



SCHOOL OF LAW
TEXAS A&M UNIVERSITY

Texas A&M Journal of Property
Law

Volume 9 | Number 2

Article 2

5-22-2023

Revisiting Touch and Concern: The Perils of Degraded Contracts versus the Perils of Opportunism

Mark Kelman

Stanford Law School, mkelman@stanford.edu

Follow this and additional works at: <https://scholarship.law.tamu.edu/journal-of-property-law>



Part of the [Property Law and Real Estate Commons](#)

Recommended Citation

Mark Kelman, *Revisiting Touch and Concern: The Perils of Degraded Contracts versus the Perils of Opportunism*, 9 Tex. A&M J. Prop. L. 263 (2023).

Available at: <https://doi.org/10.37419/JPL.V9.I2.2>

This Article is brought to you for free and open access by Texas A&M Law Scholarship. It has been accepted for inclusion in Texas A&M Journal of Property Law by an authorized editor of Texas A&M Law Scholarship. For more information, please contact aretteen@law.tamu.edu.

**REVISITING TOUCH AND CONCERN: THE PERILS OF DEGRADED CONTRACTS
VERSUS THE PERILS OF OPPORTUNISM**

Mark Kelman[†]

Abstract

The touch and concern doctrine addresses a very particular problem: Successors, at best, weakly assent to the land use promises that their predecessors made when they take the property with notice that their predecessors intended to bind them. Thus, there is little reason to presume that the deal we may bind them to would be one that they would strike. Of course, whenever deals persist over time, it is possible that one or the other contracting party would no longer feel that the gains from the deal outweighed its costs, but the problem is more pronounced when the identity of the potentially bound party has shifted, not just the tastes or circumstances of the contracting party. Moreover, initial contractors receive compensation for the risk that tastes or circumstances change, so although there are good paternalistic reasons to protect them against unduly binding long-term contracts, and reasons to give room for long-term flexibility to renegotiate, we need not worry that the initial bound contractor will receive little or no compensation for bearing a burden.

Those who advocate relying solely on initial contractors to figure out when it is sensible to make their promises run presume that successors will be compensated by paying less for property to account for the burdens of taking on unwanted obligations. This optimistic view is unwarranted: the predecessor's promises are bundled together with large numbers of land use planning promises and with the purchase of the property. It is unlikely that purchasers will adequately depress bids to account for the disutility of taking on each of the burdens.

If we looked only at the successors, we would probably just adopt a blanket rule that promises are terminated upon conveyance. But we need to protect the promisees as well: If they have made site-specific, non-fungible investments relying on the promisor and successors meeting the

DOI: <https://doi.org/10.37419/JPL.V9.I2.2>

[†] James C. Gaither Professor of Law and Vice Dean Stanford Law School. Thanks to George Triantis for comments on an earlier draft and the wonderful Stanford Law Library staff for research help. Errors, of course, remain mine.

contractual obligations, they are subject to opportunistic exploitation if the contracts simply die upon conveyance. We try to balance these concerns in the first instance by determining whether the deal the predecessor and promisee struck was one that the successor would likely undo rather than redo. Promises that touch and concern the land in this preliminary sense are ones that are location-specific (the benefits to the promisee are particularly high or the costs of compliance for the promisor are atypically low because the promisor occupies a particular parcel). If this is true, the fact that the predecessor and successor are different people, with presumably heterogeneous preferences, may be outweighed by the objective factors that would tend to make their preferences converge: each inhabits a parcel whose features make the contract atypically sensible.

This preliminary account of the best version of the doctrine is incomplete: It may bind too many successors. A promise may be somewhat location-specific, but distinctions in preferences may swamp the preference-homogenizing effects of locational specificity. It may also bind too few successors. If the promise is location-specific from the promisee's vantage—benefits from fulfilling the promise are greater because of the promisor's location—and the promisee made location-specific investments premised on the reasonable belief that successors would be bound, then the successor ought to be bound even though we are by no means confident she would have made the deal she is being asked to observe. But we ought to be alert to the possibility that the promisee indeed has reasonable substitute contracting partners and will not be held up by a uniquely situated parcel owner.

