Y*?⁴ *X* promises *A* to pay homeowners' dues and assessments for Condoacre. *X* sells Condoacre to *Y*. Can *A* extract the homeowners' dues from *Y*?⁵ *X* promises *A* to bury a pipeline below the surface of Oilacre. *X* sells Oilacre to *Y*, and *A* sells to *B*. Can *B* force *Y* to bury the pipeline?⁶ *X* buys Damacre from *A*, promising to provide electricity to *A*'s new place of business. *X* sells to *Y*. Must *Y* provide electricity to *A*?⁷

Notwithstanding the AIDS epidemic and the zero population growth movement, the population of the United States is continuing to increase, and land use is intensifying, at least by the simple criterion of

† This Article applies established economic concepts to a narrow corner of the law that has caused substantial confusion and resisted coherent explanation. Cf. C. CLARK, *REAL COVENANTS AND OTHER INTERESTS WHICH "RUN WITH LAND"* 208 (2d ed. 1947) (Judge Clark uses the phrase "so narrow a corner of the law"). I thank Henry Manne for some of the basic economic training reflected in this paper. I also thank Judge Richard Posner, and Professors Richard Epstein, Susan French, Jim Leitzel, Lora Holcombe, Harry Pratter, Val Nolan, Bill Hicks, Richard Fraher, Joe Hoffmann, Ann Gellis, Craig Bradley, Merritt Fox, Stephen Conrad, Dan Conkle, and Don Gjerdingen for helpful comments. Elizabeth Cure and Scott Schroeder provided research assistance.

* Assistant Professor, Indiana University School of Law—Bloomington; B.A., 1975, University of Illinois; J.D., 1981, Georgetown University Law Center.

1. W. SHAKESPEARE, *MUCH ADO ABOUT NOTHING* act IV, sc. i, ll. 18-19 (A. Humphreys ed. 1981).

2. See *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987).

3. See *Net Realty Holding Trust v. Franconia Properties, Inc.*, 544 F. Supp. 759, 762-63 (E.D. Va. 1982).

4. See *Lisenby v. Newton*, 120 Cal. 571, 573, 52 P. 813, 814 (1898).

5. See *Boyle v. Lake Forest Property Owners Ass'n*, 538 F. Supp. 765, 770 (S.D. Ala. 1982).

6. See *Mobil Oil Corp. v. Brennan*, 385 F.2d 951, 953-54 (5th Cir. 1967).

7. See *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 312-13, 181 S.E. 66, 68 (1935).

people per acre. Even in the absence of population growth, land use intensifies as the mechanization of farms and robotization of factories free workers for employment or recreation elsewhere. The elsewheres are becoming more and more crowded and will probably continue to do so. With this intensification, as Professor Richard Epstein has pointed out,⁸ covenants allowing two persons to share in the use of one parcel of land, along with the law governing those covenants, gain importance.

The American Law Institute has commissioned Professor Susan French, as Reporter, and an Advisory Board, to research and restate the rules governing "servitudes," or promises connected to land. For the *Restatement (Third) of Property*, Professor French proposes to reweave the ancient strands of servitude law into a new, and presumably smoother, fabric.⁹ One of the knotty strands destined for elimination or replacement is the "touch and concern" requirement:

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.¹⁰

Some may mourn the passing of horizontal and vertical privity, and touch and concern, but they may console themselves that, like the Rule in *Shelley's Case*, the echoes will linger for a long time to come.¹¹

Professor French thus calls into question the function and utility of the touch and concern requirement. This Article presents arguments for the retention of that long-enduring strand.

The answer to each of the hypothetical questions above depends on whether the promise at issue runs with an interest in land.¹² Some

8. Epstein, *Covenants and Constitutions*, 73 CORNELL L. REV. 906, 907 (1988) [hereinafter *Covenants and Constitutions*] (expanded version of remarks delivered to Property Section of American Association of Law Schools, Miami, Fla., Jan. 8, 1987).

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

10. French, *Servitude Reform and the New Restatement of the Law of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 930-31 (1988) [hereinafter *Reform*] (footnote omitted).

11. *Reweaving*, *supra* note 9, at 1319.

12. A successor to an interest in land might enforce a promise, or might have a promise enforced against her, in a court sitting either in law or in equity. When a promise is enforced by or against a successor in a court of law, the promise is called a covenant running with the land. Some covenants, called equitable servitudes, are enforced in equity even though they do not qualify as running covenants. Because of the confusion generated by the differences between these similar doctrines, scholars have urged that the two doctrines be merged into one. See Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1179, 1182, 1230, 1260 (1982); *Reweaving*, *supra* note 9, at 1304, 1319. For purposes of this Article, the differences between the two doctrines are unimportant because the touch and concern test has the same meaning in both contexts. See *id.* at

promises run with interests in land and bind or benefit future owners; others do not. When a promise runs with an interest in land, any person acquiring the interest will succeed to the benefit or burden of the promise. The original parties to the covenant have attached the promise to the land interest in such a way that no one person's action can separate it.

To make a promise run,¹³ the promisor and promisee¹⁴ must intend that the promise be enforceable by and against their successors, as well as between themselves. Mutual intent, however, is not enough.¹⁵ According to traditional doctrine, courts will ignore the parties' intent and will not attach a covenant to land unless the covenant has a special character, a special relationship to the land.¹⁶ The "touch and concern" requirement identifies this special relationship, separating those promises capable of running from those that cannot.¹⁷ A covenant will bind or benefit successors to an interest in land only if it touches and concerns. Moreover, the doctrine specifies that the two ends of the covenant¹⁸ (i.e., its benefit and its burden or its rights and its duties) require separate analysis.¹⁹ The benefit of a promise will not run with an interest in land unless that benefit touches and concerns the land;²⁰ likewise, the burden of a promise will not run unless the burden touches and concerns.²¹ Any

1272 n.55. In law and in equity, if a promise runs, it modifies an interest in land in such a way that acquisition of the interest in land carries with it the benefit or burden of the promise.

13. For the sake of brevity, and admittedly with a loss in precision, "run with an interest in land" shall in some cases be shortened to "run with the land" or simply "run."

14. In this Article, promisors will usually be assumed to be male; promisees, female.

15. See, e.g., 2 AMERICAN LAW OF PROPERTY § 9.10, at 366 (A. Casner ed. 1952); 3 H. TIFANY, THE LAW OF REAL PROPERTY § 854, at 461 (B. Jones 3d ed. 1939).

16. In some situations, a person asserting that a covenant runs must, in addition to showing the special character of the covenant, satisfy other requirements having to do with the relationships between the parties and their predecessors (such as horizontal and vertical privity), and must prove notice. See, e.g., C. CLARK, *supra* note †, at 92-94; Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 867 (1977). Because "it is the 'touch or concern' requirement (usually rendered 'touch and concern' today) that gets to the heart of real covenants," Stoebuck, *supra*, at 866, this Article leaves analysis of those other elements for another day and another author.

17. The touch and concern requirement applies both to equitable servitudes and to covenants running with the land. See Stoebuck, *supra* note 16, at 892 ("To run, equitable restrictions must touch and concern benefited and burdened land, and the requirement should be exactly the same as for real covenants."). But see *Oliver v. Hewitt*, 191 Va. 163, 167, 60 S.E.2d 1, 2 (1950) (enforcing covenant not to compete in equity after holding it unenforceable at law because it did not touch and concern).

18. As used herein, "covenant" and "promise" mean the same thing.

19. 2 AMERICAN LAW OF PROPERTY, *supra* note 15, § 9.13, at 374; R. BOYER, SURVEY OF THE LAW OF PROPERTY 516 (3d ed. 1981); A. CASNER & W. LEACH, CASES AND TEXT ON PROPERTY 990 (3d ed. 1984); C. CLARK, *supra* note †, at 111.

20. Stoebuck, *supra* note 16, at 869.

21. *Id.* This paper does not explore some of the deviations from this basic theme, such as the rule that the burden will not run unless the benefit touches and concerns some land (i.e., when the benefit is "in gross," see RESTATEMENT OF PROPERTY § 537(a) (1944)). This paper also does not

combination is possible; either end, neither end, or both ends of a covenant might touch and concern, and therefore be able to run with, an interest in land.²²

When does an obligation or a benefit touch and concern land? Defining the touch and concern element has indeed proved difficult.²³ Possibly recognizing that no formulation better describes the test than the words "touch and concern" themselves, the *American Law of Property* does not even attempt to define the phrase explicitly.²⁴ But the words "touch and concern" offer inadequate guidance to conveyancers and judges.²⁵ As Judge Lehman of the New York Court of Appeals stated in one of the more famous touch and concern cases, *Neponsit Property Owners' Association v. Emigrant Industrial Savings Bank*:²⁶

In truth the test so formulated is too vague to be of much assistance and judges and academic scholars alike have struggled, not with entire success, to formulate a test at once more satisfactory and more accurate. "It has been found impossible to state any absolute tests to determine what covenants touch and concern land and what do not. The question is one for the court to determine in the exercise of its best judgment upon the facts of each case."²⁷

Others have voiced similar opinions.²⁸ The *Neponsit* court itself adopted

address the distinction between touching and concerning a piece of land and touching and concerning an estate in land.

22. See *Streams Sports Club, Ltd. v. Richmond*, 109 Ill. App. 3d 689, 694-95, 440 N.E.2d 1264, 1268 (1982) (dicta) (burden side of covenant may run though benefit side in gross and cannot run), *aff'd*, 99 Ill. 2d 182, 457 N.E.2d 1226 (1983); R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *THE LAW OF PROPERTY* 481 (student ed. 1984).

23. Professors Cunningham, Stoebuck, and Whitman describe the touch and concern concept as "intangible." R. CUNNINGHAM, W. STOEUCK & D. WHITMAN, *supra* note 22, at 475. That term implies that it is easy to become concerned about touch and concern, but it is impossible to touch it.

24. 2 *AMERICAN LAW OF PROPERTY*, *supra* note 15, § 9.13, at 373-82.

25. For example, it would be difficult to predict from the words "touch and concern" that a promise to pay money to a homeowners' association for maintenance of a swimming pool can run with land but a promise to repay funds borrowed to build a swimming pool cannot. Cf. *Pelser v. Gingold*, 214 Minn. 281, 287, 8 N.W.2d 36, 40 (1943) (burden of covenant to pay promisee's personal debts incurred for improvements to land does not run because it does not touch and concern). Nor does it seem obvious that a promise to carry passengers over one's rail system does not "touch and concern" the land granted to the railroad. See *Dickey v. Kansas City & I.R.T. Ry.*, 122 Mo. 223, 231, 26 S.W. 685, 687 (1894) (holding, as one alternative, that burden does not run to successor railroad because covenant is in no way connected to land); *Eddy v. Hinnant*, 82 Tex. 354, 356-57, 18 S.W. 562, 563 (1891) (breach of covenant to furnish pass does not give rise to action for damages against successor railroad, but only against promisor railroad; no mention of running covenant theory or touch and concern element in opinion).

26. 278 N.Y. 248, 15 N.E.2d 793 (1938).

27. *Id.* at 256, 15 N.E.2d at 795 (quoting C. CLARK, *REAL COVENANTS AND INTERESTS WHICH "RUN WITH LAND"* 76 (1st ed. 1929)).

28. R. BOYER, *supra* note 19, at 520 ("Neither the cases nor the commentators present an exact test for determining whether or not a particular covenant touches or concerns land."); J. CRIBBET, *PRINCIPLES OF THE LAW OF PROPERTY* 193 (2d ed. 1975) ("The broad idea is clear enough, even

a definition first suggested by Dean Harry Bigelow and later refined by Judge Charles E. Clark:

If the promisor's legal relations in respect to the land in question are lessened—his legal interest as owner rendered less valuable by the promise—the burden of the covenant touches or concerns that land; if the promisee's legal relations in respect to that land are increased—his legal interest as owner rendered more valuable by the promise—the benefit of the covenant touches or concerns that land.²⁹

This formulation, however, runs in a circle.³⁰ Of course the promisor's legal relations are lessened if a court finds that the promise sticks to the land, burdening all who come to own the land. As one might expect, courts finding that a covenant touches and concerns have often invoked this version of the test.³¹ Because other formulations do little more to clarify the requirement,³² the Bigelow-Clark version remains

though application to specific cases gets a bit sticky."); C. DONAHUE, T. KAUPER & P. MARTIN, *CASES AND MATERIALS ON PROPERTY: AN INTRODUCTION TO THE CONCEPT AND THE INSTITUTION* 1157 (2d ed. 1983) ("[S]cholars and courts have repeatedly sought, without noteworthy success, to elucidate the test."); S. KURTZ & H. HOVENKAMP, *CASES AND MATERIALS ON AMERICAN PROPERTY LAW* 674 (1987) ("The concept of 'touch and concern' is extremely spongy, especially in the middle."); Rose, *Servitudes, Security and Assent: Some Comments on Professors French and Reichman*, 55 S. CAL. L. REV. 1403, 1409 (1982) ("In the older interpretations of servitudes, the fabulously frustrating doctrine of 'touch and concern' occupied a central place A reformed servitude law, then, might well substitute a phrase such as 'land-development-related' for 'touch and concern,' if only to shed the baggage of those old touch and concern doctrines, with all their vagueness and circularity."); Krier, Book Review, 122 U. PA. L. REV. 1664, 1678 (1974) ("Odd as it may seem, considerable effort has been devoted to divining the meaning of this requirement, but with very little evidence of success.") (reviewing R. POSNER, *ECONOMIC ANALYSIS OF LAW* (1972)).

29. C. CLARK, *supra* note †, at 97.

30. See *Abbott v. Bob's U-Drive*, 222 Or. 147, 159, 352 P.2d 598, 603-04 (1960); J. DUKEMINIER & J. KRIER, *PROPERTY* 1037 n.56 (1981); R. ELLICKSON & A. TARLOCK, *LAND USE CONTROLS: CASES AND MATERIALS* 620 (1981); Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 210 (1970); Krier, *supra* note 28, at 1678. The way out of the circle is to emphasize the words "in respect to the land" and "as owner" in the Bigelow-Clark definition. Even this reading of the definition offers little aid, however. Discerning when legal relations are "in respect to land" is no easier than discerning when a promise touches and concerns land. Berger, *supra*, at 211.

The *Neposht* court asserted that the Bigelow-Clark "method of approach has the merit of realism." 278 N.Y. at 257, 15 N.E.2d at 796. But even that court admitted that the adoption of the test does not avoid a "question of degree." *Id.*, 15 N.E.2d at 796. Professor Goldstein notes that "New York's decisions on the touch or concern requirement have been sparse, inconsistent, and unenlightening." P. GOLDSTEIN, *REAL PROPERTY* 761 (1984). That the New York decisions are often hailed as leading cases makes this observation all the more discomfiting.

31. See *Mobil Oil Corp. v. Brennan*, 385 F.2d 951, 953 (5th Cir. 1967) (burden made interest in land less valuable and benefit made interest in land more valuable, so benefit and burden touch and concern and run); cf. *City of Reno v. Matley*, 79 Nev. 49, 56-57, 378 P.2d 256, 260 (1963) (benefit of covenant to construct and maintain street meets Clark's test and runs).

32. Professor Cribbet suggests the following in his fine textbook:

If the promises are those you would normally expect to find in a lease and if they relate to the subject matter of the lease . . . they undoubtedly "touch and concern" the land. If they

authoritative.³³

This Article suggests an alternative understanding of the touch and concern element, one framed in terms of efficiency.³⁴ More precisely, my hypothesis is that courts find that a covenant touches and concerns land when the benefit or the burden at issue is more efficiently allocated to the successors than to the original parties to the covenant.

One should not read this efficiency-oriented view of touch and concern to imply that courts now justify or have in the past justified the touch and concern requirement with economic arguments. Indeed, the origin of the phrase "touch or concern" traces back to 1583,³⁵ when little policy explanation was expected in judicial opinions and long before economic analysis gained currency. The attempt here is not to explain what

are abnormal and seem to relate to the personal relationship of the parties rather than the lease relationship . . . they are collateral.

J. CRIBBET, *supra* note 28, at 193. Professor Tiffany states:

a covenant is regarded as touching and concerning the land if it is of value to the covenantee by reason of his occupation of the land or by reason of an easement which he has in the land, or if it is a burden on the covenantor by reason of his occupation of the land.

3 H. TIFFANY, *supra* note 15, at 455. For other formulations, see Berger, *supra* note 30, at 210-11.

33. Other courts have adopted the Bigelow-Clark formulation since *Neponsit*. See, e.g., *Mobil Oil*, 385 F.2d at 953; *City of Reno*, 79 Nev. at 56-57, 378 P.2d at 260. Commentators also view that definition as the most successful. See, e.g., R. BOYER, *supra* note 19, at 516 (slightly rephrasing test); A. CASNER & W. LEACH, *supra* note 19, at 990 (referring to Bigelow); J. CRIBBET, *supra* note 28, at 192 (same); R. CUNNINGHAM, W. STOEBCUK & D. WHITMAN, *supra* note 22, at 474-75 (referring to Bigelow-Clark); see also 5 R. POWELL, *THE LAW OF REAL PROPERTY* ¶ 675 (P. Rohan rev. ed. 1988); Williams, *Restrictions on the Use of Land: Covenants Running with the Land at Law*, 27 TEX. L. REV. 419, 429-30 (1949).

Clark offered a less "scientific" test only two pages later in his little book on covenants. He said, "Where the parties, as laymen and not as lawyers, would naturally regard the covenant as intimately bound up with the land, aiding the promisee as landowner or hampering the promisor in similar capacity, the requirement should be held fulfilled." C. CLARK, *supra* note †, at 99. Clark must have meant that courts should apply this test by referring to expectations other than those of the two original parties to the covenant, since the intent element already addresses their expectations. But what the public regards as intimately bound up with land depends in part on what promises the law allows to be tied to land. For the test to avoid this circularity, one must presume that the word "naturally" separates out the effect on a person's expectations wrought by the law itself. Even if that is possible, a test grounded in the natural expectations of a layperson calls for the kind of sociological data courts are poorly suited to gather and, in reality, leaves tremendous discretion to the judge. In either case, the test affords little predictability and security to lawyers planning conveyances.

34. This Article adopts a Posnerian meaning of efficiency. In the spirit of Kaldor-Hicks, Judge Posner asks who would end up with an asset (or liability) if voluntary transactions among all persons involved were feasible. See R. POSNER, *ECONOMIC ANALYSIS OF LAW* 14 (3d ed. 1986); see also Culp, *Judex Economicus*, LAW & CONTEMP. PROBS., Autumn 1987, at 95, 101-05 (discussing Posnerian judge's approach). A covenant case presents the court with the question whether *X* or *Y* must bear the burden of performing a covenant. If (1) *X* and *Y* are the only affected persons, (2) objective reasons support the belief that *X* and *Y* would agree between themselves to allocate the burden to *X*, and (3) substantial transaction costs would prevent such a private allocation, then the court should allocate the burden to *X*.

35. See *Spencer's Case*, 77 Eng. Rep. 72 (K.B. 1583).

courts have said, but rather what they have done. The data most relevant to this inquiry are the facts and the results of cases in which courts have indicated that the result turned upon the application of the touch and concern test.

Any attempt to use an efficiency test confronts an immediate hurdle. Efficiency concerns often support the conclusion that courts should enforce the parties' freely negotiated agreement in accordance with their intent. However, by limiting the types of promises that two parties may attach to land, the touch and concern requirement interferes with the intentions of the original parties to the promise. Professor Epstein argues that this interference is unwarranted.³⁶ He attacks judicial use of touch and concern to overcome the original parties' intentions. While Epstein acknowledges that third parties need some protection from invisible obligations secretly attached to land, he concludes that the constructive notice provided by modern recording acts adequately protects strangers from such surprise obligations.³⁷ The restrictions that the touch and concern requirement imposes on freedom of contract impair efficiency by creating uncertainty about the doctrine's application and incentives for economically less desirable transactions.³⁸ Therefore, Epstein argues, the mutual intent of the parties should determine whether promises attach to land.³⁹

36. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353 (1982) [hereinafter *Freedom of Contract*]. Epstein presumably would not object to the use of touch and concern as a means of determining the parties' intent when that intent is otherwise unclear.

37. Record notice protects individual strangers from unwittingly failing to deal with all of the necessary parties in acquiring a desired interest in land. *Id.* at 1357.

38. *Id.* at 1361-64.

39. Epstein's attack on the touch and concern element sounds in libertarianism as well as utilitarianism. Professor Allison Dunham, on the other hand, suggests that liberty is compromised by unrestricted freedom to bind covenants to land. See Dunham, *Promises Respecting the Use of Land*, 8 J.L. & ECON. 133, 164-65 (1965). This Article takes no stand on how best to protect or foster liberty; efficiency is the only criterion explored. A comment on the coercive effects of the touch and concern element and the land promise doctrine may, however, be appropriate here. The land promise doctrine allows judicial enforcement of promises against persons who have not explicitly agreed to be bound by those promises. The touch and concern element, by limiting such occasions, reduces the frequency of such coercive state actions. But the touch and concern requirement allows enforcement of obligations against the original promisor for a time period longer than he bargained for. The occasions of such extended enforcement against the original promisor will, by logic, outnumber the situations in which the requirement prevents the state's coercion against the successor. By substituting some cases of coercion against the original promisor for a smaller number of cases involving coercion against successor promisors, touch and concern increases the frequency of coercive state action against persons who have not agreed to be bound. But the frequency of coercive state actions should not be the sole consideration in the coercion calculus. Coercion against successors may be more obnoxious than coercion against the original promisor. The original promisor knowingly agreed to perform for a while; the successor has not agreed to perform at all. It might be less offensive to force two persons to continue to perform beyond the agreed time of performance than to force one person to perform a promise that he has never considered making. The touch and concern

Epstein's argument might convey the impression that the property law governing the scope of promises that attach to land is more restrictive than contract law, that agreements otherwise enforceable as contracts become unenforceable because they relate to land. But such an impression is unwarranted. No one contractually bound to perform an obligation can be freed from performing merely because the obligation is connected to an interest in land. If, in the silent presence of *Y*, *X* promises *A* that anyone buying his car will allow *A* to drive it occasionally and *Y* later buys the car from *X*, courts will not hold *Y* bound to *X*'s promise. To the limited extent that property law allows the enforceability of promises against persons who have not voiced assent, it enlarges the scope of enforceable promises beyond that of ordinary contract rules.⁴⁰

On the other hand, the touch and concern requirement prevents intended beneficiaries from enforcing some promises designed to benefit third parties. On the benefit end of covenants, then, property law doctrines do appear to restrict freedom of contract. This theoretical restriction has little restrictive effect, though, because a promisee can assign any benefits that do not touch and concern to her successor as ordinary contractual rights.⁴¹ Because a party can easily circumvent the touch and concern requirement on the benefit side of the covenant, the important question is whether the requirement serves as a useful limitation on the parties' ability to create burdens that will bind nonparties.

Part I of this Article justifies a heightened judicial scrutiny of attempts to attach promises to land (as opposed to ordinary contracts) and offers some utilitarian reasons for questioning Epstein's normative conclusion that, as far as efficiency is concerned, a court's consideration of intent and notice should suffice.⁴² The first part reaches no conclusion

element also tells some people desiring to make a deal that the government will not enforce the deal as they structure it. But a governmental refusal to enforce an agreement ought not to be considered as coercive as a governmental enforcement of an agreement against a person who has not agreed to be bound.

40. Two special aspects of covenants relating to land allow this extension beyond the ordinary bounds of contract law. First, the recording system makes it relatively easy to devise a system for giving purchasers notice that a liability is attached to the asset. Second, the asset itself is not movable, so it may serve as security for the performance of the promise.

41. *City of Reno v. Matley*, 79 Nev. 49, 56, 378 P.2d 256, 260 (1963). A successor would lose (or fail to acquire) the benefit of a promise that was intended to run in a case where a court determined that the benefit did not touch and concern, that the promisee had not specifically assigned the benefit, and that the promisee was unavailable. But such a case should not occur often. The promisee has an incentive to inform the successor of the benefit's existence, and, once informed, the successor can easily protect his interest by getting an express assignment of the benefit.

42. Professor Sterk launches a multi-pronged attack on Epstein's analysis. See Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615 (1985). Sterk argues that servitudes may generate negative effects that are external to the parcels

regarding whether the benefits of this judicial intervention outweigh the transaction costs and disincentives that arise from such review. This part's only objective is to show that courts *might* achieve some gains in efficiency by closely reviewing attempts to attach covenants to land. After exploring reasons why courts may rightly hesitate to honor the original parties' intent to bind a promise to land, part II discusses the role of the touch and concern requirement in land promise doctrine. Part III then analyzes the results of cases in which the courts have applied the touch and concern requirement and identifies the fact patterns that overcome judicial reluctance to allow covenants to attach to interests in land. This descriptive part concludes that touch and concern functions in a way easily understood in efficiency terms. The Article thus demonstrates that economic benefits support and explain the hearty survival of "touch and concern."⁴³

The approach taken in this Article differs from the mode of economic analysis frequently used to examine legal issues—examination of the incentives created by various proposed rules. The incentive effects are an essential component, but only one component, of the economic picture of servitude law. Just as deterrence cannot guide the entire discussion of criminal law issues such as the death penalty, incentives cannot guide the entire discussion of touch and concern. Just as the rate and severity of accidents make up only one part of the economic analysis of accident liability rules,⁴⁴ disincentives and uncertainties stemming from

involved in the servitudes and unaccounted for in negotiating the servitudes. *Id.* at 621-24. He also argues that landowners can make mistakes regarding their own best interests and that a paternalistic concern for landowners' well-being may justify judicial supervision of servitudes. *Id.* at 617. Moreover, Sterk asserts, perpetual enforcement of servitudes resolves difficult questions of intergenerational fairness against future generations. *Id.* at 616-17, 634-39, 643-44. This Article takes a narrower view that ignores most effects external to the specified parcels of land under a covenant and avoids any reliance on a paternalistic concern for the well-being of covenant-making landowners. This Article's efficiency approach to intergenerational concerns also differs from Sterk's fairness approach.

43. This survival alone suggests that the touch and concern element helps to achieve an efficient allocation of resources. "One of the things that positive economic analysis of law has taught us is that we should think long and hard before condemning to oblivion institutions that have survived for many centuries." *Symposium: Time, Property Rights, and the Common Law—Round Table Discussion*, 64 WASH. U.L.Q. 793, 854 (1986) [hereinafter *Roundtable Discussion*] (comments of T. Merrill). Apart from covenants between landlords and tenants, this position has less force because, as Professor Reichman notes, the running covenant doctrine has existed for less than 200 years. Reichman, *supra* note 12, at 1212.

44. See G. CALABRESI, *THE COSTS OF ACCIDENTS* 26-28 (1970). The approach here corresponds to the part of Calabresi's analysis that relates to the distributional effects of various liability rules. Calabresi divides the economic concerns into primary, secondary, and tertiary costs of accidents. In his analysis, the primary costs include the effects of a liability rule on the rate and severity of accidents; secondary costs are the societal expenses that result from accidents; and tertiary costs are the sums society must spend for administering a liability rule. The incentive effects discussed by

the very existence of touch and concern make up only one part of the analysis of the requirement. Leaving aside incentive effects on other parties, the operation of the doctrine has efficiency ramifications in each concrete case. Even focusing solely on efficiency, what happens to particular covenants and their successors matters too.

I. THE COMPLEXITY OF TYING PROMISES TO LAND

Epstein's position takes insufficient account of the fact that people do stupid things.⁴⁵ When people act stupidly, they reduce the well-being of society. One response to this point is that a person making an error should bear the entire loss, that the *rest* of society loses nothing. Although an error-maker does himself bear the entire loss of wealth, most people do not consume all their assets before dying. To the extent that an error reduces wealth that the error-maker would have left to others, society bears the loss.⁴⁶ The point here is not that the individuals lack sufficient incentives to make correct decisions.⁴⁷ As Judge Posner has explained,⁴⁸ anyone who dies holding substantial assets must have some desire to pass those assets to his successors. If such a decedent valued consumption over beneficence, he would have purchased an annuity allowing complete consumption of his wealth without risk of exhausting it before his death.⁴⁹ Since the decedent had a beneficent intent, he would value a

Epstein correspond to Calabresi's primary costs; the efficiency concerns discussed here correlate to Calabresi's secondary costs of accidents.

45. The point hardly needs support, but some credit for its application to land law should be given to Victor Goldberg, who has offered the observation in response to Epstein's attacks on the Rule Against Perpetuities. See *Roundtable Discussion*, *supra* note 43, at 842 (comments of V. Goldberg). The point applies equally well to covenants.

46. See Sterk, *supra* note 42, at 617 (to permit current landowners' preferences to govern for a long time would be to resolve difficult questions of intergenerational fairness against future generations).

Donative activities have the ability to multiply the happiness generated by wealth. If a donor suffers a loss, she derives less happiness from giving because she has less to give. The donee also receives fewer assets to enjoy.

Even if the diminution in wealth does not reduce the potential for consumption that the error-maker will pass on to others, society may still bear some of the consequences of the error. For humanitarian reasons, we do not usually allow fellow Americans to starve to death. If one dissipates all of her own wealth and survives, society will share with her. In doing so, society takes upon itself some of the losses caused by individuals' mistakes.

47. An argument along those lines could, however, be made. Professor Williams observes that in some circumstances individuals will insufficiently account for the value of a resource to future generations, resulting in a decision to consume rather than conserve. See Williams, *Running Out: The Problem of Exhaustible Resources*, 7 J. LEGAL STUD. 165, 199 (1978). If the attachment of covenants constitutes consumption, judicial restraint might be justified to reduce consumption in order to achieve greater long-term efficiency in the allocation of land resources.

48. R. POSNER, *supra* note 34, at 480.

49. The possibility of extreme sickness, curable only at a high cost, casts some doubt on this conclusion. If there are expensive cures for ailments against which one cannot insure, it may be

larger gift over a smaller gift and thus would have an incentive to maximize his wealth, including an incentive not to make a mistake in writing a covenant. Regardless of incentives, however, the fact remains that individuals make mistakes.⁵⁰ The point of this consumption argument is merely that the rest of society has good reason to be concerned about such errors, because society, along with the individual, bears a portion of the loss. Above and beyond any paternalistic reasons for us to care about an individual's mistakes,⁵¹ we have a self-interested reason to care—mistakes reduce the wealth of those surrounding the mistake-maker.⁵²

A. *The Difficulty of Correcting Errors.*

One witless thing a person might do is attach a covenant that burdens himself far more than it benefits the other party. This occurs when the promisor mistakenly underestimates the extent to which attaching the promise will diminish the value of his land and, as a result, sets his price for the covenant too low. Because of this, the burdens generated by the covenant can outweigh its benefits.

In a simple two-party situation, parties could negotiate for the termination of such a promise after discovering the error. Thus, if covenants always benefited and burdened only two identifiable parties, a special land covenant doctrine might not be needed.⁵³ But land covenants last longer than many contracts; without special doctrinal constraints, they could endure forever, and in the course of that forever, the land underlying the promise might be divided many times. Land interests can be divided in three ways: a single interest can be held concurrently by several owners; a single parcel can be divided into temporal

necessary to conserve wealth rather than buy an annuity if one is to optimize consumption by prolonging life.

50. Any analysis resting on an assumption that substantial numbers of competent individuals will continue to make large mistakes may well strike an economist as a bit strange. For reasons given below, however, human error deserves more attention in the land promise domain than in ordinary contractual situations.

On the other hand, lawyers might consider strange any effort aimed at explaining why land promises might not follow predictive models premised on rational decisionmaking.

51. It is sensible to desire protection from self-made mistakes if a social rule can achieve that protection more cheaply than any personal efforts to prevent mistakes. For example, the constructive notice provided by the recording acts is not actual notice. This gives an error-maker an opportunity to quietly shift the loss to another, getting from a purchaser the full fair market value of a piece of land as if it were unencumbered by a promise. It is not obvious that the recording acts necessarily provide enough protection from devious error-makers.

52. We collectively protect ourselves against the possibility that we will individually inherit land assets that have been deprived of their value by being knotted to irrelevant promises.

53. This weak conclusion remains questionable, however, because even in simple two-party situations negotiations can break down. See Cooter, *The Cost of Coase*, 11 J. LEGAL STUD. 1, 20-24 (1982) (strategic bargaining often leads to noncooperation).

interests; and one plot can be divided into many. However the division occurs, the attached promise will also be divided. Thus, land covenants by nature divide more easily than ordinary contracts and have more time to fall into multiple hands.⁵⁴

Multiple ownership of a promise creates hurdles when a promisor seeks to detach the promise from his land,⁵⁵ with the result that the promisor may not easily purchase his way free of the obligation when the burdens outweigh the benefits. The simple problem of dealing separately with a large number of parties could torpedo the promisor's attempt by raising the costs of negotiation beyond the amount to be gained from detaching the promise.⁵⁶ Even if only a few parties need agree, holdout problems may delay renegotiation or entirely prevent a promisor from liberating his land from the covenant.⁵⁷

A holdout problem develops when one party insists on more than a proportionate share of the price that a willing buyer will pay for a right held jointly by all members of a group, or when that party insists on more than the value he places on the right simply because others are receiving a higher amount. Suppose, for example, that five adjoining landowners hold the benefit of a covenant that prevents use of certain land for a business. If business use would increase the value of the servient parcel by \$100,000, renegotiation should occur if the total reduction in value to surrounding parcels is less than that amount. But if one

54. Many of the points in this subsection do not apply to promises to pay money. The inefficiencies associated with the attachment of such promises to interests in land are discussed separately. See *infra* text accompanying note 136.

55. The promise can be detached by complete rescission or by permanent allocation to one person.

56. See Ellickson, *Adverse Possession and Perpetuities Law: Two Dents in the Libertarian Model of Property Rights*, 64 WASH. U.L.Q. 723, 724-25 (1986).

57. See Calabresi & Melamed, *Property Rules, Liability Rules, and Inalienability: One View of the Cathedral*, 85 HARV. L. REV. 1089, 1106-08 (1972); Sterk, *supra* note 42, at 620. In addition to the holdout problem, a free rider problem could possibly hamper efforts to terminate an inefficient covenant. The free rider problem occurs when access to a benefit cannot be restricted to those willing to pay for the benefit. Situations where free riders prevent termination of a running promise appear to be rare. If the benefit of such a promise has been divided widely, the only obstacle to negotiated termination is the holdout, because the benefits of the contemplated negotiation will accrue to a single person, the promisor or his successor. If the burden has been divided widely, the free rider problem can occur only if lifting the burden from one landowner also lifts the burden from those who do not pay for its removal. Ordinarily, an agreement between the promisee and one of the promisors would not operate to free other promisors from their burdens. Other promisors or their successors might, however, use such an agreement as evidence in favor of terminating the covenant under a theory of laches, estoppel, or changed conditions. See *Petersen v. Beekmere, Inc.*, 117 N.J. Super. 155, 171-72, 283 A.2d 911, 920-21 (Ch. Div. 1971) (court refused to enforce covenants requiring individual lot owners to purchase stock in property owners' association and pay assessments because general scheme had been destroyed by releases given to some lot owners). Such an application of those doctrines, if successful, could create a free rider problem.

neighbor assesses his loss at \$40,000 and the others see a loss of \$10,000 each, one of the other four might not agree to nullify the restriction unless she also received \$40,000. She might rather lose \$10,000 than be treated, in her view, unfairly. Even if all attach the same \$10,000 valuation to their loss and none care about fairness, one might see an opportunity to make a killing by asking for \$50,000. The promisor might then refuse the deal in spite of the gains forgone.⁵⁸ In any event, the party who deals last holds a monopoly. For that reason, each party will attempt to delay agreement until all others have agreed. Given that incentive for delay, expunging the promise could take a long time.

While spatial division of land can lead to holdouts, any form of concurrent ownership may generate a different form of opportunistic behavior: free riding. Each owner may refuse to pay for lifting a restriction, hoping that other owners will pay and that there will be no legal means of excluding him from the benefits.⁵⁹ Temporal division of land also exacerbates the multiple-party problems, and creates another of its own. Future interest holders may be difficult to identify; if they are not yet alive or ascertained, communication and agreement become especially problematic.⁶⁰

One might argue that any pricing mistake made by a promisor will be recognized by his successor, causing the successor not to buy until the covenant is eliminated. The covenantor would then, before the land could be divided, be forced to undo the restriction while the transaction costs of detachment were still relatively low. This argument, however, ignores the possibility that the benefited lands may have fallen into multiple or uncertain ownership before the promisor's successor purchased the burdened parcel. There is no reason for purchasers of benefited lands to urge renegotiation of a covenant before they purchase. In addition, gratuitous transfers of land occur frequently. Donees will be reluctant to complain that the restriction reduces the value of the gift beyond the amount of benefit that it generates for the promisee.

58. Studies in experimental economics indicate that people will incur some loss in order to punish others for unfair behavior. Kahneman, Knetsch & Thaler, *Fairness as a Constraint on Profit Seeking: Entitlements in the Market*, 76 AM. ECON. REV. 728, 736 (1986).