Each of the proposals I offer to affirm a functional version of touch and concern contradicts the positions taken in the Third Restatement, which, in my view, utterly misunderstands the role the doctrine plays.

I. INTRODUCTION	265
II. TOUCH AND CONCERN AND THE PROBLEMS OF CONTRACTS ACROSS TIME AND PERSONS	269
A. <i>Is Someone Bound no Matter How We Resolve the Touch and Concern Question?</i>	269
B. <i>Degraded Contracts versus Opportunistic Renegotiation ...</i>	272
C. <i>Regulatory Options That Protect the Successor</i>	277
D. <i>Defining Touch and Concern to Address the Substantive Problems</i>	288
III. CONCLUSION	293

I. INTRODUCTION

I buy your home. You have made a promise to your neighbor that you will forebear from some otherwise permissible action (it is not barred by, for instance, nuisance law or legislative/administrative land use planning law)¹ or take some action you are not otherwise legally mandated to take.² You two agreed that your promise will bind your successors, and I have notice of my predecessor's promise (most typically constructive notice, notice that a reasonable person in my position should have gained through a search of recorded deeds.)³ The question that Property scholars, and to a somewhat lesser extent courts, have wrestled with is whether I am invariably bound by this promise—that is to say, the promisee or her successors⁴ can sue me if I breach the contractual promise—or whether I am not bound.

I may not be bound because there are *ex post* defenses to the obligation to perform (changed circumstances or relative hardship) that bear

1. Some simple examples: You promise that you will not use the property commercially though commercial uses are permitted by local zoning law and would not constitute a nuisance; you promise not to build a structure taller than a single story of 15 feet though such taller structures are otherwise permissible.

2. You promise to provide your neighbor a certain quantity of irrigation water from your irrigation ditch or maintain the common wall or driveways between your homes; you promise to pay annual fees to the golf club that abuts your home or the workout gym on the top floor of your condo building.

3. In most circumstances that matter for land use planning purposes, it would be more sensible to speak about the possibility that “we” residents of a Common Interest Community (CIC) made promises to the developer from whom we purchased our single units or promises that would run to all of our neighbors rather than to focus on the classic one-on-one covenant or equitable servitude. And much of the development of the law surrounding the “running” of promises occurred because of promises that were made largely or exclusively in the CIC context, particularly promises to pay fees to a Neighborhood Association or Condominium Board to create or maintain common amenities. But the structural points I emphasize in this essay are most easily illustrated in the context of simple bilateral promises.

4. There are a host of separate legal issues about whether the benefit of a particular promise can run to the successors of the promisee and questions, of more historical than current interest, about whether burdens could run to successors of the promisor if the benefit of the promise was in gross (i.e. meant to benefit a person, corporate or corporate) rather than appurtenant (i.e. tied to the ownership of a particular parcel of land). For a typical case enforcing the traditional rule that burdens will not run if benefits are in gross, see *Shaff v. Leyland*, 914 A.2d 1240 (N.H. 2006). Again, for my narrow purposes, these issues are beside the point. I will be addressing only issues about the general propriety of burdens running to a promisor's successors. There were also issues of more historical than current importance that I will also set aside about whether the initial covenantors were (or had to be) in horizontal privity or the successor and promisor in vertical privity in order to bind successors. For a clear, accessible summary of the traditional privity rules, see William B. Stoebuck, *Running Covenants: An Analytical Primer*, 52 WASH. L. REV. 861, 876–880 (1977).

a family resemblance to frustration of purpose or impossibility in contract law more generally, focusing on shifts in the benefits and burdens of compliance. Traditionally, too, I might also not be bound because a court finds that the promise did not “touch and concern” the land. The conclusion that the promise does not “touch and concern” land occurs when there is a reference to features of the contract observable at the contract’s initial formation. The successor is freed from the duty to perform without regard to what turned out, *ex post*, to happen. We are not asking whether the promise became markedly less beneficial to the promisee (or the promisee’s successor), e.g., because of changes in land use patterns in the neighborhood of the promisee’s land, as we do if we invoke the doctrine of “changed circumstances.” Nor are we trying to determine, as we would if invoking the “relative hardship” doctrine, if it became substantially more burdensome for the promisor’s successors to comply with the promise, and the burdens of compliance are now disproportionate to the benefits, which must not merely be considerably lower than the burdens, but relatively insignificant in absolute terms.⁵