59. Temporal division, too, can cause a free rider problem. Holders of contingent future interests in burdened realty are not sure whether they will ever get possession and may find it difficult to calculate the value of their interest, burdened or free of the restriction. To solve this problem, a present interest holder could buy up a benefit, acquiring freedom for himself and an interest he could sell to his successor. This tactic might, however, cause rent seeking. If, for example, an earlier owner purchases from a promisee a right to prevent construction above twenty feet and retains that right while the land and a ten story building pass to his successor, the two will have a substantial prize to fight over. The expenditure of funds in that competition, whether in court or out, wastes resources.

60. See Ellickson, *supra* note 56, at 725.

Thus, when burdened lands have fallen into multiple ownership, strategic individual behavior or the necessity of multiple transactions will often prevent or delay voluntarily negotiated termination of a bad promise.⁶¹ As a result, the promise may greatly reduce the value of the lands to society, and much of the resulting consumption loss may fall on persons other than the one who made the mistake.

Epstein cautions that transaction costs cut both ways.⁶² He points out that if reviving a covenant requires coordinated action among many landowners, then achieving the necessary unanimous consent will be highly unlikely. In such cases, the gains of a running covenant will be lost. Just as opportunistic behavior can prevent the detachment of an inefficient covenant from an interest in land, so too can opportunistic behavior prevent the reattachment of an efficient covenant if a court wrongly (inefficiently) decides to unstick a covenant that earlier owners had tied to the land.

Although both underenforcement of efficient relationships and over-enforcement of inefficient relationships are possible, the consequences are not equally severe. The strategic behavior problems associated with reattaching promises found not to touch and concern pale by comparison to the problems of detaching those same covenants if the touch and concern requirement is not satisfied. If a covenant does not touch and concern land and hence is unrelated to land use, there is no reason to believe that it is important to have all of the landowners in a given area agree to the covenant, i.e., there is no need for coordinated action to resurrect a similar covenant. The diminished importance of unanimous agreement reduces landowners' opportunities for strategic behavior. As a result, a person who wants to reestablish a covenant that has been stricken because it does not touch and concern will not confront any important strategic behavior problems.⁶³ If, for example, the promisee only needs one promisor, she can approach many; she does not need the agreement of a particular neighbor because the promise will be unrelated to that neigh-

61. The first question, then, is whether courts have upset efficient allocations of promises by applying the touch and concern requirement. Have courts failed to perceive efficiencies that the parties might have seen and attempted to achieve when they tried to attach the promise? Have courts, by allocating wrongly, effectively terminated any covenants that, because of the possibilities of strategic behavior, would be difficult to create anew? Next, assuming that few situations have been made less efficient, have any been made more efficient? Or, assuming some efficiency gains in individual cases, do those gains outweigh the costs that Epstein says retaining the requirement entails? Finally, do fairness losses outweigh any efficiency gains from the touch and concern rule? This Article does not attempt to answer the last two questions.

62. *Freedom of Contract*, *supra* note 36, at 1361.

63. This point suggests one possible economic definition of touch and concern: a covenant touches and concerns land when possibilities of strategic behavior would make reconstructing a similar promise difficult.

bor's land.⁶⁴ Even if the promisee desires to purchase such a promise from a group of people, she can do so by making her offer to a larger number, or any number, of that group. Because the promise is unrelated to land, her dealings are not limited to promisors who have a relationship to any particular piece of land, and, because there is no essential party, she confronts no holdouts. Similarly, if the initiator desires to be on the burdened end of a promise and wants to get a number of persons to buy the benefits, there is no reason why he needs to have all of any particular group of landowners agree to pay for his performance; he confronts no free rider problems. When a promise does not touch and concern, it will be less difficult for private parties to recreate an efficient promise. The probability that strategic behavior will interfere with the termination of inefficient promises tied to land is greater than the likelihood that strategic behavior will prevent the recreation of judicially detached covenants. In these special cases involving promises relating to land, the immediate costs⁶⁵ of judicial action in one direction are greater than the immediate costs of judicial action in the other.

Take, for example, a promise by *X* to *A* that the owner of *X*'s lot will massage the feet of the owner of *A*'s lot. After transfers, successors *Y* and *B* might place quite different values on the benefits and burdens of the promise. If so (and if the promise can be enforced by *B* against *Y*) a bilateral monopoly exists, hindering the detachment of the promise. No similar bilateral monopoly would prevent the creation of a new promise if the original promise were held unenforceable between the successors.

B. *The Likelihood of Errors.*

We should be especially open to the idea that people act improvidently in the land transaction arena, because an extremely high percentage of land transfers occurs between actors who are not experienced in the business of transferring land. Many, if not most, people will buy and sell real property at least once in their life, but most of them will do so fewer than ten times.⁶⁶ Because transactions are infrequent, errors have

64. While it is possible that the promisee would need the promise to attach to land in order to have security for performance, it seems unlikely that only one piece of land would be of sufficient value to provide that security.

65. "Immediate costs" as used here means only those costs incurred by the parties in the case; it does not include any financial effects on unrelated persons who learn of the decision or the law.

66. The importance of this fact, as it pertains to covenants, would diminish under an Epsteinian law because covenants could arise separately from a land transfer, which might increase the frequency of their creation. Nevertheless, the average person would probably not engage in a sufficient number of covenant transactions to be weeded out of the market. Even if landowners attached promises to land more frequently, they would not sell their land more frequently. It is the sale or attempted sale of burdened land that weeds the promisor from the market or teaches him the market

little opportunity to teach or eliminate those who are likely to err. Therefore, compared to most markets, the real estate market is loaded with error-prone actors. As a consequence, accuracy in pricing decisions will vary much more in the land market than in other markets where players have stayed in the game over a long series of transactions.⁶⁷

The abilities of the players aside, there are other reasons for giving real estate covenant transactions less judicial deference than transactions involving other assets. Items exchanged in the land covenant market are much less standardized than stock or commodities, for example. Plots of land are not fungible, and covenants vary infinitely. In addition, there are no published market prices that a seller can use as a basis for even a rough comparison. For those reasons, sellers have difficulty assessing a covenant's impact on the future market price of burdened land. Mistakes, even large ones, will occur frequently. The absence of a market for similar covenants attached to similar land makes it difficult for a covenantor to estimate the effect of a covenant on the preferences of others who might be interested in his land.⁶⁸

One might argue that the same lack of a market applies equally to most contracts for goods and services. Although many such contracts are unique, land promises differ in important ways. The purchaser of goods or services often buys an asset that will have a relatively short life and will not be resold, except possibly for scrap. The purchaser intends

response to his behavior in attaching the promise. Without an increase in sales of burdened lands, the market will remain full of novices.

67. Although many land transferors enlist the aid of a lawyer, lawyers do not usually add much to their clients' price-setting ability. A lawyer may have seen covenants before, but not *the covenant at issue* attached to *the land at issue*. Even if the lawyer has seen the same covenant attached to a similar parcel, he may not know of any related diminution in market value. The problem is not that the parties to the transaction do not understand the legal consequences of the deal, but rather that one party does not comprehend the deal's financial consequences for him. Of course, many covenants are written by professionals who fully understand the value of the covenants' benefits and burdens. If the touch and concern requirement impedes the drafting or enforcement of such covenants, then one might desire that a separate rule apply to major land developments such as residential subdivisions. The infrequency of cases holding covenants exchanged in major land development projects unenforceable suggests that the touch and concern requirement does not create substantial uncertainty for such professional drafters. It is, however, entirely possible that these professionals turn to less appropriate, but more certain, forms of control when the touch and concern test may pose a problem. See *Freedom of Contract*, *supra* note 36, at 1363 (implicitly suggesting private contract provisions as the proper form of control). Whether the touch and concern requirement substantially impedes these professionals presents a difficult empirical question.

Brokers may be of help in determining a covenant's value. Often, however, the buyer is the promisor and the broker works for the seller. In such situations, it would be against the broker's personal interests and professional obligations to warn the buyer of the negative value of a covenant.

68. The lack of a market should ordinarily encourage more judicial deference to price determinations made by the parties. But, as explained below, courts do not review the pricing of covenants. Judicial review of a covenant is limited to questions within the court's competence—those questions answerable with facts that appear to be readily available to the court.

to consume the investment. The critical question for the consuming investor is "What rents will the asset generate?" rather than "What is the resale or market value of the asset?" The opinion of the market should exert more influence on a promisor's price for a land promise than on a purchaser's price for unique services or goods that are intended to be consumed. Therefore, parties attaching a promise to land have access to less of the information important to their decision than parties to ordinary contracts. This lack of information magnifies pricing errors.

Finally, although covenant mistakes are difficult for the parties to repair, they are relatively easy for society to undo. The stroke of a judicial pen can detach a covenant; many other assets are not as easily restored. Because the reparation is (at least relatively) simply effected and because the land will, by its misuse, give notice of the value tied up in the promise, some person will see the opportunity to realize a financial gain by eliminating the promise. If any legal arguments that support detachment or destruction of land promises exist, someone will sue to detach them.⁶⁹ And, of course, someone else will attempt to keep the promise attached. Such legal battles for the values locked into a promise, a form of "rent seeking,"⁷⁰ waste resources. Indeed, in some circumstances, rent seekers may expend more total resources in an effort to win than the winner will actually gain.⁷¹

Clear legal rules on the running of a promise curtail rent seeking, because they allocate the prize to one party before the game begins. Battles will be less frequent and waste more limited if the law allows no exceptions to a promise's enforceability (or unenforceability). Even an ironclad rule upholding all covenants, however, will not eliminate rent-seeking behavior. As long as the common law allows new exceptions to be grafted onto old rules, lawyers will invent new arguments and doc-

69. See *Roundtable Discussion*, *supra* note 43, at 843 (comments of V. Goldberg), 846-47 (comments of N. Komesar).

70. A lottery, the proceeds of which are not spent for the benefit of the players, exemplifies the rent-seeking concept. Two (or more) players each purchase tickets in an attempt to win a prize. The more one invests, the greater the chances of winning. At some point, though, the cost of investing another increment outweighs the expected return, or the increase in chances of winning multiplied by the amount of the prize. At that point, the player should stop investing. From the viewpoint of each player, his behavior is optimal. But from the perspective of the players as a group, they have wasted resources. If they had agreed between themselves to purchase one ticket and divide the prize (or allocate it by flipping a coin), they would have guaranteed their winning of the prize and wasted no resources in the process. Thus, any expenditure beyond the price of one ticket would be wasted.

71. See G. Tullock, *Efficient Rent Seeking*, in *TOWARD A THEORY OF THE RENT-SEEKING SOCIETY* 97, 102 tbl. 6.2 (S. Buchanan, R. Tollison, & G. Tullock eds. 1980). The amount each party ought to spend depends on the expenditure's perceived effectiveness. It is even possible for each party's expenditures to exceed the value of the prize. Note also that the first lawsuit over a covenant attached to land does not prevent additional rent seeking in the future if the court upholds the attachment.

trines in favor of new exceptions. If the prize is large enough, i.e., if the increase in land value expected to arise when a restriction is eliminated is large enough, rent seeking will occur no matter how clear the law is.⁷²

Like clear rules, doctrines that reduce the frequency with which stupid promises attach to land also reduce the frequency of rent seeking, by eliminating the prize.⁷³ Therefore, with regard to the waste caused by rent seeking, the question is whether a reduction in prizes (lost but restorable rents) outweighs any decrease in clarity from the different legal rule.

Rent seeking may be a greater problem in the area of land promises than in other contract areas. The original parties to a land promise may have had a common understanding of the promise's meaning, but failed to express it clearly, leaving room for their successors to disagree on the promise's scope. Any extra range of disagreement creates extra room for rent seeking.⁷⁴ Furthermore, because the two parties are unlikely to be related by any personal dealings (at least one of the two is, by hypothesis, a successor), the promisor may feel less bound by "honor" or conscience to perform the covenant. In other words, rent seeking carries a lower personal or psychic cost. On the other hand, the parties will often be neighbors, a relationship with incentives that may replace the absent incentives from prior dealings.

In short, because of the market and the players, mistakes will likely be frequent, large, and costly for the successors to undo outside of the courtroom. In order to preserve society's assets in such cases, the law might intervene to invalidate the promises, just as the civil commitment law restrains the actions of those who might destroy their own property.⁷⁵

72. Assuming risk-neutrality, as long as the odds of success multiplied by the value of success exceeds the costs of the battle, it makes financial sense to start the fight. Because the odds of success in court can never be reduced to zero, it is always possible for the prize to become sufficiently large to make litigation a good investment.

73. One might respond that, because those doctrines do not eliminate the prize until they are applied in a lawsuit, the doctrines require rent seeking in order to do their work. This view is wrong. If the doctrine is clear (however complex), the parties will be able to determine that a promise does not stick without rent-seeking litigation. The often costly process of getting legal advice does not qualify as rent seeking.

74. The promisee's understanding is critical, for she can inflate the prize by demanding the most costly performance conceivable under the covenant.

75. *Roundtable Discussion*, *supra* note 43, at 845-46 (comments of R. Ellickson). The operation of the touch and concern requirement, however, differs in a critical way from a doctrine of temporary insanity with respect to silly covenants. The land promise doctrines do not usually invalidate a bad promise immediately upon its creation; a transfer of ownership must occur before a party can rely upon any of the running covenant or equitable servitude requirements (except intent and compliance with the statute of frauds) in resisting enforcement of the promise. A doctrine of silly covenants would go further, invalidating the promises *ab initio*. The possibilities of multiple transactions

One aim of this Article, so far, has been to suggest that there are good reasons to suppose that a rule allowing judges to scrutinize promises that two parties have attempted to attach to interests in land might avoid large losses. This is not to say that such a rule will achieve those gains, or that the gains will offset the disadvantages of intervention; these questions remain open. The following part attempts to identify how the touch and concern requirement might accomplish such gains, by examining the doctrinal role of the requirement. In other words, the next part reviews the ramifications flowing from a judicial determination that a covenant touches and concerns or fails to touch or concern.

II. THE ROLE OF THE TOUCH AND CONCERN REQUIREMENT

In light of the efficiency concerns that arise when parties attach promises to land, one might ask whether courts have applied the touch and concern requirement to eliminate either those promises that are inefficient from the start or those that have become inefficient over time. Professor Reichman argues for an initial validity approach when he suggests that the requirement fixes the boundaries of servitudes, only allowing those that offer some positive efficiency gains to survive.⁷⁶ But the operation of the requirement does not support that approach. The cases do not even suggest that failure to satisfy the touch and concern prerequisite would make a promise, purportedly attached to land, unenforceable between the original parties. If judges can or do use a touch and concern requirement to weed out promises that lack potential for efficiency, why do courts not also use the requirement to prevent enforcement of a promise between the original two parties? Because of the requirement's limited scope of operation, it cannot effectively serve to determine the initial validity of promises attached to interests in land.

Nor does the touch and concern requirement appear well-suited for the task of terminating agreements that have become inefficient or that are likely to become inefficient over time.⁷⁷ The requirement prevents an original promisee from enforcing a promise against a successor to the promisor even if just a month has passed from the time the covenant was made. At the other extreme, touch and concern has no effect if land has not changed hands, no matter how ancient the covenant. Moreover, servitude law contains other, more precise rules aimed at terminating cove-

and strategic behavior that would justify judicial scrutiny of the promise become problematic only after a transfer of the promise-bearing land. Therefore, it is appropriate that the doctrinal hurdle presented by the touch and concern requirement not apply in a suit between the original parties to the covenant before either has transferred the land.

76. Reichman, *supra* note 12, at 1232-33.

77. See *Reweaving*, *supra* note 9, at 1308-09.

nants that have become inefficient over time, such as the "change of neighborhood" (or "changed circumstances" or "changed conditions") doctrine and statutes limiting the duration of covenants.⁷⁸

Recognizing that the touch and concern requirement is poorly suited to determining either initial validity or later obsolescence,⁷⁹ Professor French argues that the requirement should be dropped entirely.⁸⁰ She correctly suggests that courts should not use the touch and concern test to invalidate promises that are contrary to public policy. For example, Justice Holmes, writing for the court in *Norcross v. James*,⁸¹ should have declared the covenant not to compete in that case unenforceable as contrary to public policy rather than using the touch and concern test to reach a pre-Sherman Act antitrust result. But Professor French's conclusion that the touch and concern requirement should be eliminated depends on the premise that the requirement's function is to filter out covenants that should not be enforced *ab initio* or because circumstances have changed.⁸²

Clearly, a mismatch between the accepted operation of the touch and concern test and the twin functions of determining initial validity and eventual obsolescence exists. But that mismatch suggests two alternate possibilities. One could conclude, as Professor French does, that the touch and concern element does its job poorly and ought to be replaced by a combination of constraints better tailored to making ex ante and ex post determinations of validity. Or one could conclude that such validity determinations are not what the requirement is all about. The problem with the latter choice has been that most judges and scholars have failed

78. See RESTATEMENT OF PROPERTY § 564 (1944); 2 AMERICAN LAW OF PROPERTY, *supra* note 15, § 9.39, at 444-48; R. CUNNINGHAM, W. STOEBOCK & D. WHITMAN, *supra* note 22, at 482-83; 5 R. POWELL, *supra* note 33, ¶ 679[2]; *Reweaving*, *supra* note 9, at 1281 n.106, 1300-02; see also N.Y. REAL PROP. ACTS. LAW § 1951(2) (McKinney 1979) (statutory method for terminating covenants that lack substantial benefit).

79. *Reweaving*, *supra* note 9, at 1308-09.

80. *Id.* at 1319; *Reform*, *supra* note 10, at 933. Professor French, the Reporter for the *Restatement (Third) of Property*, suggests replacing the touch and concern requirement with a combination of ex ante "initial validity" constraints and ex post "termination" limitations, *id.* at [text accompanying note 68], which, she implies, could perform the requirement's proper function. She, like Professor Epstein, advocates eliminating touch and concern. Unlike Epstein, however, she would retain other constraints on servitudes. *Id.*

81. 140 Mass. 188, 2 N.E. 946 (1885), *overruled*, *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 97, 390 N.E.2d 243, 250 (1979).