There is an enormous literature attempting, with little success, to figure out how courts have determined whether a promise, in fact, touches and concerns either the putatively burdened land, the putatively benefitted land, or both.⁶ Writers almost invariably conclude that the doctrine is incredibly muddled, and while defending a touch and concern requirement, I do not argue that the case law instantiates either the variant of the requirement I would support or any other applicable rule or set of balanced standards.

There are also two strands of abolitionist literature. The first, most associated in its pure form with libertarians like Richard Epstein, argues that I should be bound so long as I take with notice of promises that the original contracting parties intended to bind me. For Epstein, this is true in all cases.⁷ The second strand of abolitionist literature, most associated with Susan French and the Restatement (Third) of Property, Servitudes for which she served as Reporter, generally *presumes* that Epstein’s

5. See JOSEPH SINGER et. al., PROPERTY LAW: RULES, POLICIES, AND PRACTICES (7th ed.) 654–56 (2021), for a summary of the doctrines of “changing circumstances” and “relative hardship.”

6. For summaries of the unsuccessful efforts to harmonize judicial holdings and citations to the considerable literature, see, for instance, A. Don Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 813–21 (1998). *Notes: Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal*, 112 HARV. L. REV. 938, 939–40 (2009).

7. See generally Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 SO. CAL. L. REV. 1353 (1982).

position is right in the run of cases⁸ but would bar enforcement somewhat more often, without (at least openly) using the touch and concern requirement at all,⁹ choosing to rely on some mix of doctrines that more rigorously police the reasonableness and public policy compatibility of land use contracts¹⁰ and also allow more frequently both for

8. “The new Restatement places far more emphasis on carrying out the intent of the parties than the old touch and concern requirement . . .” Susan F. French, *The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger*, 77 NEB. L. REV. 653, 666 (1998).

9. Professor French viewed the Third Restatement as abolishing the touch and concern requirement, believing all its reasonable ends could be met through other mechanisms. “The American Law Institute’s new servitudes restatement project is designed to shake servitudes law 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.” Susan French, *Servitude Reform and the New Restatement of the Law of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 930-931 (1988); “. . . the new Restatement . . . has replaced the doctrine with a number of other rules and doctrines designed to fulfill many of the functions that have been ascribed to the traditional touch and concern doctrine.” French, *supra* note 8, at 654; “The flexibility of the doctrine, due primarily to the vagueness of its content, allowed courts to use it to stop covenants thought to pose unnecessary risks of depressing land values or of unfairly burdening successors who would not have expected to become liable on the covenant. These functions will be addressed under the headings of protecting land values, protecting purchasers from surprises, and modification and termination of servitude arrangements.” *Id.* at 659.

10. The Third Restatement’s list of justifications for refusing to enforce a land use promise largely refers to factors that seemingly ought to invalidate the initial contract, rendering it unenforceable against even the original promisor: In that regard, it can be seen simply to expand (in the context of land use planning deals) traditional doctrine voiding contracts that run afoul of public policy. On its face, of course, the list simply refers to the question of whether the promise binds successors (this is a Restatement of Servitudes, not of Contracts generally.) But there is no explanation in Professor French’s explanations of the Third Restatement’s position, for instance, of why a promise that is anti-competitive (§ 3.6 of the Third Restatement) or unconscionable (§ 3.7) should bind the initial promisor. Nor is there any developed explanation of why initial promisors should be held to have waived their future self’s ability to exercise significant constitutional rights (or quasi-constitutional rights, “rights” that could plainly not be interfered with by a state entity that are instead regulated by contract-based private governance bodies like Neighborhood Associations) when they contract to do so (see § 3.1, invalidating those servitudes that “violate public policy” because, for example, they “unreasonably burden a fundamental constitutional right.”) Some of the Restatement’s list though arguably attempts to deal with the problems that touch and concern might have addressed (e.g. promises that unduly restrain alienation under § 3.4 or § 3.5), and still others (the prohibition on the enforcement of idiosyncratic promises under § 3.1) could deal with the substantive issue that I will argue the doctrine most sensibly addresses—identifying and invalidating promises that at the moment of initial formation we should foresee would not be remade between the promisor’s successor and either the initial promisee or her successors—though it does not facially state that such promises are valid between the initial parties even if invalid as promises running with the land. But it is fairly plain that it would radically alter ordinary contract law were we to invalidate contracts because a party had sought a promise to receive something that is sensible

modification of agreements and remedy limitations¹¹ when promises prove to be less valuable to their beneficiaries or more onerous to perform for the burdened party.

The touch and concern requirement is almost surely of relatively modest practical moment. State courts of appeal decide remarkably few touch and concern cases. Assume that one accepts the argument that I make in Section II below that courts should retain the power to refuse to enforce promises made by one's predecessors even when one has actual (much less constructive, record) notice of them, and even in the absence of a showing of significantly declining benefits or intensifying burdens. One might still believe that even if legally permitted to do so, initial contractors would rarely draft contracts declaring that they intend them to bind successors if the contracts were the sort that their successors would prefer to undo (or at least that they will rarely draft contracts whose subject matter suggests that the successors would want them undone). If my predecessor made a deal with *The Economist* that anyone residing in her home would continue to subscribe to the journal, the promise would not touch and concern under pretty much any formal or substantive version of the test. But we really do not observe such covenants because promisors would sense that their successors would at least marginally prefer not to be bound to pay for something they will not use, and there is little or no reason to believe that living at a particular address is associated with a desire to read a particular journal. Moreover, the journal managers are not likely to think that its

only given his idiosyncratic tastes.

Courts often express further hesitations about permitting a promise to run to successors in terms that would seem to imply they should be hesitant to allow the promise to be enforceable against the initial covenantor as well. For instance, some of the reluctance courts have shown to enforce affirmative covenants is that they worry that supervising the performance of certain affirmative obligations might stretch the limits of the court's capacity. But if a promise is hard to enforce through a mandatory injunction, it is just as hard to enforce through a mandatory injunction directed at the promisor as it would be if directed at his successors. *See, e.g., Oceanside Cmty. Ass'n. v. Oceanside Lake Co.* 195 Cal. Rptr. 14 (Cal. App. 4th Dist. 1983) (court frees developer's successor from promise to build and maintain a golf course adjacent to promisees' parcels in part because court supervision of the complicated process of restoring a golf course that had fallen into disrepair was so difficult; court does, however, hold successor responsible to pay damages to the promises, who could enforce the monetary award through an equitable lien).

11. The decision to refuse to grant an injunction even when the initial agreement contemplated that remedy rather than damages (the typical "equitable servitude," generally associated with promises to forebear from otherwise-permissible action) is typically grounded in the fear that a promisee will be able to charge a promisor up to the amount he would lose if forced to take some action or forebear from some action in order to waive the obligation to perform, even though damages from the defendant's desired actions would be quite a bit lower.

subscription base can readily be maintained or expanded by adopting a policy of making and enforcing location-based promises.

My discussion of touch and concern is, then, mostly academic in the sense that it is designed above all to illuminate more general issues about contracting and policing contract-based regimes. I am dubious that courts will face a significant volume of difficult touch and concern cases. However, to the extent that they do face the basic, defining issue that touch and concern raises—which is not (despite the Third Restatement’s confused approach to the issue) the acceptability of the land use promise itself but the wisdom of binding successors to the promise—my discussion is indeed intended to give practical guidance to them.