82. *Norcross* suggests that determining initial validity is a function of the touch and concern requirement. But the occasional use of touch and concern as a test for initial validity or obsolescence does not compel the conclusion that the element serves only that purpose. Such a use of the requirement might be a misuse. Indeed, the operation of the requirement suggests that it must have some other function.

to offer a convincing alternative interpretation.⁸³ Such an interpretation of touch and concern must focus on the critical fact that the requirement is not triggered unless and until a purportedly encumbered interest in land is transferred.⁸⁴

This Article focuses on the transfer. My thesis is that, rather than determining the efficiency of the covenant itself, the touch and concern requirement allows courts to determine the efficient allocation of the benefits and burdens of the land promise. Consider, for example, a promise by landowner *X* to neighbor *A* that the owner of *X*'s land will keep a barn painted an attractive color. If *X* sells to *Y*, *A* sells to *B*, and *Y* fails to perform, the court might try to redetermine⁸⁵ whether the promise is *itself* efficient, i.e., whether the benefits to *B* of performance outweigh the costs to *Y* of performing. Using the touch and concern requirement, however, the court asks a different question: whether the benefits to *B* are greater than the benefits to *A*, and whether the costs of performance by *Y* are less than the costs of performance by *X*. The touch and concern element thus helps to find the most efficient allocation of the covenant between the prior holder of an interest in land and his successor.

Some might argue that the question of who should benefit or suffer under a promise is not any more a matter for judicial determination than the issue of a promise's efficiency. In either case, one might say, courts should enforce what the parties have decided. But a significant difference separates a decision to review the efficiency of a promise from a decision to examine the efficiency of its allocation. To determine the efficiency of a promise itself, whether it should be terminated or not, is to engage in a balancing of one party's costs against another party's benefits, a matter appropriately left to the parties themselves. But the efficient allocation question asks how to allocate the two ends of a promise. The decisionmaker must determine who will enjoy the benefit more (the promisee or her successor) and who will suffer less under the burden (the promisor or his successor) after the interests in land are sold. Those two issues involve comparisons of benefits against benefits (on one end) and costs against costs (on the other). Courts can better address these issues by focusing on objective factors.

83. See *Reform*, *supra* note 10, at 931 n.14 ("Why does it matter whether a covenant burden or benefit touches and concerns the land? We are never told.").

84. Judge Posner suggests a reading of touch and concern that properly accounts for the operation of the requirement. He states that "having too many sticks in the bundle of rights that is property increases the costs of transferring property." R. POSNER, *supra* note 34, at 61. This view would also account for the fact that the requirement results in plucking a few sticks from the bundle exactly at the time of transfer. Posner, however, seems unconvinced by his own explanation. See *id.* at 62.

85. *X* and *A* made the determination initially.

Though this Article assesses touch and concern on economic grounds, a fairness point in favor of allocation over termination can be made. Under the efficient allocation approach, a finding that a covenant does not touch and concern works a smaller injustice to the promisee than it would if failure to satisfy the touch and concern requirement could kill a covenant. If that were the case, the promisee would lose the entire benefit of her bargain. Under the efficient allocation approach, the covenant is not dead, and the purchaser of the benefit of a promise does not lose the entire benefit of her bargain if a court holds that the covenant does not touch and concern. If a court holds that the benefit does not run, it has determined that the covenant is personal to the promisee. She still holds the benefit, and she may assign it. If a court holds that the burden does not touch and concern, the promisee has lost her security for performance,⁸⁶ but the original promisor remains bound.⁸⁷ The promisee, however, may not be able to acquire jurisdiction over the original

86. By holding that the burden does not run, the court changes the promisee from a secured creditor into an unsecured creditor. The touch and concern requirement says, in effect, that land will not be automatic security for certain types of promises. If in attaching a promise (such as a promise to pay money) to land, the promisee intended merely to acquire security for the performance of the promise, the promisee might have achieved that same goal by obtaining a mortgage interest in the land or attaching a lien to the land. To provide a means of security for promisees, the law need not allow covenants that do not touch and concern land to run.

The availability of alternative forms of security, however, indicates that there is nothing per se objectionable in the attachment of unrelated obligations to land. Why then should the law divert parties from a covenant and toward a mortgage? Covenants, being less formal than mortgages or liens, seem less official and binding. The word "covenant" itself strikes a layperson as less important than "lien" or "mortgage." (Even if the word "lien" is used in a deed, a court may require the promise to touch and concern before enforcing it. See *Neponsit Property Owners' Ass'n v. Emigrant Indus. Sav. Bank*, 278 N.Y. 248, 259-60, 15 N.E.2d 793, 794, 797 (1938). *Neponsit* implies that only separately recorded liens give sufficient notice to avoid the touch and concern requirement.) Moreover, neither the word "covenant" nor any other legalese is needed to create a covenant. See 3 H. TIFFANY, *supra* note 15, § 848, at 443. "[A]ny words in a deed which shew an agreement to do a thing, make a covenant." *Williams v. Burrell*, 135 Eng. Rep. 596, 607 (C.P. 1845) (quoting 3 J. COMYNS, A DIGEST OF THE LAWS OF ENGLAND, tit. *Covenant*, § 1(A)(2), at 263 (5th ed. 1822)). As a result, a covenant is slightly less likely to provide actual notice to the successor, which increases the chance of unfairness to purchasers. Indeed, some scholars have used this idea of notice to define touch and concern. See, e.g., *Berger, supra* note 30, at 211 ("[T]he requirement does serve the useful purpose of putting the normal expectations of society into effect If this is so, then the test of touch and concern ought to be what the usual expectation of a well-informed layman would be"); Krasnowiecki, *Townhouses with Homes Associations: A New Perspective*, 123 U. PA. L. REV. 711, 718 (1975) ("The covenant must relate to the land in such a way that the ordinary mortal would expect that if he takes the land, the covenant will come with it.").

In addition, and for the same reasons, a covenant might be less likely to impress upon the promisor the reduction in marketability that its attachment to land poses; this problem increases the likelihood of inefficient attachment. Furthermore, a promisor subdividing a parcel subject to a lien or mortgage might be more likely to satisfy those encumbrances before closing (because of their more accurately perceived effects on value) than to burden all of the subdivided parcels with the restriction. In that way, the lien and mortgage methods of securing performance reduce the likelihood that a burden will become difficult to undo because of multiple-party problems.

promisor, and the practical result of such a holding may be the same as terminating the covenant.⁸⁸ The efficient allocation hypothesis suggests that the courts ignore this important practical point in determining whether a promise touches and concerns.

Admitting that the operation of the touch and concern requirement may work an unfairness to promisees in some situations does not mean that the rule causes a net loss in fairness. Any inequity to promisees from a loss of security for performance must be weighed against the fairness gains that result from reducing the frequency of binding people to promises of which they are unaware. One might argue that because a successor to a burdened interest has constructive notice of the burden, allocating that burden to him involves no unfairness: he should have checked the record and obtained legal advice on whether a covenant would bind him. On the other hand, the promisee also has the notice given by the common law that some promises do not run with land and cannot be attached to land by the mere statement that they are intended to run. By giving such notice, the law gives the promisee an opportunity to protect herself against the possibility that the promisor or his successor will not perform. If the promisee feels the need to have some interest in the land to secure the promise, she ought to obtain a lien, mortgage, or some other independent interest in land. Both sides have notice and opportunity to protect themselves; indeed the promisee may well have the better notice and the better opportunity to protect herself. The fairness gains from not enforcing promises against those who have not agreed to perform could easily exceed the fairness losses to promisees. In any event, reallocation is less unfair to promisees than complete termination.

The points made so far are theoretical. First, a judicial check on private parties' attempts to *attach* covenants to interests in land might enhance efficiency more than a similar check on private attempts to *create* covenants. Second, the situations in which the touch and concern requirement has importance demonstrate that the requirement can effectively serve as a means of choosing which of two parties should bear or enjoy a promise. It makes theoretical sense, therefore, to suggest that courts should find the touch and concern requirement satisfied by facts indicating that placing the burden (or benefit) on the successor would

87. In this view, the touch and concern test accomplishes, without the need for an additional clause in the original transfer, exactly what Professor Krier suggests the parties could accomplish by an express provision that the original promisor will be liable if his successor fails to perform. Krier, *supra* note 28, at 1679 n.44. It is only the focus on the allocation between the original party and successor rather than between the successors that differentiates the analysis in this Article from Professor Krier's.

88. This is especially true when the original promisor dies. His estate might be held liable for a while, but, after the estate is wound up, the promisee has no remedy.

prevent an inefficient situation. The remainder of this Article tests this efficient allocation approach. Conceptually, the touch and concern requirement provides a tool for detaching a promise that should not be bound to an interest in land; it remains to be seen when the courts have used the requirement as such a tool.

III. TESTING THE EFFICIENCY HYPOTHESIS

The hypothesis that the touch and concern requirement serves to efficiently allocate the benefit and burden of a covenant raises two empirical questions: First, does the touch and concern requirement indeed serve to allocate rather than terminate a covenant? Second, can allocations made by courts be explained in efficiency terms?⁸⁹

A. *Allocation or Termination.*

Does touch and concern analysis decide the existence of a covenant, or merely its allocation? Two complications arise when one seeks to answer this question. The first stems from the separate element of intent and the second from the fact that only limited parties appear before a court deciding touch and concern cases. A court finding that a covenant does not touch and concern might also find that the original parties did not intend the covenant to be enforceable with respect to their successors. In such a case, the court would hold that the covenant is not enforceable at all, but the reason should be the lack of intent rather than the failure to touch and concern; if the parties did not intend the covenant to survive transfer, the touch and concern test is irrelevant. On the other hand, a court might find that a covenant touches and concerns the land at issue, but hold that the original promisor remains liable for performing the promise even if he has sold his interest in the land.⁹⁰ This result is explainable on the ground that the original parties intended two separate promises: an ordinary contractual obligation that would survive the sale and a covenant that would run with the land.⁹¹ Therefore, cases

89. The best test of the hypothesis, of course, would be to use it to make predictions before courts decide touch and concern cases. Given how few relevant opinions are currently published each year, however, it would take many years to develop an adequate database. This Article instead examines decided cases.

90. *City of Glendale v. Barclay*, 94 Ariz. 358, 362, 385 P.2d 230, 232-33 (1963) (promise to pay \$1.50 per month per house less than 250 built and connected to a sewer line does not run because promisee relied on original promisor's standing and credit). This result could also be explained on the ground that the aspect of the covenant involving a promise to pay money did not touch and concern.

91. In cases, for example, unless the covenant specifies otherwise, courts treat the promisor as if he made two promises, one an ordinary personal contract, the other a covenant intended to run with the leasehold. Professor Lawrence Berger concludes that, even after the land has been transferred, promisors continue to be bound to affirmative, as opposed to restrictive, covenants that run.

holding the original promisor liable to perform a promise that also runs with an interest in land do not necessarily undermine the efficient allocation theory. Nevertheless, the cases outside of the landlord-tenant area generally do hold that a promisor relieves himself of the burden of a promise by transferring his interest in the land;⁹² those cases thus tend to confirm the hypothesis.

In addition to these complications with the intent element, procedural practicalities hide the implications of courts' decisions. Rarely do both of the parties to one end of a covenant appear before a court. Once a court finds that the covenant does not touch and concern, the dispute is resolved; the party asserting the covenant may not enforce it against the party resisting enforcement. There is usually no need for the court to say whether the covenant could be enforced by or against someone else. However, in a 1941 case, *165 Broadway Building, Inc. v. City Investing Co.*,⁹³ the Second Circuit strongly suggested that the covenants in question would survive, benefiting the original promisor, even if they did not touch and concern. Indeed, the court stated that "the refunds are due and the question is whether they are personal rights, as contended by [the original owner], . . . or are benefits which run with the land, as claimed by [the present owner]."⁹⁴ Dicta in a few other cases also support the efficient allocation view that covenants survive a finding that they do not touch and concern.⁹⁵

Berger, *supra* note 30, at 210 n.101. But the leasehold example does not compel such a broad conclusion. The narrower view is, as stated above, that leases contain two promises.

92. See *Gallagher v. Bell*, 69 Md. App. 199, 217-20, 516 A.2d 1028, 1037-39 (1986), *cert. denied*, 308 Md. 382, 519 A.2d 1283 (1987); *Goldberg v. Nicola*, 319 Pa. 183, 185-91, 178 A. 809, 810-13 (1935) (original promisor not liable on promise to abide by height restrictions); *Oliver v. Hewitt*, 191 Va. 163, 166, 60 S.E.2d 1, 2 (1950); *accord* Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323, 1335 n.54 (1982). But some decisions do hold the original promisor to his promise. *Id.* at 1336 n.56.

93. 120 F.2d 813 (2d Cir.), *cert. denied*, 314 U.S. 682 (1941).

94. *Id.* at 814.

95. See *Choisser v. Eyman*, 22 Ariz. App. 587, 589-90, 529 P.2d 741, 743-44 (1974) (benefit of refund covenant does not run; original promisor can enforce); *Meado-Lawn Homes, Inc. v. Westchester Lighting Co.*, 171 Misc. 669, 13 N.Y.S.2d 709 (Sup. Ct. 1939) (because promise to refund money paid for gas mains construction does not run, original promisee can enforce; court finds neither touch and concern nor intent that covenant run), *aff'd*, 259 A.D. 810, 20 N.Y.S.2d 396, *aff'd*, 284 N.Y. 667, 30 N.E.2d 608 (1940). The court in *Dickey v. Kansas City & I.R.T. Ry.*, 122 Mo. 223, 230, 26 S.W. 685, 687 (1894), after holding against a promisee on the ground that the covenant at issue did not touch and concern, opined that the promisee was entitled to specific performance by the original promisor if performance was within the original promisor's power. The opinion in *Eddy v. Hinnant*, 82 Tex. 354, 18 S.W. 562 (1891), supports the same conclusion but is less conclusive because the court does not mention the running covenant theory or the touch and concern requirement. The *Eddy* court held that breach of a covenant to furnish a pass does not give rise to an action for damages against a successor railroad, only against the promisor railroad. *Id.* at 355, 18 S.W. at 563. Likewise, in *Ruddick v. St. Louis, K. & N.W. Ry.*, 116 Mo. 25, 30, 22 S.W. 499, 500 (1893), the court stated that the promisee could bring an action for damages against the

Because few, if any, cases have required a court to decide whether a covenant that did not touch and concern (but was intended to survive) would continue to bind or benefit the original party, the direct implications of that part of the hypothesis are relatively unimportant. Certainly, cases holding that such a covenant did not survive would undermine the efficient allocation hypothesis, but the mere absence of cases holding that such covenants survive does not. The important empirical question is whether the hypothesis explains the results in cases that turn on the operation of the touch and concern test. In the area of touch and concern, "[t]he cases really should be examined in the library and in detail."⁹⁶ The next sections undertake such an examination to see whether an efficiency analysis can explain the results in touch and concern cases. Section B tackles the burdens, section C the benefits.

B. *Allocation of Burdens to Promote Efficiency.*

A court's theoretical choice on the burden side of a covenant is whether the promise is enforceable against the original promisor or his

original promisor based on a covenant that did not touch and concern. The court in *Oliver v. Hewitt*, 191 Va. 163, 167, 60 S.E.2d 1, 2 (1950), offered additional support for this position when it wrote that a covenant not to compete is "binding between the original parties . . . [and] only the original parties as it does not run with the land." See also *Stegall v. Housing Auth.*, 278 N.C. 95, 100, 178 S.E.2d 824, 827 (1971) ("A restriction which is merely a personal covenant with the grantor does not run with the land and can be enforced by him only.").

The opinion in *Miller v. Clary*, 210 N.Y. 127, 135-36, 103 N.E. 1114, 1117 (1913), supports the opposite conclusion—the failure to touch and concern terminates the covenant. See also *Town of North Hempstead v. Eckerman*, 30 Misc. 2d 798, 802, 216 N.Y.S.2d 566, 570 (Sup. Ct. 1961) (covenant to demolish building on land did not run), *aff'd*, 21 A.D. 751, 252 N.Y.S.2d 32 (1964). Finally, one could argue that the absence of dictum in *Caullett v. Stanley Stilwell & Sons*, 67 N.J. Super. 111, 170 A.2d 52 (App. Div. 1961), suggests that the New Jersey court thought the covenant would not be enforceable against the original promisor after he sold the burdened interest.

Professor Lawrence Berger has stated that touch and concern determines whether a restrictive covenant binds the person or the land, but excludes affirmative covenants from that assertion. Berger, *supra* note 30, at 210 n.101. Other scholars agree with Berger's conclusions. See S. KURTZ & H. HOVENKAMP, *supra* note 28, at 674 (physician (original promisor) continues, after land transfer, to be liable on promise to perform checkups); see also J. CRIBBET, *supra* note 28, at 193 (covenant "does not 'touch and concern' the estate and cannot be enforced by or against remote parties"); 3 H. TIFFANY, *supra* note 15, § 854, at 455 ("[I]f it is not so related it will not accompany a transfer of ownership.").

It is primarily on this question of allocation versus termination that this Article differs from Professor Krier's excellent analysis in his book review of Posner's *Economic Analysis of Law*. Krier, *supra* note 28, at 1679-80. Professor French has taken the opposite view for the *Restatement (Third)*. Under her scheme, a set of initial validity and termination constraints can accomplish any useful limitations that are effected by the touch and concern requirement; consequently, touch and concern can be deleted from land promise doctrine. *Reform*, *supra* note 10, at [text accompanying note 68]. Although such a change might indeed streamline servitude doctrine, this Article's position is that no combination of validity and termination constraints can accomplish the results of a correctly applied touch and concern requirement.

96. C. CLARK, *supra* note †, at 230.

successor.⁹⁷ This Article seeks to show that, given such a choice, courts allocate responsibility to avoid results that would leave a large potential for inefficiency. Courts try to avoid situations that would require additional transactions or allow strategic behavior. If a covenant is to run, the nature of the covenant and the land to which it is supposedly attached must give the courts some reason to presume that placing the burden of the covenant on the successor to the interest in land would be more efficient than allocating the burden to the original promisor. Otherwise, courts will choose to detach the promise in order to avoid the potential inefficiencies inherent in any running covenant.⁹⁸ A tie does not go to the runner; if the facts do not justify a belief that allocating the burden to the successor will avoid an identifiable inefficiency, the burden will not run with the land.

To facilitate analysis, the following discussion separates land promises into two basic categories: (1) promises that a landowner will (or will not) do an act that must be done on either the promisor's or the promisee's land, and (2) promises that a landowner will (or will not) do something that can or must be done away from either the promisor's or promisee's land.