II. TOUCH AND CONCERN AND THE PROBLEMS OF CONTRACTS ACROSS TIME AND PERSONS

A. *Is Someone Bound no Matter How We Resolve the Touch and Concern Question?*

If a court decides that a covenant or equitable servitude does not bind a successor to her predecessor’s promises because it does not “touch and concern” the land, two distinct things may then happen: the promisees (or those successors/assignees permitted to sue to enforce the promise) may still be able to sue the initial promisor, though not the successor, or they can sue no one at all. Typically, though, if the court finds that the successor *is* bound, the initial promisor will be released from the promise.¹²

If a particular plaintiff can still sue the promisor so long as the successor is unbound, the plaintiff should be indifferent to the court’s resolution of a case turning on touch and concern so long as promisor and successor are equally capable of either performing the promise or paying damages. One would think where there are questions about touch and concern then, plaintiffs would typically join both potential defendants to ensure that *someone* performed.¹³ Jeffrey Stake, one of the few legal academics to analyze touch and concern in wholly functional, economic terms, assumes that *all* touch and concern cases are simply about ascertaining which of two plausible defendants (current landholder or initial promisor) is actually subject to suit. Given that supposition, the question that arises in touch and concern cases is not whether the promise continues to be binding given a change in ownership of the initial

12. See SINGER et al., *supra* note 5, at 587.

13. See FED. R. CIV. P. 20(a)(2)(A).

promisor's parcel but simply who is bound.¹⁴ Stake thus largely focuses his functional inquiry on the question of which of the two parties is better positioned to perform the promise,¹⁵ noting that if the court decides that the party who is in fact more poorly positioned to perform is declared the apt defendant, the promisor and successor will be forced to make some sort of deal to shift the responsibility to the other, leading both to high and needless transaction costs and the possibility of opportunistic exploitation.¹⁶

It is simply not true, though, that in situations in which the court frees a successor from a promise because it does not touch and concern the land that the initial promisor will inevitably still be bound. In fact, if courts took certain aspects of existing doctrine seriously, initial promisors would virtually never be bound, though of course Professor Stake is correct to note that many courts do find them bound.¹⁷ The formal test for whether initial promisors are bound after conveying their property is intent-based: they remain bound only if the parties to the initial contract intended them to be bound.¹⁸

At the purely formal level, in any case in which we need to reach the question of whether a promise touches and concerns, we must have already found that the initial parties intended to bind successors, and, since initial promisors are freed if their successors must perform, they have implicitly stated their intention to remain unbound. (The promise is, in essence, "I intend not to be bound because I intend that my successors will be bound and that will unbind me.") Obviously, the parties could express their intention to hold or not to hold the initial promisor

14. Jeffrey E. Stake, *Toward an Economic Understanding of Touch and Concern*, 1988 DUKE L.J. 925, 945-51 (1988).

15. *Id.* at 930, 950-51.

16. *Id.* at 958-59 (showing a clear example of the analysis in relationship to promises to supply water when the water is more cheaply provided from the parcel owned by the initial promisor).

17. *Id.* at 949-50 n.95.

18. *See, e.g.*, *Gallagher v. Bell*, 516 A.2d 1028, 1039 (Md. App. 1986) ("It will suffice to conclude only that the continuing liability of an original covenantor . . . will end upon his conveyance of the burdened property if the parties intend that to be the case.")

This understanding of the parties' presumed intention conforms with presumptions we make about intention in considering the running of *benefits* for easements. If an easement is determined to be appurtenant (so that any occupant of the dominant tenement can make use of it), it can no longer be used by the party to whom it was initially granted once that party has left the dominant tenement. *See, e.g.*, *Cricklewood on the Bellamy Condo. Ass'n v. Cricklewood on the Bellamy Trust*, 805 A.2d 427 (N.H. 2002). Unless the promisee explicitly states that she retains personal rights to use the easement, courts assume she intended to lose those use rights after conveyance. Here, the parties intended the *burden* to be appurtenant, and it seems reasonable to believe that they therefore believed the burdens would not survive conveyance.

responsible more explicitly (“I intend to be bound *if* it is found that my successor is not bound” on the one hand or “I intend to be unbound as soon as I sell the property whether my successor ultimately turns out to be bound or not” on the other.) But absent such an explicit declaration one way or the other, the statement of intention to bind successors should almost surely be read to imply that one’s obligation ends with conveyance.¹⁹

Even if courts looked to determine implied intention without regard to the typical explicit statements that the parties wanted, and likely expected, the promise to bind successors, my view is that they should still typically free the initial promisor from a wide range of promises even when successors were unbound.²⁰ It is, of course, clearer why the promisor should be freed from promises that touch and concern in the sense that they are easier or cheaper to perform for someone occupying the

19. Questions about what to make of this sort of “conditional intent” could in theory arise explicitly in these touch and concern cases, but courts do not appear to have understood that these controversies indeed raise conditional intention issues.

If one looks instead to the criminal law, the question often arises of whether a party who intends to do something only under particular circumstances has an intent to do that thing: This may be an important question because having the intention to do “that thing” is a necessary condition to be convicted of any crime or is an aggravating factor. If one looks at *Holloway v. United States*, the Supreme Court’s leading case mooting the issue of whether a party intends an action when his condition is conditional, one sees that Justice Scalia, in dissent, has the most restrictive understanding of when an actor intends those things he conditionally intends and even under his restrictive definition, we would say that the promisor in these cases intends to be unbound because he both expects and wants to be unbound. The issue in the *Holloway* case was whether a carjacker acted “with the intent to cause death or serious bodily harm” if he intended to use violence only if his victims resisted his efforts to take the car. In arguing that the defendant lacked such intent in this case, Justice Scalia stated: “I think... that in customary English usage the unqualified word ‘intent’ does not usually connote a purpose that is subject to any conditions precedent except those so remote in the speaker’s estimation as to be effectively nonexistent—and it *never* connotes a purpose that is subject to a condition which the speaker hopes will not occur When a friend is seriously ill, for example, I would not say that ‘I intend to go to his funeral next week.’ I would have to make it clear that the intent is a conditional one: ‘I intend to go to his funeral next week if he dies.’” See *Holloway v. U.S.*, 526 U.S. 1, 14–15 (1999) (Scalia, J., dissenting).

I think Scalia is wrong here, that his account of the range of ordinary usages of “intention” is too restrictive: it is not at all abnormal to say that I intend to go to a funeral without adding the words *if my friend dies* (“I can’t meet you for lunch next Friday. I intend to go to my old friend F’s funeral late in the week even though I’d initially thought it would be too awkward to go since I’ve had a troubled relationship with his wife.”). A President might well say that “The United States intends to begin bombing Country C next Monday unless C capitulates to our demands.” But even using Justice Scalia’s hyper-restrictive definition, the initial promisor in our land use promise case intends to be unbound because he *hopes* to be unbound (*and* may well not foresee in any way that he won’t be unbound).

20. See, e.g., *Miller v. Clary*, 210 N.Y. 127, 135–36, (1913).

initial promisor's parcel, but it may also be the case that promisors still do not expect to be responsible for certain charges once they have left the parcel. It may or may not, for instance, be cheaper for a parcel occupant to pay insurance premia than a non-occupant²¹ or to pay fees for membership and use rights in the rooftop gym.²² But even if it is not in fact cheaper—the fact that one can after all send in the same check from anywhere tells us that the promise can at least be reasonably fulfilled by non-occupants in the way that promises to make certain uses of the promisor's land or forbear from other uses might not be readily performed by the initial promisor though they can be by the successor/occupant—people unable to use the gym or enjoy the benefits of being insured might nonetheless expect that they will not continue to pay for services that are irrelevant to them. It might well be sensible for someone to contract to pay a certain fee to use the rooftop gym so long as she is an occupant of the building, but it is hard to imagine that she would contract to pay the fee forever if her successors were unbound when, at the time the initial contract was signed, she would have no reasonable way of guessing whether the fee would be reasonable to pay for many years (because it generated the benefit of access) or wholly burdensome for a long period.

Again, largely to ease exposition of the points that I want to emphasize, I will assume for argument's sake going forward that if the promise does not touch and concern the land, *no one* is bound. The promisee or successors entitled to benefit from her predecessor's promise will have no one to sue.