1. *Promises Performed on the Land.*

a. Promisor's land. Covenants in which a landholder has promised that a certain act will not be done on his land make up one-half of this group. One example is the commonplace covenant not to construct any building within a certain distance of a street. On first impression, it appears that the original promisor can perform such a covenant as easily as his successor. Indeed, it is easier for former owners not to build than for a current owner. Were that the whole matter, the efficiency hypothesis would predict that a court would find such a covenant collateral and hold that it does not run. But a covenant not to build near the street is intended as more than a promise by the promising lot owner not to build beyond a set-back line. A court would deem the promise broken if the promisor's son built a club house too near the street or if a builder mistakenly constructed a garage too near the street. In either event, the court would interpret the promise as a promise both not to build and not

97. See, e.g., *Dickey*, 122 Mo. at 230, 26 S.W. at 687 (burden of covenant to supply railroad pass does not run with railroad's land to successor railroad; promisee could win specific performance against original promisee if original promisee still able to comply); *Ruddick*, 116 Mo. at 30, 22 S.W. at 500 (promisee can bring action for damages against original covenantor, or can bring action in ejectment for condition broken). But see *Miller*, 210 N.Y. at 135-36, 103 N.E. at 1117 (court sees question as one of allocating expense between promisee and successor to promisor; court holds that burdens of affirmative covenants do not run).

98. See *supra* notes 45-89 and accompanying text (identifying these inefficiencies).

to allow anyone else to build in the specified area.⁹⁹

If the covenant is read as a promise not to allow construction, the landholder could perform the covenant more readily than could the original promisor. The successor holds the legal right to prevent construction on the land and, as a practical matter, could easily prevent anyone from building. The original promisor could enforce the covenant only by negotiating with the would-be builder not to build or with the successor to prevent the building. In either case, the parties would have to spend some time negotiating the form of the agreement, the price to be paid by the promisor,¹⁰⁰ and possibly the nature of the security provided by the successor. Finally, all of these negotiations would have to be expressed and memorialized. The result of placing the burden of the covenant on the promisor rather than his successor is to add an extra and substantial set of transaction costs to the promisee's performance. Because allocating the promise to the successor will prevent these costs, the efficiency hypothesis predicts that covenants not to do something on or with the promisor's land should run with the land, and indeed they usually do.¹⁰¹

99. See *Klapproth v. Grininger*, 162 Minn. 488, 203 N.W. 418 (1925) (covenant restricting use of lot to residential purposes is violated by granting perpetual easement across lot for right of way to other landowners); see also 3 H. TIFFANY, *supra* note 15, § 862, at 491 n.84.

100. Substantial rent seeking may occur as the parties negotiate the price. The original promisor will realize a gain if he can get his successor to perform for an amount less than the cost of buying out the promisee and less than the cost of nonperformance. If those costs are both high, then a large prize awaits the most effective bargainer. In such a case, both bargainers will waste substantial resources in the bargaining process. Where there are multiple promisees, the cost of buying out the promisees is likely to be especially high. The cost of not performing can also be high if the court orders an injunction.

101. Covenants not to do an act on a promisor's property come in many forms, almost all of which have been found to touch and concern the land. See, e.g., *Hagan v. Sabal Palms, Inc.*, 186 So. 2d 302, 311 (Fla. Dist. Ct. App.) (covenant restricting land use to dwellings runs), *cert. denied*, 192 So. 2d 489 (Fla. 1966); *Adult Group Properties, Ltd. v. Imler*, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987) (covenant disallowing commercial use of land runs); *Lex Pro Corp. v. Snyder Enters.*, 100 N.M. 389, 391, 671 P.2d 637, 639 (1983) (deed restriction preventing construction within 50 feet of street runs with restricted land); *Eppolito v. Medlicott*, 28 Misc. 2d 43, 46, 211 N.Y.S.2d 302, 306 (1961) (covenant forbidding nonresidential land use runs); *Latimer v. Pierce*, No. 126, slip op. (Tenn. Ct. App. Mar. 12, 1987) (LEXIS, States library, Tenn file); *Collum v. Neuhooff*, 507 S.W.2d 920, 922 (Tex. Civ. App. 1974) (covenant not to erect house or fence within 25 feet of "parkline" touches and concerns land); see also *Cook v. El Paso Natural Gas Co.*, 560 F.2d 978, 987 (10th Cir. 1977) (covenant not to dig wells that would result in waste of potash runs); *Chi-Mil Corp. v. W.T. Grant Co.*, 70 F.R.D. 352, 357 (burden of covenant not to make structural changes to building runs), *amended on other grounds*, 422 F. Supp. 46 (E.D. Wis. 1976); *In re 523 East Fifth Street Housing Preserv. Dev. Fund Corp.*, 79 Bankr. 568, 574-75 (Bankr. S.D.N.Y. 1987) (burden of covenant to use property solely for low-income housing touches and concerns); *Callahan v. Weiland*, 291 Ala. 183, 188, 279 So. 2d 451, 455 (1973) (covenant forbidding construction of "multi-unit projects" held to bar building of condominium); *Little v. Hunter*, 289 Ala. 6, 14-15, 265 So. 2d 441, 448 (1972) (promise not to subdivide property runs); *Singer v. Wong*, 35 Conn. Supp. 640, 643-55, 404 A.2d 124, 126 (Super. Ct. 1978) (covenant forbidding use of premises as retail shopping center runs); *Thodos v. Shirk*, 248 Iowa 172, 177, 79 N.W.2d 733, 736 (1956) (restriction that only buildings costing more

One type of covenant not to do an act on the promisor's land, the covenant not to compete, has given courts some trouble, but this difficulty relates more to the issue of intent than to the requirement of touch and concern. A court can interpret a promise not to operate a competing business in two ways. The court can read the covenant as one intended only to prevent the promisor from opening a competing business. If so, the parties intend the promise to be personal¹⁰² and there is no need to determine whether its burden touches and concerns. Covenants not intended to run will not run even if they touch and concern.¹⁰³

On the other hand, the court can construe the covenant as a promise that no one will operate a competing business on the specified land. So read, the covenant does not differ in any important way from a covenant not to erect a building. Both promises are more efficiently performed by the person holding possessory rights in the land than by the original promisor. The burden of a covenant intended to prevent anyone from using the land to compete with the promisee should and does run with the land.¹⁰⁴

than \$3000 may be built runs); *Fishback v. Dozier*, 362 S.W.2d 490, 491 (Ky. 1962) (covenant forbidding construction of filling station runs); *Cook v. Tide Water Associated Oil Co.*, 281 S.W.2d 415, 418-20 (Mo. Ct. App. 1955) (same); *Paine v. La Quinta Motor Inns*, 736 S.W.2d 355, 358 (Ky. Ct. App. 1987) (covenant forbidding construction of motel runs); *Orange & Rockland Util. v. Philwold Estates, Inc.*, 52 N.Y.2d 253, 263-66, 418 N.E.2d 1310, 1314-15, 437 N.Y.S.2d 291, 295-97 (1981) (burden of covenant not to use land for anything but hydro-electric plant touches and concerns, but covenant is void as against public policy); *Bodin v. Kinne*, 128 A.D.2d 931, 512 N.Y.S.2d 737 (1987) (burden of covenant restricting land to mink raising not challenged on touch and concern grounds); *Rome v. Rehfuess*, 391 Pa. 82, 137 A.2d 233 (1958) (burden of covenant not to build more than one dwelling on land runs, but court does not strictly enforce because of changed circumstances of surrounding land); *Albright v. Fish*, 136 Vt. 387, 393, 394 A.2d 1117, 1120 (1978) (promise not to subdivide runs); *Leighton v. Leonard*, 22 Wash. App. 136, 139, 589 P.2d 279, 281 (1978) (mutual agreement not to build tall buildings binds subsequent purchaser); cf. *Dierberg v. Wills*, 700 S.W.2d 461, 469 (Mo. Ct. App. 1985) (covenant forbidding construction of any building except for one-family residence held not to prohibit construction of parking lot).

102. See *Keller v. California Liquid Gas Corp.*, 363 F. Supp. 123, 126-27 (D. Wyo. 1973); *Hyde v. Liebelt*, 394 N.W.2d 888, 890-91 (S.D. 1986).

103. However, as *Stoebuck* notes, the fact that a covenant touches and concerns might help to persuade a court that the parties intended the promise to run. *Stoebuck*, *supra* note 16, at 875. The two elements, however, cannot be merged into one, because intent presents a question of fact for the jury, while touch and concern involves a determination of law left to the judge.

104. E.g., *Doo v. Packwood*, 265 Cal. App. 2d 752, 756, 71 Cal. Rptr. 477, 480 (1968); *Whitinsville Plaza, Inc. v. Kotseas*, 378 Mass. 85, 97, 390 N.E.2d 243, 249-50 (1979); *Gulf Oil Corp. v. Fall River Hous. Auth.*, 364 Mass. 492, 500, 306 N.E.2d 257, 262-63 (1974); *Lipton Professional Soccer, Inc. v. Bay State Harness Horse Racing & Breeding Ass'n*, 8 Mass. App. 458, 468, 395 N.E.2d 470, 475 (1979); *Alexander's Dep't Stores, Inc. v. Arnold Constable Corp.*, 105 N.J. Super. 14, 31-32, 250 A.2d 792, 801 (Ch. Div. 1969); *Silverstein v. Shell Oil Co.*, 40 A.D.2d 34, 36-37, 337 N.Y.S.2d 442, 445-46 (1972), *aff'd*, 33 N.Y.2d 950, 309 N.E.2d 131, 353 N.Y.S.2d 730 (1974); *John & Sal's Automotive Serv., Inc. v. Montesano*, 197 N.Y.S.2d 1001, 1005 (Sup. Ct. 1960); *Quadro Stations, Inc. v. Gilley*, 7 N.C. App. 227, 235, 172 S.E.2d 237, 242 (1970); *Gillen-Crow Pharmacies, Inc. v. Mandzak*, 5 Ohio St. 2d 201, 205, 215 N.E.2d 377, 380 (1966); see also J. DUKEMINIER & J. KRIER,

The other half of this first group of covenants consists of promises to perform affirmative acts rather than promises to refrain from acts. For example, a landowner might promise his neighbor that he and subsequent owners will keep a drainage ditch in good repair. To allocate that burden efficiently, a court should enforce the covenant against the current occupant rather than against the former possessor (the promisor). Either party might maintain the ditch, and no reason exists for presuming that the new owner is better able to do so than the former owner. Indeed, the successor may be less able, not having expressly chosen to take on the obligation. But aside from arguably irrelevant personal attributes, two reasons support the supposition that the person in possession can perform the covenant more efficiently than the original promisor. First, the possessor is more likely to observe deterioration of the ditch;¹⁰⁵ by imposing the burden on the promisor instead of the new owner, the court might greatly increase the cost of monitoring.

Second, not only can the successor monitor the ditch more easily; he can also maintain it more efficiently. Maintenance requires access to and control of the land,¹⁰⁶ powers not held by the promisor. The promisor could seek to buy the right to enter and work on the ditch from the

supra note 30, at 1044; Comment, *Covenants Not to Compete—Do They Pass?*, 4 CAL. W.L. REV. 131, 133-34 (1968). But see *Shell Oil Co. v. Henry Ouellette & Sons*, 352 Mass. 725, 727-29, 227 N.E.2d 509, 511-12 (1967) (covenant preventing establishment of competing service station on adjacent land does not run), *overruled*, *Whitinsville Plaza*, 378 Mass. at 97, 390 N.E.2d at 250; *In re Turners Crossroad Dev. Co.*, 277 N.W.2d 364, 371-72 (Minn. 1979) (covenant prohibiting construction of restaurant or liquor establishment does not run); *Kerrick v. Schoenberg*, 328 S.W.2d 595, 601 (Mo. 1959) (agreement not to sell nearby land for filling stations does not run); *Bill Wolf Petroleum Corp. v. Chock Full of Power Gasoline Corp.*, 70 Misc. 2d 314, 316-17, 333 N.Y.S.2d 472, 476-77 (Sup. Ct. 1972) (requirements contract limiting purchase of petroleum products from single oil distributor does not run), *modified*, 41 A.D.2d 950, 344 N.Y.S.2d 30 (1973); RESTATEMENT OF PROPERTY § 537 comment f (1944).

105. The new owner visits his land more often; while there, he may notice problems. The original promisor would have to make special trips to the land, and even then might not notice the problems as quickly. The promisor could, of course, pay the new owner to monitor and report the condition of the ditch. But the costs of reporting, combined with the costs of negotiating an agreement for that service, could easily exceed the cost of the simple task involved.

106. The decision in *Miller v. Clary*, 210 N.Y. 127, 132-35, 103 N.E. 1114, 1116-17 (1913) (burden of affirmative covenant does not run), indicates that courts are aware of the importance of access when they consider who should perform a covenant. Although the court saw the question as a choice between placing the cost of performance on the successor or on the promisee, rather than as a choice between the promisor and his successor, the court considered the fact of access when it allocated the burden. The court stressed that the promisee had an easement allowing access to a mill before it decided that there was no reason to impose the burden on the promisor's successor rather than the promisee. The court's opinion thus recognized both that efficiency of performance might critically influence whether a covenant runs and that access to the place of performance might influence the efficiency comparison.

landowner, but the costs of negotiating the purchase price,¹⁰⁷ when added to the costs involved in drafting the instrument to transfer the rights, seem far out of proportion to the costs of ditch upkeep. Moreover, the landowner will suffer a loss of privacy if someone else monitors and maintains the ditch. Alternatively, the promisor could pay the landowner to perform the promise, but that too would require an additional transaction, which would include negotiating, transferring the right, monitoring performance, and establishing security. Placing the burden with the new landowner would avoid all those costs. The promisor could also ask the current landowner to repair the ditch at the promisor's expense. But this alternative generates its own inefficiency: the "moral hazard" problem. The landowner will have no incentive to minimize ditch repair costs because someone else (i.e., the original promisor) will pay the bill.¹⁰⁸ For these reasons, a court can reasonably assume that imposing the obligation of ditch repair on the current landowner rather than the original promisor will lead to more efficient performance.¹⁰⁹

The efficient allocation approach predicts that other promises to perform an act on the promisor's land will, like ditch maintenance, ordinarily touch and concern and therefore run with the land. Abundant decisions confirm this prediction. Burdens that touch and concern have arisen from a landowner's promise to repair and maintain buildings,¹¹⁰ to apply insurance proceeds toward reconstruction of a burned building,¹¹¹

107. The negotiators must agree on the scope and duration of the rights of access. The promisor would probably want to negotiate a long-term right of access to prevent the successor from extorting a large price for performance in the future. Negotiating such a long-term right could prove costly. Common law judges, having seen a greater number of ridiculous property disputes than most laypersons, may have a healthy respect for the difficulty of negotiating such an agreement for a right of entry onto land.

108. The current owner will waste resources by making higher-quality repairs (by using decorative tiles, for example) than he would be willing to underwrite.

109. The efficiency hypothesis thus explains a recent decision, *Moseley v. Bishop*, 470 N.E.2d 773, 777 (Ind. Ct. App. 1984), in which the court found that an eighteenth-century promise to maintain a drainage ditch did touch and concern the underlying land. The court, however, held that the burden did not run to those successors of the promisor who did not own land crossed by the ditch because the burden did not touch and concern their land. The efficiency test makes sense of this result. The successors with land not traversed by the ditch had no advantage of either access or control that would allow the court to presume that allocating the burden to them would result in more efficient performance than allocating it to the original promisor would.

110. See *Ring v. Mayberry*, 168 N.C. 563, 565, 84 S.E. 846, 847 (1915) (covenant to build stairway on promisor's land to serve promisee's building enforced by promisee against promisor's successor).

111. See *Voight v. Southern Ohio Sav. Bank & Trust Co.*, 63 Ohio App. 56, 60-61, 25 N.E.2d 304, 305-06 (1939) (landlord entitled to have proceeds of insurance devoted to erecting building similar to one destroyed by fire because, according to court, promise to rebuild benefits tenant as well); see also *Arroyo v. Marlow*, 122 A.D.2d 821, 822-23, 505 N.Y.S.2d 892, 894 (1986) (burden of stipulation in court settlement requiring landlord to restore fire-damaged premises to habitable condition runs with land).

to bury a pipeline and tear down a drilling pad,¹¹² to build and maintain fences,¹¹³ to construct a roadway,¹¹⁴ to maintain a water flume,¹¹⁵ to supply steam,¹¹⁶ to repair a dam or canal,¹¹⁷ to maintain a station or crossing,¹¹⁸ to build a golf course,¹¹⁹ and to operate a first-class department store.¹²⁰ As efficiency analysis would suggest, courts repeatedly find that these promises to perform an act on the promisor's land satisfy the touch and concern requirement.

Occasionally, however, courts have found that promises to do an act on a promisor's land do not satisfy the requirement, but the efficiency hypothesis can also explain these exceptions. In the nineteenth century, railroads often agreed to supply transportation to landowners in exchange for an interest in lands on which rails would be laid.¹²¹ The railroads would perform these promises by carrying persons and packages over rails laid on the promisor's lands, or at least on lands to which the promisor had access. But unlike the situation with other promises performed on the land, the efficiency gains in allocating these covenants to

112. See *Mobil Oil Corp. v. Brennan*, 385 F.2d 951, 953-54 (5th Cir. 1967) (covenant enforced by successor to promisee against promisor's successor, who owned mineral rights and appurtenant surface easements). Although the promisor in *Mobil Oil* would not have faced any access problem if he were held liable on the promise (he had access to the drilling pad via the promisee's land), he could not have destroyed the pad without permission of the promisor's successor, the pad's new owner. Therefore, the promisor, if found responsible for performing the promise, would have confronted substantial bargaining problems similar to those faced by an original promisor held liable on a promise requiring performance on the successor's land.

113. See 3 H. TIFFANY, *supra* note 15, § 854, at 457 n.68. Fence cases ought to depend on whether the fence is on the land of, and therefore belongs to, the promisor or the promisee. The conclusion that the promise to repair touches and concerns should apply only to fences that lie upon, and form part of, the land of the promisor, because only those fences could not be mended by the original promisor unless he negotiated with his successor for a right of access to the fence.

114. See *In re Wildflower Landholding Ass'n*, 49 Bankr. 246, 249 (Bankr. M.D. Fla. 1985); *Hunt v. DelCollo*, 317 A.2d 545, 550 (Del. Ch. 1974).

115. See *Beckham v. Ward County Irrigation Dist. No. 1*, 278 S.W. 316, 318 (Tex. Civ. App. 1925).

116. See *Rhineland Real Estate Co. v. Cammeyer*, 216 A.D. 299, 304, 214 N.Y.S. 284, 289 (1926).

117. See 3 H. TIFFANY, *supra* note 15, § 854, at 457 n.67.

118. See *id.* at 457-58 nn.69-70; see also *Moule Indus. v. Sheffield Steel Prods.*, 105 So. 2d 798, 801 (Fla. Dist. Ct. App. 1958) (promise to maintain railroad lines runs), *cert. denied*, 111 So. 2d 41 (Fla. 1959); *Boston & M.R.R. v. Construction Mach. Corp.*, 346 Mass. 513, 518-21, 194 N.E.2d 395, 399-400 (1963) (promise to light platforms, ramps, and access ways and to clear away snow runs).

119. See *Lowenburg v. City of Saraland*, 489 So. 2d 562, 565 (Ala. 1986).

120. See *Net Realty Holding Trust v. Franconia Properties, Inc.*, 544 F. Supp. 759, 762 (E.D. Va. 1982) (burden of covenant to operate first-class department store in mall enforced against successor occupant).

121. Sometimes a grant to a railroad was made in fee simple (both absolute and determinable, see *Missouri K.T.R.R. v. Taub*, 345 S.W.2d 442, 443 (Tex. Civ. App. 1961)); other times, only an easement was transferred, see Annotation, *Deed to Railroad Company as Conveying Fee or Easement*, 6 A.L.R.3d 973 (1966).

the successor would seem *de minimis*. Although, as owner of the rights of way, the tracks, and the trains, the successor railroad was ultimately the only entity capable of performing the promise, no major efficiency gains would accrue from a decision to place the burden on the successor railroad rather than the promisor. Common-carrier rules took the right to exclude others from using trains out of the railroad's hands, and gave it to the public instead. By removing the railroad's right to exclude landowners, the rules thus eliminated the costs of any negotiation over access. Furthermore, because the successor railroad had already set and published its prices, the parties had no need to negotiate over the price of performance. By paying the fare, the original promisor could force the railroad to provide transportation without incurring any additional transaction costs.¹²²

The key factor here, though, is not the railroad's common-carrier status. Rather, it is the nature of the covenant and the availability of a performer whom the promisor can hire as easily as can his successor that removes any reason to suppose that placing the burden on the successor would eliminate substantial transaction inefficiencies.¹²³ As the efficiency view of touch and concern predicts, the courts usually hold that the obligation to provide transportation does not run.¹²⁴ It seems ironic that courts will not enforce a covenant to provide common-carrier services against the only entity capable of providing such services, but no efficiency-related reasons justify shifting the burden of the covenant to the carrier. Courts, therefore, should find that the burden does not touch and concern.

Thus, courts generally find that promises to do or not to do something on a promisor's land satisfy the touch and concern requirement. The efficient allocation hypothesis explains this result, as well as the occasional exceptions.

122. Cases involving promises to provide a pass rather than the transportation itself illustrate that the ownership of the land does not facilitate performance. See *Ruddick v. St. Louis K. & N.W. Ry.*, 116 Mo. 25, 30, 22 S.W. 499, 500 (1893) (covenant to furnish free pass would not have run if not coupled to forfeiture clause); *Eddy v. Hinnant*, 82 Tex. 354, 357, 18 S.W. 562, 563 (1891) (breach of covenant to furnish pass does not give rise to action for damages against successor railroad, only to action against promisor railroad).

123. Because the focus of inquiry remains on the nature of the covenant rather than on the status of the defendant, this rule should not stifle sales to common carriers.

124. See *Dickey v. Kansas City & I.R.T. Ry.*, 122 Mo. 223, 231, 26 S.W. 685, 687 (1894) (alternative holding that burden does not run to successor railroad because covenant is in no way connected to land); see also *Ruddick*, 116 Mo. at 30, 22 S.W. at 500 (covenant to furnish free pass would not have run if not coupled to forfeiture clause). Compare *Eddy*, 82 Tex. at 357, 18 S.W. at 354 (breach of covenant to furnish pass does not give rise to action for damages against successor railroad) with *Munro v. Syracuse, L. & N. Ry.*, 200 N.Y. 224, 231, 93 N.E. 516, 519 (1910) (burden of covenant to provide pass runs with land because condition subsequent that pass must be provided runs with land). In neither *Eddy* nor *Munro* did the court discuss the touch and concern element.

b. *Promisee's land.* Sometimes, a covenant promises that an act will be done on the promisee's land rather than the promisor's. For example, in a 1935 South Carolina case, *Epting v. Lexington Water Power Co.*, a purchaser of land with a stream that supplied water power promised that he would furnish electricity to the seller at his next business location.¹²⁵ Like railroad transportation, electricity can be purchased on terms that do not require substantial negotiation. The efficiency approach would thus predict the same result in *Epting* as in the railroad cases: the court should find that the burden of the covenant does not touch and concern the promisor's land. Indeed, this prediction proves accurate. In spite of the close relationship in *Epting* between the burden and the land (the defendant generated electricity with water that covered the land in question), the court held that the burden did not run to the successor because the covenant did not touch and concern.¹²⁶

Courts have found that promises to provide a promisee's land with water, as opposed to electricity, do touch and concern, and hence run with, the promisor's land.¹²⁷ In those cases, the promisor promises large amounts of water and has the only adequate water source near the place of performance, the promisee's land.¹²⁸ Either the burdened land would supply the water, or it would come from more distant sources; when large amounts of water are involved, transportation costs become significant.¹²⁹ If a court holds the promisor personally liable, he will either bear these transportation costs, resulting in inefficient performance, or

125. 177 S.C. 308, 317-21, 181 S.E. 66, 70-71 (1935) (burden of covenant to supply electrical power does not run to promisor's successor because it does not touch and concern land). *But see* Casperson v. Meech, 583 P.2d 218 (Alaska 1978) (dicta) (covenant to provide electricity and water to promisee's land runs).

126. *Epting*, 177 S.C. at 317, 181 S.E. at 70.

127. *See, e.g.,* Atlanta, K. & N. Ry. v. McKinney, 124 Ga. 929, 932, 53 S.E. 701, 702 (1906) (burden of covenant to supply water from springs to neighboring land touched and concerned land with springs and thus was enforced against promisor's successor); *see* Murphy v. Kerr, 5 F.2d 908, 910 (8th Cir. 1925) (covenant to pump water upon promisee's demand from dam on promisor's land to irrigation reservoir on promisee's land through pipes and connections operated from promisor's land enforced by promisee against promisor's successor); *Cooke v. Chilcott*, 3 Ch. D. 694, 700 (1876) (burden of covenant to supply up to 65 gallons of water per day from well to neighboring land runs). Neither *Murphy* nor *Cooke* mentioned the touch and concern element. *See also* Kerrick v. Schoenberg, 328 S.W.2d 595, 601 (Mo. 1959) (covenant to supply dirt for landfill from adjacent property runs); *cf. Casperson*, 583 P.2d at 218 (dicta) (covenant to provide electricity and water to land of promisee runs). *But cf. Eagle Enters. v. Gross*, 47 A.D.2d 835, 365 N.Y.S.2d 885, *aff'd*, 39 N.Y.2d 505, 349 N.E.2d 816, 384 N.Y.S.2d 717 (1976) (holding successor not bound by promise to pay money for water supplied to land, but opining that, in absence of showing that land would be without water, covenant to provide water for seasonal use does not touch and concern).

128. *See* *Murphy*, 5 F.2d at 910; *Cooke*, 3 Ch. D. at 695.

129. In the absence of an existing pipeline or canal for distribution, transportation costs for large amounts of water are high because of the weight and bulk of water relative to its purchase price at the source. A court may reasonably presume that it is more efficient to take water from its nearest source than to truck it from distant sources or build a parallel pipeline.

negotiate with his successor for performance of the covenant. In the event of such a negotiation, society will suffer additional rent-seeking and information-gathering costs. Therefore, even if the promise to supply water to the promisee's land allows the water to come from any available source, a court should find that the burden of the covenant to supply water, at least to some rural locations, touches and concerns the nearest land with an adequate water supply.¹³⁰

In some of these water cases, courts have found that the covenant at issue called for provision of water from a specific source on the promisor's land.¹³¹ If the parties had in fact intended provision of particular water, the efficient allocation hypothesis would predict the result in these cases as well. As with most covenants performed on the promisor's land, the person holding the water source can more readily perform a covenant to supply specified water than can the original promisor. But some courts have found an intent to require particular water even where it seems unlikely that the original promisee cared about the source.¹³² Although these courts reached the correct result—that the burden ran with the land—they had to add a gloss to the terms of the covenant in order to reach that result under traditional formulations of the touch and concern test.¹³³ The efficiency hypothesis, on the other hand, would explain the result without distorting the parties' intent.

The hypothesis predicts that promises to perform some service on the promisee's land would touch and concern when the promisee can hire no existing business as an alternative performer. On the other hand, if the service is commercially available, the burden should not touch and concern; at least some of the cases so hold.¹³⁴

130. See *infra* note 132; cf. *Nicholson v. 300 Broadway Realty Corp.*, 7 N.Y.2d 240, 246, 164 N.E.2d 832, 835, 196 N.Y.S.2d 945, 950 (1959) (burden of covenant to provide heat to neighbor-promisee touches and concerns). But cf. *Atlanta, K. & N. Ry.*, 124 Ga. at 934, 53 S.E. at 703 (finding that covenant to supply water from springs touches and concerns, as efficiency view would predict, but adding in dictum that, if covenant had allowed water from any source, it would have been personal, collateral, and would not have touched and concerned); *Indiana Natural Gas & Oil Co. v. Hinton*, 159 Ind. 398, 401, 64 N.E. 224, 225 (1902) (burden of covenant to furnish natural gas for heat and light runs to successor of lessee of rights to drill for gas and oil).

131. See, e.g., *Atlanta, K. & N. Ry.*, 124 Ga. at 931-32, 53 S.E. at 702; see also *Indiana Natural Gas*, 159 Ind. at 401, 64 N.E. at 225 (covenant to pay delay rentals in oil and gas lease runs); *Kerrick*, 328 S.W.2d at 601 (covenant to supply dirt for landfill from adjacent property runs).

132. See *Atlanta, K. & N. Ry.*, 124 Ga. at 930-31, 53 S.E. at 701-02 (parties intended that water would be supplied only from springs on promisor's land); see also *Murphy*, 5 F.2d at 910 (covenant to provide water for irrigation interpreted to require water from specific source on promisor's land).

133. A's promise that the owner of his land will always supply water, from no particular source, to B's land does not seem to touch and concern A's land. Only using the efficiency analysis might one come to the conclusion that it does.

134. See, e.g., *Epting v. Lexington Water Power Co.*, 177 S.C. 308, 320-21, 181 S.E. 66, 71 (1935) (burden of covenant to supply electrical power does not touch and concern and does not run to promisor's successor); cf. *Coulter v. Sausalito Bay Water Co.*, 122 Cal. App. 480, 495, 10 P.2d

2. *Promises Performed off the Land.* The last category of cases comprises those in which a covenant can be performed away from the lands of both the promisor and the promisee. A common example is a promise to pay a sum certain to, or on behalf of, the promisee. A person who has no interest in a particular piece of land can perform such a promise as easily and efficiently as a person with such an interest. For that reason, the efficient allocation hypothesis predicts that such an obligation will not touch and concern the land.¹³⁵ If there is no reason to presume that moving the burden of the promise to the succeeding landholder will result in efficiency gains of any sort, under the hypothesis one would expect a court to refrain from holding the successor to the obligation.

As the efficiency hypothesis predicts, promises to pay money do not ordinarily touch and concern the promisor's land.¹³⁶ To take a simple example, a purchaser's promise to pay for land does not bind his successor.¹³⁷ Likewise, the burden of a purchaser's promise to pay a seller's

780, 785 (1932) (burden of covenant to supply water in area where utility supplied water to all buildings did not run to successor, but covenant nonetheless was enforced in equity).

135. It must be noted here that one of the potential inefficiencies associated with attaching promises to land does not arise as readily with promises to pay money. Both a promisor and his successor can easily evaluate the implications of a promise to pay money. One might question, therefore, whether the courts should apply touch and concern to monetary promises. Nevertheless, courts do apply the requirement, and the efficient allocation hypothesis explains the outcomes.

Potential inefficiencies do exist, however. If either the dominant or servient parcel is subdivided and the promise to pay money runs, the new owners may engage in costly rent seeking in an effort to decide who holds what portion of the benefit or burden. Such disputes are avoided when the promise touches and concerns the land, as exemplified by the ditch maintenance case, *supra* note 109.

136. See, e.g., *Chesapeake Ranch Club, Inc. v. C.R.C. United Members, Inc.*, 60 Md. App. 609, 616, 483 A.2d 1334, 1337-38 (1984) (promise to pay membership dues for use of social and recreational facilities connected to subdivision does not touch and concern or run); *Plaza Inv. Co. v. Abel*, 8 Mich. App. 19, 34, 153 N.W.2d 379, 386 (1967) (promise to reimburse tenant for damages caused by leaky roof does not run); *Chasan v. Village Dist. of Eastman*, 128 N.H. 807, 817-18, 523 A.2d 16, 22-23 (1986) (promise to charge only agreed-upon tax for water supplied does not run); *Longley-Jones Assocs. v. Ircon Realty Co.*, 67 N.Y.2d 346, 348, 493 N.E.2d 930, 931, 502 N.Y.S.2d 706, 707 (1986) (promise to pay commission if lease extended or renewed does not run); *Eagle Enters. v. Gross*, 47 A.D.2d 835, 836, 365 N.Y.S.2d 885, 888 (1975), *aff'd*, 39 N.Y.2d 505, 509-10, 349 N.E.2d 816, 819-20, 384 N.Y.S.2d 717, 720 (1976) (promise to pay for water supplied to land does not run); *Nassau County v. Kensington Ass'n*, 21 N.Y.S.2d 208, 215 (Sup. Ct. 1940) (burden of covenant to pay dues to "sort of a property owners' association" treated as ordinary promise to pay money and thus held not to touch and concern or run); *Mullendore Theatres, Inc. v. Growth Realty Investors Co.*, 39 Wash. App. 64, 66, 691 P.2d 970, 972 (1984) (burden of covenant to refund security deposit at expiration of lease does not touch and concern or run). But see *Peto v. Korach*, 17 Ohio App. 2d 20, 24, 244 N.E.2d 502, 506 (1969) (promise to pay one-third of cost of upkeep of common sewer line runs with land); cf. *Ball v. Rio Grande Canal Co.*, 256 S.W. 678, 682 (Tex. Civ. App. 1923) (promise, secured by lien, to pay irrigation company runs with land).

137. See *Lisenby v. Newton*, 120 Cal. 571, 573, 52 P. 813, 814 (1898) (promise to pay for land does not run because money does not issue from land and is not expended for benefit of land); see also *Lingle Water User's Ass'n v. Occidental Bldg. & Loan Ass'n*, 43 Wyo. 41, 56-60, 297 P. 385, 389-91 (1931) (without discussing touch and concern, court holds that, because promise to pay debt

existing debts will not pass to the next purchaser;¹³⁸ nor do covenants to pay real estate brokers' commissions and lawyers' fees touch and concern.¹³⁹

Traditional formulations of the touch and concern requirement offer little explanation for these cases. Under the traditional Bigelow-Clark definition,¹⁴⁰ a promise to pay a debt for improvements to realty should touch and concern the land because the obligation to pay the debt will diminish the burdened parcel's value. Because a debt incurred for improvement seems beneficial to the land and related to its use and enjoyment, a court should find that the promise touches and concerns. But at least one court has found such a promise not to touch and concern the land.¹⁴¹ The efficiency hypothesis explains this failure to attach any importance to the purposes for which the debt was incurred: the use to which the borrowed funds were put has no bearing on the efficient allocation of the promise to repay the debt.

Courts have usually found that homeowners' association dues, unlike most other promises to pay money, do touch and concern the promisor's land. These decisions initially seem to undercut the efficiency

underlying mortgage does not run, promise to pay debt associated with purchase of appurtenant water rights does not run); *cf.* *Kelly v. Tri-Cities Broadcasting, Inc.*, 147 Cal. App. 3d 666, 679, 195 Cal. Rptr. 303, 311 (1983) (promise to submit to binding arbitration regarding rent touches and concerns).

138. *See* *Schram v. Coyne*, 127 F.2d 205, 209 (6th Cir.) (agreement to assume and pay mortgage held not to be covenant running with land), *cert. denied*, 317 U.S. 652 (1942); *Beaver v. Ledbetter*, 269 N.C. 142, 147, 152 S.E.2d 165, 170 (1967) (mortgage assumption clause in deed is not covenant running with land, but is collateral undertaking, personal in nature and not relating to land); *Wells v. Benton*, 108 Ind. 585, 591-92, 8 N.E. 444, 447 (covenant to pay for land by paying off judgment against grantor is personal undertaking and therefore not covenant running with land; not clear if touch and concern or intent is basis for holding), *aff'd on reh'g*, 108 Ind. 593, 9 N.E. 601 (1886); *see also* *City of Douglas v. Catrett*, 109 Ga. App. 683, 686, 137 S.E.2d 358, 361 (1964) ("The agreement to pay damages neither touched nor concerned the land."); *Dolph v. White*, 12 N.Y. 296 (1855) (lessee's covenant to pay outstanding note is collateral); *Guaranty Trust Co. v. New York & Q.C. Ry.*, 253 N.Y. 190, 199-200, 170 N.E. 887, 890 (mortgagor's covenant to subject future acquired property to mortgage is collateral), *reh'g denied*, 254 N.Y. 126, 172 N.E. 264, *appeal dismissed*, 282 U.S. 803 (1930); *Gower v. Postmaster-General*, 57 L.T.R. 527, 530 (Ch. 1887) (tenant's covenant to pay taxes on lessor's unleased land does not touch and concern).

139. *See* *Silver v. Abbot Realty, Inc.*, 249 So. 2d 38, 38-39 (Fla. Dist. Ct. App. 1971); *James Talcott, Inc. v. Roy D. Warren Commercial, Inc.*, 120 Ga. App. 544, 545-46, 171 S.E.2d 907, 908-09 (1969); *Spivak v. Madison-54th Realty Co.*, 60 Misc. 2d 483, 486-87, 303 N.Y.S.2d 128, 132-33 (Sup. Ct. 1969); *Blasser v. Cass*, 158 Tex. 560, 562-63, 314 S.W.2d 807, 809 (1958); *Latses v. Nick Floor, Inc.*, 99 Utah 214, 224-25, 104 P.2d 619, 624 (1940).

140. *See supra* notes 29-33 and accompanying text.

141. *See* *Pelser v. Gingold*, 214 Minn. 281, 287, 8 N.W.2d 36, 40 (1943) (burden of covenant to pay promisee's personal debts incurred for improvements to land does not touch and concern and thus does not run). The *American Law of Property* recognizes that the result may turn on whether the improvements have already been made, but offers little explanation for that distinction. 2 AMERICAN LAW OF PROPERTY, *supra* note 15, § 9.13(b), at 380-82.

hypothesis. Leaving aside any de minimis advantages from proximity,¹⁴² there is no obvious reason to presume that performance by the current landholder will result in any substantial efficiency gains. But a closer look at the situation reveals a substantial danger of inefficiency from holding the original promisor liable on such covenants. Homeowners' associations offer a solution to a bargaining difficulty that arises with respect to neighborhood improvement projects. Without an organization that has the power to tax its members, owners have no means of compelling other owners to pay for improving and maintaining common areas. Each owner's self-interest dictates that she refuse to contribute voluntarily because any contribution redounds in part to the benefit of her neighbors and she can enjoy the benefits of her neighbors' contributions regardless of her decision. Just as constitutions grant power to state and national governments to tax in order to provide for the security of all, covenants among owners of neighborhood lots establish, by private agreement, a small, majority-rule government with the power to assess dues from all its citizens for the purpose of making mutually beneficial improvements. Citizenship, and the right to vote, in this private government is conferred automatically upon the purchase of a lot within the scheme.

The touch and concern issue arises after a lot has been transferred to a new owner. A court must decide whether the new owner should be bound by the old owner's promise to pay dues. Aside from concerns for its own time and resources, two efficiency issues confront the court. As Epstein has observed,¹⁴³ a ruling that such covenants do not touch and concern will greatly diminish the value and discourage the use of servitudes as a means of overcoming problems that arise as land use intensifies. A court that desires to make the law more efficient by reducing disincentives to private resolution of conflicts should, therefore, hold that such covenants touch and concern. But were that the ultimate goal, courts would abandon touch and concern entirely.¹⁴⁴ The efficiency hypothesis says that touch and concern decisions work to promote the efficiency of the situation at hand and others like it, rather than the efficiency of servitude law at large. In the case of homeowners' associations, courts can allocate the burden of assessments either to those who have expressly agreed to pay or to their successors. Since the successors, as current "citizens" in the associations, make the decisions to assess dues, judicial decisions that such covenants do not run would result in

142. The landowner can deliver the homeowners' association dues payment in person without going to the post office or buying a stamp.

143. See *Covenants and Constitutions*, *supra* note 8, at 907-08.

144. See *id.*

current landowners having the power to tax former landowners for improvements. In addition to being unfair, this situation would result in too much spending on neighborhood improvements, i.e., a misallocation of resources.¹⁴⁵ Holdings that the burdens of covenants to pay dues run¹⁴⁶ prevent possible overallocations of resources to improvement and

145. Even a proper allocation of the burden of paying dues does not ensure efficiency; a public goods problem may arise. Each homeowner pays the average cost of the improvements, but receives a marginal benefit unrelated to the average cost. If more than half of the members receive a marginal benefit just greater than the average cost, they will undertake the improvement even when the minority receives far lower marginal benefit than the average cost. In other words, even when those who gain pay for the gains, the group may make inefficient decisions concerning improvements. It is possible that the pro-spending error caused by allowing members to create costs borne by nonmembers would counteract a preexisting anti-spending bias, and thereby improve overall efficiency. However, since there is no reason to presume that the public goods problem more often creates a bias against spending rather than in favor of spending, it seems appropriate to attempt to eliminate a bias that can only work in favor of spending. Furthermore, it might be hoped that homeowners would bargain among themselves to eliminate the general public goods problem.

146. *E.g.*, Boyle v. Lake Forest Property Owners Ass'n, 538 F. Supp. 765, 769-70 (S.D. Ala. 1982) (burden of covenant to pay assessments runs to successor owners; court prevented free riders by ignoring owner's attempt to withdraw from association); Lincoln v. Cherry Creek Homeowners Ass'n, 30 Bankr. 905, 909 (Bankr. D. Colo. 1983) (promise to pay assessments by association touches and concerns and runs); Homsey v. University Gardens Racquet Club, 730 S.W.2d 763, 764-65 (Tex. Ct. App. 1987) (burden of covenant to pay assessments to Racquet Club runs to successor, along with voting rights regarding expenditure of funds); Selected Lands Corp. v. Speich, 702 S.W.2d 197, 199 (Tex. Ct. App. 1985) (covenant requiring property owner to pay maintenance fees runs); Rodruck v. Sand Point Maintenance Comm'n, 48 Wash. 2d 565, 575-76, 295 P.2d 714, 720-21 (1956) (covenant to pay assessments enforced by homeowners' street maintenance commission against promisor's successor who became member of commission automatically upon purchase of land); see also United States v. Florea, 68 F. Supp. 367, 368-71 (D. Or. 1945) (burden of covenant to pay assessments for reclamation works runs); Cerro de Alcala Homeowners Ass'n v. Burns, 169 Cal. App. 3d Supp. 1, 3-4, 216 Cal. Rptr. 84, 85-86 (App. Dep't Super. Ct. 1985) (absentee condo owner bound to covenant to pay maintenance assessment because all rights of ownership not relinquished); St. Paul Fed. Bank for Sav. v. Wesby, 149 Ill. App. 3d 1059, 1063-64, 501 N.E.2d 707, 710 (1986) (condominium association members' covenant to pay for common expenses runs), *appeal denied*, 114 Ill. 2d 557, 508 N.E.2d 736 (1987); Rasp v. Hidden Valley Lake, Inc., 519 N.E.2d 153, 157 (Ind. Ct. App. 1988) (covenants requiring payment of water and sewer service by lot owners to developer runs); Brendonwood Common v. Franklin, 403 N.E.2d 1136, 1141 (Ind. Ct. App. 1980) (covenants requiring subdivision residents to pay assessments for maintenance expenses run); Essex Co. v. Goldman, 357 Mass. 427, 431-32, 258 N.E.2d 526, 528-29 (1970) (covenant to pay perpetual annual rent for mill power runs); Burton-Jones Dev. Inc. v. Flake, 368 Mich. 122, 130-35, 117 N.W.2d 110, 114-17 (1962) (covenant of subdivision owners to pay for improvements agreed to by majority of lot owners runs); Rittenhouse Park Community Ass'n v. Katznelson, 223 N.J. Super. 595, 597-98, 539 A.2d 334, 335-36 (1987) (covenant requiring owners to pay assessment for maintenance of common land in subdivision and creating lien in favor of community association upon default runs); Lincolnshire Civic Ass'n v. Beach, 46 A.D.2d 596, 597-98, 364 N.Y.S.2d 248, 251 (1975) (covenant requiring landowners to become members of association to maintain common recreational facilities runs); Lawrence Park Realty Co. v. Crichton, 218 A.D. 374, 376-77, 218 N.Y.S. 278, 280 (1926) (covenant to pay proportionate share of maintenance costs runs); Starkey Point Property Owners' Ass'n v. Wilson, 96 Misc. 2d 377, 379-81, 409 N.Y.S.2d 376, 378 (Yates Co. Ct. 1978) (covenant to pay annual assessment for upkeep and maintenance of common areas touches and concerns and runs); Four Seasons Homeowners Ass'n v. Sellers, 62 N.C. App. 205, 210-11, 302 S.E.2d 848, 852-53 (same), *cert. denied*, 309 N.C. 461, 307 S.E.2d 364 (1983); Inwood North Homeowners' Ass'n, Inc.

maintenance of common areas. Indeed, tying the burden to those in control of the spending prevents inefficient allocation of resources equally well in cases where the funds might be spent on projects unrelated to the land.¹⁴⁷

Options to purchase present an interesting and difficult variation. An option involves a promisor's undertaking to sell at an agreed price if the purchaser-promisee decides to buy. Should this kind of covenant run with a transfer of the land? After transfer of the land subject to option, could the original promisor perform without substantial inefficiencies if he were allocated the burden? Probably not. At the least, he would have to negotiate with the successor before performing. Beyond that, the current owner could hold up the promisor by insisting on a price far above fair market value. If the solution is for a court to require the successor to sell at fair market value, the court may impose the burden on the successor in the first place by letting the covenant run. If, as would surely be the case, the court refused to force the successor's sale to the promisor so that he could perform, the court would leave the original promisor to deal with a monopolist. The efficiency analysis thus concludes that the covenant should touch and concern; consistent with this view, courts

v. Harris, 736 S.W.2d 632, 635-36 (Tex. 1987) (same); cf. Southern Pac. Transp. Co. v. City of Eugene, 627 F.2d 966, 968-69 (9th Cir. 1980) (burden of promise to pay assessments for road improvements runs with easement to successor of grantee; no discussion of touch and concern element); Kell v. Bella Vista Village Property Owner's Ass'n, 258 Ark. 757, 759-60, 528 S.W.2d 651, 653 (1975) (covenant requiring payment of assessment does not run; members must pay anyway); Anthony v. Brea Glenbrook Club, 58 Cal. App. 3d 506, 512, 130 Cal. Rptr. 32, 35 (1976) (covenant requiring membership in homeowners' association runs with land); Paulinskill Lake Ass'n v. Em-mich, 165 N.J. Super. 43, 45, 397 A.2d 698, 699 (1978) (covenant requiring membership in homeowners' association imposes no unreasonable restraint against alienation); Chimney Hill Owners' Ass'n v. Antignani, 136 Vt. 446, 454-55, 392 A.2d 423, 428 (1978) (covenant to pay annual charge for right to use common land runs). But see Nassau County v. Kensington Ass'n, 21 N.Y.S.2d 208, 215 (Sup. Ct. 1940) (burden of covenant to pay dues to "sort of a property owners' association" does not touch and concern and does not run). The court in *Nassau County* stated that the "covenant itself should provide that the land burdened by the payment should be benefitted when the money collected . . . is expended" and that "defendant is not committed to use the funds for any particular purpose or in fact to spend the money at all." *Id.* The court ignored the fact that those paying the dues had control of the association and therefore could choose whether to use the assessments for the benefit of the burdened parcels. Professor French explains this irregular result by arguing that the promisee was guilty of overreaching. *Reweaving*, *supra* note 9, at 1290. But cf. Beech Mountain Property Owners' Ass'n v. Seifart, 48 N.C. App. 286, 294, 269 S.E.2d 178, 182-83 (1980) (homeowners' association assessment not enforced against successor because, inter alia, covenant did not establish a standard specific enough to govern amounts of assessments).

147. See *Homsey*, 730 S.W.2d at 764 (burden of covenant to pay assessments to Racquet Club runs to successor, along with voting rights regarding expenditure of funds). The efficiency view also explains why the nonexclusivity of the club was not a material factor in the court's view: the non-owner members had no vote.

hold that the burdens of such promises run.¹⁴⁸

Promises to insure realty for the benefit of a promisee present another tricky situation. Anyone can buy an insurance policy on a piece of land.¹⁴⁹ For that reason, courts would generally be expected to find that a covenant to insure does not touch and concern. As expected, where the facts indicate that anyone could buy the policy in question, the courts usually do hold that the covenant does not run.¹⁵⁰ Depending on the realty, however, some possible uses of the land might substantially increase the insurance premiums. In such cases, the efficiency hypothesis would predict that a court would place the burden of insuring on the successor in order to force him to internalize the increases in insurance costs owing to his activities.¹⁵¹

Cases that involve the running of such burdens offer firm support for the view that courts will find the burden to touch and concern whenever allocating that burden to the original promisor would create possibilities of opportunistic behavior or necessitate an additional transaction in per-

148. See, e.g., *Keogh v. Peck*, 316 Ill. 318, 327-29, 147 N.E. 266, 269 (1925) (burden of covenant granting option to purchase reversion touches and concerns and runs with land interest to which option applies; option enforced against landlord-promisor's successor); *Texas Co. v. Butler*, 198 Or. 368, 373, 256 P.2d 259, 262 (1953) ("The right to purchase the property, based upon a valuable consideration, is a covenant that runs with the land . . ."). But cf. *Shower v. Fisher*, 47 Wash. App. 720, 727, 737 P.2d 291, 294-95 (1987) (option to purchase and right of first refusal might run; remand to trial court to determine parties' intent).

149. Although the beneficiary must have an insurable interest, the purchaser need not. See 3 COUCH ON INSURANCE 2D §§ 24:101 to :110 (M. Rhodes rev. 2d ed. 1984).

150. See, e.g., *Farmers' Loan & Trust Co. v. Penn Plate Glass Co.*, 186 U.S. 434, 453 (1902) (burden of covenant in mortgage to keep property insured does not run to grantee who takes subject to mortgage); *The City of Norwich*, 118 U.S. 468, 494 (1886) ("the insurance which a man has on property is not an interest in the property itself"); *Columbian Ins. Co. v. Lawrence*, 35 U.S. (10 Pet.) 507, 511 (1836) (mortgagee has no right to proceeds of insurance policy underwritten by mortgagor because policy does not touch land); *Spillane v. Yarnalowicz*, 252 Mass. 168, 171, 147 N.E. 571, 572 (1925) (burden of covenant to insure on behalf of mortgagee does not run); *Kaplan v. Wilderman*, 95 N.J. Eq. 463, 465, 123 A. 165, 165 (1924) (same); *Rollman Corp. v. Goode*, 137 Vt. 84, 88, 400 A.2d 968, 970 (1979) (covenant in mortgage to insure for the benefit of mortgagor does not run). But see *Northern Trust Co. v. Snyder*, 76 F. 34 (7th Cir. 1896) (lessee's covenant to insure runs to his assignee; lessor's insurance proceeds do not run to lessee); *Thomas v. Von Kapff*, 6 G. & J. 372, 381 (Md. 1834); *Voight v. Southern Ohio Sav. Bank & Trust Co.*, 63 Ohio App. 56, 56, 25 N.E.2d 304, 305 (1939) (lessee's covenant to insure runs to his assignee). In the oft-cited case of *Masury v. Southworth*, 9 Ohio St. 340, 348 (1859), the burden of a lease covenant to insure was held to run to a tenant's assignee. Although the efficient allocation view fails to explain this result, the explanation given by the court is equally inadequate. The court said that the proceeds would be used to rebuild for the benefit of both landlord and tenant. But, according to the pleadings upon which the case was decided, the covenant did not require the landlord to rebuild with the insurance proceeds. See *id.* at 345. Where the promisor also promises to rebuild with the proceeds, the covenant is best viewed as one that must be performed on the land of the promisor. See *Northern Trust*, 76 F. at 37; *Case Note, Covenant to Insure Construed as Covenant to Pay Rent*, 36 YALE L.J. 1187, 1187 (1927).

151. See *St. Regis Restaurant, Inc. v. Powers*, 219 A.D. 321, 325, 219 N.Y.S. 684, 688 (1927) (lease covenant to pay for increased costs of insurance due to tenant's activities runs with land as part of covenant to pay rent).

forming it. A (shorter) discussion of the cases involving the running of benefits follows.

C. *Allocation of Benefits to Promote Efficiency.*

Courts face the same theoretical question on the benefit side of a covenant as on the burden side: to whom should the promise be allocated?¹⁵² Under the efficient allocation hypothesis, the analytical focus on the benefit side should shift from efficiencies associated with performing the promise at issue to efficiencies associated with enjoying it. As the efficiency hypothesis predicts, courts will find that a promise touches and concerns when shifting the benefit to the successor will avoid a situation fraught with potential for inefficient behavior, and the opposite finding will result when the court can see no efficiency gains attending the running of the promise. For purposes of this analysis, the cases can be divided along lines similar to those used in classifying the burden decisions. Discussion of covenants involving performance on or near a promisee's land precedes analysis of promises not necessarily performed near a promisee's land.

Before this section reviews the cases, one point mentioned earlier should be expanded. The touch and concern element carries less weight on the benefit side of a covenant because contractual benefits are transferable by ordinary assignment.¹⁵³ Thus, a party can separately assign a benefit that does not touch and concern; the touch and concern requirement does not prevent a promisee from passing her rights to her successor. This point leaves open the question of how the benefit of a promise should be allocated, however, because whether a promisee *intended* to pass her rights is often at issue. The touch and concern requirement may aid in resolving that issue. If a court has no reason to believe that the successor is the more efficient holder of the benefit, then it should find that the promise does not touch and concern and allocate the benefit to the original promisee. The requirement thus serves as a method of determining the intent of the promisee and her successor at the time the prom-

152. See, e.g., *Choisser v. Eyman*, 22 Ariz. App. 587, 589, 529 P.2d 741, 743 (1974) (because benefit of refund covenant does not run, original promisor can enforce); *Meado-Lawn Homes, Inc. v. Westchester Lighting Co.*, 171 Misc. 669, 671, 13 N.Y.S.2d 709, 712 (Sup. Ct. 1939) (because promise to refund money paid for gas main construction does not run, original promisee can enforce), *aff'd*, 259 A.D. 810, 20 N.Y.S.2d 396, *aff'd*, 284 N.Y. 667, 30 N.E.2d 608 (1940).

153. See *City of Reno v. Matley*, 79 Nev. 49, 56, 378 P.2d 256, 259-60 (1963):

Most objections to upholding covenants as running with the land stem from the seeming incongruity that permits a man, by making a promise, to bind another who subsequently succeeds to land . . . This difficulty, however, would seem to be more real than imagined when we are dealing with the benefits, and not the burdens, of the covenant.

isee transferred her interest in land.¹⁵⁴

The analysis of the benefits cases first considers promises not to build a structure in front of a set-back line. Assume that the promisee in these cases is a neighbor with a picture-window view that such a structure would block. After the promisee sells the house with the picture window, the new owner may call upon a court to enforce the covenant not to build against the promisor. The court will then have the opportunity to save society the costs associated with at least one transaction, by correctly identifying the person who values the promise more highly. If the court allocates the benefit of the promise to the person who values it less, society will either suffer a loss of enjoyment equal to the difference between the two valuations or bear the costs of the transfer to the person who would enjoy the promise more.

Ignoring, as always, subjective differences between the two potential beneficiaries, one fact remains. The new owner of the picture-window view will observe the encroachment more often, and will probably suffer more than the original promisee. Since the transferee-owner of the benefited land is likely to value the promise more than the original promisee, the efficiency analysis dictates that the promise should run. If the promise does not run, the successor could try to purchase the covenant from the promisor or the promisee, but that would require an additional transaction. Allocating the benefit of the promise to the successor will avoid the costs of that transaction.¹⁵⁵

Even if the court assumes that the successor and promisee are equally likely to enjoy the promise, efficiencies of proximity favor placing the benefit with the successor. The successor, because of his proximity to the land, can more easily monitor the condition of the burdened parcel and file any action necessary to obtain performance of the promise. Moreover, the pleasant surprise that attends the running of a benefit to

154. See *Reweaving*, *supra* note 9, at 1289. Berger suggests this is the purpose on the *burden* side of the covenant: the burden should touch and concern when an ordinary buyer would expect that he would get the burden along with the land. Berger, *supra* note 30, at 208-09. Krier's suggestion, that the burden should run when the court finds that the successors would be expected to adopt the promise in the absence of transaction costs, would probably reach a similar result. See Krier, *supra* note 28, at 1679. Both of these approaches dovetail with Epstein's approach. Epstein would allow the touch and concern element to serve as a default address when the original parties fail to make their intent clear. See *supra* notes 36-39 and accompanying text. Either Berger's or Krier's test would seem appropriate for defining how the touch and concern test could operate in such cases.

155. Bigelow adopted a similar approach in his seminal 1914 article, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645-46 (1914). He suggested that courts focus on whether the promisor or the successor has the "primary interest" in the covenant. Professor Val Nolan's "would he care?" test also suggests a concern for allocating of the benefit to the person likely to value it most highly.

the transferee is less likely to generate demoralization costs¹⁵⁶ than a surprise burden. Since demoralization costs are low, even a small efficiency gain might suffice to overcome the presumption against running promises.

As the efficiency hypothesis would predict, courts usually find that benefits of promises that require performance near a promisee's land do touch and concern.¹⁵⁷ Such covenants have included an agreement with neighbors not to build too close to the edge of a lot,¹⁵⁸ an agreement not to build a dwelling whose floor level is more than a foot higher than street level,¹⁵⁹ an agreement not to use land for other than residential purposes,¹⁶⁰ a promise to bury a pipeline under a promisee's surface estate,¹⁶¹ a covenant to supply water to a promisee's land,¹⁶² a promise to supply heat to a neighbor-promisee's building,¹⁶³ a promise to tear down a studio cottage,¹⁶⁴ and an obligation to maintain a ditch that drains water from a promisee's land.¹⁶⁵

Promises not requiring performance near a promisee's land, on the other hand, often fail to touch and concern. For example, in *Bisbee v.*

156. See Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1214-15, 1221-1223 (1967).

157. See *Mobil Oil Corp. v. Brennan*, 385 F.2d 951, 953-54 (5th Cir. 1967) (promisee's successor enforces covenant to bury oil pipeline and to remove drilling structures from surface estate against successor owner of mineral rights and appurtenant surface easements); see also *Aronsohn v. Mandara*, 98 N.J. 92, 98-99, 484 A.2d 675, 678-79 (1984) (implied covenant of good workmanship in constructing patio is assignable to promisee's purchasers); cf. *Bodin v. Kinne*, 128 A.D.2d 931, 512 N.Y.S.2d 737 (1987) (enforcement of covenant restricting land to mink raising not challenged on touch and concern grounds).

158. See *Day v. McEwen*, 385 A.2d 790, 793 (Me. 1978) (benefit of covenant not to obstruct ocean view runs to heir); *Lex Pro Corp. v. Snyder Enters.*, 100 N.M. 389, 391-92, 671 P.2d 637, 639-40 (1983) (benefit of covenant not to build within 50 feet of street runs to successors of next-door neighbors); *supra* text following note 154.

159. See *Rodgers v. Reimann*, 227 Or. 62, 67-69, 361 P.2d 101, 103-04 (1961).

160. See *Huff v. Duncan*, 263 Or. 408, 411, 502 P.2d 584, 585 (1972) (restriction to residential use clearly touches and concerns land); cf. *Muldawer v. Stribling*, 243 Ga. 673, 675, 256 S.E.2d 357, 359 (1979) (benefit of covenant not to have single-family-only property rezoned for other uses runs).

161. See *Mobil*, 385 F.2d at 953-54.

162. See *Choisser v. Eyman*, 22 Ariz. App. 587, 589, 529 P.2d 741, 743 (1974) (dictum); *Farmer's High Line Canal & Reservoir Co. v. New Hampshire Real Estate Co.*, 40 Colo. 467, 478, 92 P. 290, 293 (1907) (benefit of covenant to provide irrigation water via ditch for one dollar per inch runs to successor of promisee); *Martin v. City of Glens Falls*, 27 Misc. 2d 925, 929, 210 N.Y.S.2d 372, 375 (Sup. Ct. 1961) (benefit of covenant to allow use of water from water line without payment runs).

163. See *Atlas Land Corp. v. Ettinger*, 283 A.D. 379, 381, 128 N.Y.S.2d 73, 75, *appeal denied*, 283 A.D. 871, 129 N.Y.S.2d 919 (1954).

164. See *Pioneer Improvement Ass'n v. Slattery*, 69 A.D.2d 960, 960-96, 416 N.Y.S.2d 85, 86-87 (1979).

165. See *Moseley v. Bishop*, 470 N.E.2d 773, 778 (Ind. Ct. App. 1984) (benefit of 1896 covenant to maintain drainage ditch tiles touches and concerns and runs with land drained by ditch).

Spacht,¹⁶⁶ the New York Supreme Court's Appellate Division faced a dispute regarding the benefit of a promise to convey one-half of the mineral rights associated with a piece of land upon satisfaction of a purchase money debt secured by the surface interest. The court held that the benefit did not run because the right to obtain the mineral rights did not touch and concern the surrounding land.¹⁶⁷ This result comports with the efficiency hypothesis. There is no objective reason why the successor would value the mineral rights any more highly than the promisee, and no impediment prevents transfer of the rights even if the successor does value them more highly. A holding allocating the benefit to the original promisee would create no risk of opportunistic behavior; therefore, the covenant should not run.

Just as the burden of a promise to pay money rarely demands reallocation to prevent inefficient relationships, the benefit of a promise to pay money need not attach to land in order to preserve efficiency. Preserving the initial allocation of a right to receive money will not result in opportunistic behavior or necessitate another private transaction to place the benefit in the most appreciative hands. Therefore, the benefit of a promise to pay should not touch and concern. And so some courts have held.¹⁶⁸

In another New York case, *Rossi v. Simms*,¹⁶⁹ a landlord promised not to charge a tenant the higher of two rental rates. The tenant transferred his interest to a successor, who tried to claim the benefit of the covenant. The court held that the original parties lacked the necessary intent to make the covenant run, but also noted that covenants concerning payment of money usually do not touch and concern.¹⁷⁰ Once again, the decision to leave the benefit with the original party creates no chance of opportunistic behavior. Even if the old tenant could assert the right to the lower rental rate, he would not receive the benefit. But he could sell the right to either the new tenant or the landlord. Although minor nego-

166. 125 A.D.2d 982, 510 N.Y.S.2d 378 (1986).

167. *Id.* at 983, 570 N.Y.S.2d at 379.

168. *E.g.*, *Choisser v. Eyman*, 22 Ariz. App. 587, 589, 529 P.2d 741, 743 (1974) (benefit of covenant to refund money relating to water utility attachments did not run because, inter alia, it did not touch and concern); *Safe Deposit & Trust Co. v. Baltimore-Gillet Co.*, 176 Md. 594, 598, 6 A.2d 226, 228 (1939) (benefit of covenant to refund part of fees for extending water mains did not run to successor because did not touch and concern); *Raintree Corp. v. Rowe*, 38 N.C. App. 664, 670, 248 S.E.2d 904, 908 (1978) (benefit of covenant to pay country club dues does not run); *Grimes v. Walsh & Watts, Inc.*, 649 S.W.2d 724, 727-28 (Tex. Ct. App. 1983) (benefit of covenant to pay royalty interest in oil lease on farm-out agreement does not run). *But see* *Bessemer v. Gersten*, 381 So. 2d 1344, 1347 (Fla. 1980) (benefit of covenant to pay for maintenance of common facilities touches and concerns).

169. 119 A.D.2d 137, 506 N.Y.S.2d 50 (1986).

170. *Id.* at 142, 506 N.Y.S.2d at 53.

tiation costs might arise, no substantial inefficiencies would obtain. The problem of collusion that would arise in an analogous case on the burden side remains insignificant here, because the promisee can enforce the promise even if the other two collude. The party holding the benefit, unlike the party burdened, is not forced to deal with a monopolist.¹⁷¹

The Second Circuit faced a particularly difficult money-payment case not long after Clark had written his famous book on covenants. In *165 Broadway Building, Inc. v. City Investing Co.*,¹⁷² Judge Clark found that the benefits of two covenants did touch and concern land. He decided that a promise to repay construction costs when the promisor discontinued his use of the constructed facility ran with the land.¹⁷³ But no potential inefficiencies justified that half of the result. He also held that the benefit of a promise to refund the purchase price of ticket choppers after discontinuing their use (at either the promisor's or landowner's election) touched and concerned the land.¹⁷⁴ Allocating that promise to the original promisee, on the other hand, would have created incentives for inefficient behavior on the part of other similarly situated successors to promisees. After hearing that the covenant to refund the purchase price of the ticket choppers would not run, a successor in the position of the promisee's successor in *165 Broadway Building* would be discouraged from purchasing new choppers as needed (because he might not get the refund), and also from discontinuing use of the facilities when the assets were not producing adequate returns (because his calculations on chopper use would not include the opportunity for a refund upon cessation of use). The efficiency approach thus suggests that one covenant should have run, but not the other. The judges had no theory with which to distinguish the two, however, and the decision split the panel.¹⁷⁵

The efficient allocation analysis explains many touch and concern decisions with respect to both the burden and benefit sides of a promise. If the facts of a case indicate that shifting a covenant to the succeeding landholder would leave the potential parties (the promisor, promisee, and successor(s)) in a situation less likely to generate wasteful opportu-

171. Compare *Castle v. Double Time, Inc.*, 737 P.2d 900, 902 (Okla. 1986), in which the court held that the benefit of a landlord's promise to renew a lease for five years touched and concerned the land at issue and, therefore, ran to the tenant's successor. Because the successor tenant would likely value the term more highly, the court was able to save the costs of a transaction by shifting the right to renew along with the tenant's estate.

172. 120 F.2d 813 (2d Cir.), *cert. denied*, 314 U.S. 682 (1941).

173. *Id.* at 819.

174. *Id.*

175. With a nice sleight of hand, Clark suggested that the then-current New York law may have been somewhat more liberal than the prior New York decisions would indicate; those prior decisions were part of a general trend that Clark himself had discerned. See *id.* at 818. In other words, the common law had changed in the absence of any cases.

nistic behavior, the court should and usually does find that the covenant touches and concerns the land. If a decision to attach a promise appears not to lessen inefficiency, courts usually find that the covenant does not touch and concern, thereby preventing future opportunistic behavior from interfering with negotiations for the detachment of bad promises.

To paraphrase Molière: "Good Heavens! For more than forty years we have been speaking economics without knowing it."¹⁷⁶

IV. CONCLUSION

It is important to keep perspective on the efficiency-oriented analysis attempted here. The primary goal has been to offer a coherent description of the operation of touch and concern, an explanation that will predict what results judges will reach when they apply the element in future cases. To illuminate the actual operation of touch and concern with economic analysis, however, is not to justify the touch and concern requirement's existence. The larger normative question whether touch and concern should be retained or eliminated turns on an evaluation of several different factors, only one of which is analyzed in depth here. The efficiency benefits that the element achieves in particular situations, as identified in part III above, must be weighed against the negative incentives generated by the very existence of the rule and the tertiary costs of implementing the rule through the judicial system.¹⁷⁷ The increasing importance of servitudes as a means of private land-use regulation justifies attention to both descriptive and normative points. If courts continue to require promises to touch and concern, descriptions that help lawyers to predict the application of the test will reduce disincentives to the use of covenants and to the costs of resolving disputes involving servitudes. And as increasingly intensive land use calls for more flexible private means of coordinating conflicting uses, the overall utility of touch and concern will call for more and more careful examination. That examination ought to include the particular benefits of specific applications, as well as systemic incentive effects and costs of resolving disputes.

A few suggestions flow from the analysis in this Article. First, on a purely doctrinal level, courts might improve the traditional articulation of the touch and concern requirement by flipping it on its head. The prevailing test asks whether the covenant at issue would add to the promisee's enjoyment of the land or detract from the promisor's. Courts

176. Cf. J. MOLIÈRE, *LE BOURGEOIS GENTILHOMME*, act II, sc. iv, l. 34 (1640) (Nilsson ed. n.d.) ("Par ma foi il y a plus de quarante ans que je dis de la prose sans que j'en susse rien . . .").

177. The costs of administering the rule include the costs, to the parties and the courts, of litigation that would not have occurred but for the presence of the touch and concern element within the servitude doctrine.

might define the touch and concern test more accurately and helpfully by asking whether ownership of a particular parcel aids in the enjoyment or performance of the covenant.

Beyond this, courts and commentators could further refine the test by explicitly considering the various inefficiencies that are seemingly recognized in the cases. A checklist that covers transaction costs, possibilities of opportunistic behavior, and accountability problems might identify those situations in which shifting a covenant to a successor would prevent inefficient relationships. Explicit use of an efficient allocation test might make the touch and concern element of land promise law clearer, satisfying the frequently expressed need for a workable definition. Fewer cases revolving around the question of whether a covenant runs would arise, because lawyers would be better able to predict the outcomes of such disputes. For the same reason, parties would be less likely to forgo the covenant approach in favor of alternatives if touch and concern were more clearly defined. Moreover, conveyancers could use covenants more securely if courts would heed their explanations of the efficiencies associated with attaching a covenant, including their recitations of any special local circumstances that make attachment efficient. In sum, by clarifying the doctrine, the efficient allocation approach could reduce the transaction costs, rent seeking, and negative incentive effects now associated with touch and concern.¹⁷⁸

But such gains might carry an unexpected cost. By making efficiency an explicit consideration, courts might in the end reach less efficient results. The cases suggest that courts do a fine job of seeking efficiency without labeling their search as such; they seem to find efficiency without appearing to have sought it at all. Indeed, an explicit statement of the efficient allocation test might limit courts' considerations, causing subtle efficiencies to go unrecognized or ignored.¹⁷⁹ An

178. See *Freedom of Contract*, *supra* note 36, at 1361-64; text accompanying notes 55-66.

179. One earlier attempt to give the touch and concern element economic interpretation led to a nonsensical rule. The *Restatement of Property's* rule that the burden of a covenant may not run with land unless the benefit touches and concerns some other land seems to result from a combination of two premises: first, that land resources are finite, and second, that the burden of a restrictive covenant reduces the social utility of the affected land. See RESTATEMENT OF PROPERTY § 537 comment a (1944). In order not to reduce the value derived from that limited resource, land, we must make sure that any loss of utility in one parcel is offset by a gain in another. Even if one ignores the plausible possibility that losses in land utility might be made up by gains in the utilization of other (nonland) resources, the *Restatement* position is misguided. The first premise noted above is plausible. Although more land might be created, it is certainly true that the supply of land is less price-elastic than the supply of many other resources. But the second premise is wrong. A promisee realizes a benefit *from land* if a promisor keeps a promise, whether or not the benefit relates to the use of any other land. The promisor's enjoyment in using the land as limited by the covenant, combined with the promisee's enjoyment of the land as a result of the promisor's performance of their covenant is greater than their combined enjoyment of the same land in the absence of the

enumeration of categories might lead courts to overlook unclassified inefficiencies. Even a general test worded in terms of "efficiency" might narrow the efforts of lawyers unsophisticated in economic analysis, causing them to argue false economies or ignore important efficiencies that they cannot articulate in economic jargon.¹⁸⁰

Given courts' excellent record at seeking efficiency, changing to an explicitly economic test could easily bring about less efficient outcomes. In the end, one must weigh that possibility against the likely gains of increased predictability.¹⁸¹ It might well be best for courts applying the touch and concern requirement to continue doing what they are doing *and* saying what they are saying.

According to the evidence supporting the efficient allocation hypothesis, the touch and concern requirement does not determine the *survival* of covenants. Therefore, any analysis of the doctrines governing land promises should at least consider framing the touch and concern issue as a choice of which person (original covenantor or successor) should be held liable to perform a covenant and which person should be permitted to enforce the covenant. If that narrow perspective can explain judicial behavior, then the touch and concern requirement performs a quite limited check on the parties' expressed intent. Thus limited, judicial review of attempts to tie promises to interests in land may be justified on utilitarian grounds. Because land traders are inexperienced and the assets involved are unique, efficiency concerns justify a harder look at covenants intended to run with land than at ordinary con-

covenant. Just as the division of land geographically (into smaller parcels) or temporally (into a term of years and a reversion) can result in greater total enjoyment than is possible with the interests joined in one owner, division of the land with respect to use might also maximize its value. That a covenant does not, in some people's view, rise to the dignity of an estate in land does not mean that the interest created in the land should be ignored in calculations of the benefits derived from the parcel. Because it is entirely possible for a single piece of land to generate more good if two people divide the rights respecting its use, the idea that one lot should not be burdened unless a different lot is benefited is defective.

180. As must be obvious, this Article does not take the view that the explanation of judicial events in economic terms will itself have a detrimental impact on judicial decisionmaking, although that is a possibility. But the question whether the judiciary should itself adopt the economic terms is another issue entirely. On that issue, one might argue that we should not hesitate to urge judges to adopt a more accurate test, just as we should not hesitate to urge mountaineers to use watches so they can get to safety before nightfall. But there is cause to hesitate. If it appears that the climbers do a tolerable job of reckoning time from the angle of the sun, a watch might reduce their safety. First, they might not know how to read the watch. We might instruct them by teaching. But would it not be the safer course to do the teaching before we pass out the watches? Second, watches might fail in the mountains. Safety suggests that watches be tested under the intended conditions of use, high altitude, and cold, before climbers come to depend on them. Unless both the watch and its wearer will perform consistently, the new instrument should not replace the old.

181. Indeed, if the courts botch the economic analysis often enough, as is easily done, none of the predictability gains will accrue.

tracts. In applying the touch and concern requirement, the courts quite effectively take that hard look.

Indeed, judges' intuited sense of efficiency may be so powerful that they will continue to address the economic concerns now comprehended by the touch and concern requirement whether or not that rubric remains available. If so, eliminating the requirement as a matter of *doctrine* would prove ineffective, and possibly counterproductive. Without the touch and concern test to comprehend efficiency factors, courts might incorporate their concerns into other existing doctrine, or invent a new element to replace touch and concern. Creating a new element to take the place of touch and concern would confuse conveyancers at least during its gestation, and might finally turn out to be even less comprehensible.

In the end, forsaking the long-running requirement that promises touch and concern could easily generate new uncertainties greater than those eliminated by abandoning the requirement. Moreover, it remains doubtful whether the negative incentive effects and other uncertainty costs associated with the touch and concern requirement outweigh the gains realized by increased judicial review of attempts to bind promises to land.¹⁸² Without evidence that the requirement substantially impedes conveyancers, we should resist the temptation to displace this ancient strand of servitude law.

182. Epstein relies on incentive effects and other costs of uncertainty in attacking the touch and concern element. See *supra* text accompanying notes 36-38.