B. *Degraded Contracts versus Opportunistic Renegotiation*

Assume—as we generally do in contract law, in the absence of fraudulent misrepresentation/information deficits or duress or contractor incompetence, each of which can be defined more or less broadly, in ways that reject the validity of a smaller or larger proportion of contracts—that the initial promisor and promisee found the original deal that they struck with one another mutually advantageous. Another way of putting that same point is that making the deal generated a surplus

21. The argument that it is cheaper is that the occupant can both better limit the risk of insured-against events and have greater incentives to do so and thus should pay less for insurance.

22. The argument that it is cheaper for occupants to do so would be that their dues help maintain the gym and that the maintained gym increases the value of their units. So, the net cost of belonging (fees minus gains) is lower for an occupant than it would be for someone a block away, even if they valued the services of the gym identically.

(which the parties presumably split): the joint subjective value of the properties burdened and benefited by the promise was higher than their joint value absent the promise. We might nonetheless worry that the deal they struck is *no longer mutually advantageous* at some point in time in the sense that the burdens of compliance, going forward, now outweigh its prospective benefits. The contract that the parties made is not one that they would make now; performance would diminish the joint value of their holdings. This could be the case *either* because the burdened party is hurt more by fulfilling the promise than he was initially *or* because the benefited party is helped less (or both, of course).

This can, of course, be true in “ordinary” contract law situations in which the dispute is between the initial parties to the deal rather than successors because the parties or the circumstances in which they operate have changed in some relevant way given the passage of time. But the key to understanding why the touch and concern doctrine emerges and how best to define the elusive concept is that it is an even more pressing problem in this context because the identity of the parties has changed.

Contract law, of course, has its own set of doctrines to deal with the possibility that a once-efficient contract is one that would no longer be negotiated. There are doctrines excusing promisors from performing or compensating the promisee for non-performance (that is to say, doctrines that discharge the promisor) when the promisor will get radically less benefit from the promisee’s reciprocal performance than anticipated (*and the promisor did not take the risk that benefits would decline in the relevant way*) or when it would become radically more expensive or “impossible” to perform (*and the promisor did not assume the risk that he would have to compensate the promisee for losses that occur if performance proved too onerous*).²³ More important, perhaps, there are doctrines regulating the renegotiation of contracts whose initial terms no longer benefit both parties. At common law, a party seeking increased payments because the cost of performance had risen dramatically (so that performance at the contract price would now be unprofitable) might well have been unable to enforce the revised contract because the party who had agreed to pay more than the initial contract price received no consideration for the new promise. That party, after all, was already entitled to performance.²⁴ But for quite some time, courts have

23. RESTATEMENT (SECOND) OF CONTRACTS, §§ 261-66 (AM. L. INST. 1981); UCC § 2-615 (AM. L. INST. 2013); Melvin Eisenberg, *Impossibility, Impracticability, and Frustration of Purpose*, 1 J. LEGAL ANALYSIS 207 (2009).

24. This traditional position is well-articulated in *Levine v. Blumenthal*, 117 N.J.L.

permitted renegotiated contracts to be enforceable so long as the party seeking renegotiation sought the new terms in good faith, rather than opportunistically, and the terms were not accepted as a result of duress.²⁵

Of course, though, when we are considering the issue at stake in these controversies—whether to bind a successor to her predecessor’s promises—the probability that the promise is now unwanted increases. This point would be most obvious if we imagine a regime in which the successor was bound even without notice so long as the initial contracting parties intended the successor to be bound. I obviously return to the question of whether—or more accurately, to what degree—we should treat taking property with notice of a predecessor’s promise as a substitute for contracting directly, but for now I am making a simpler point. We think of contract law as permitting heterogeneous parties to order their affairs in accord with their idiosyncratic, individual subjective preferences. If we believed that a deal would be in any random party X’s interests if X could be bound by another random party Y’s deals, we would not really need a regime that facilitated exchange or contracting; we could all be well-served by what amounted to a comprehensive regime of tort obligations in which the preferences of some (now-hypothetical) Y, interacting with some (equally hypothetical) promisee, established all of our duties.

Because we do not believe that successors necessarily have the same tastes as their predecessors or would be able to meet obligations as cheaply or readily, we need to deal with the possibility that a successor would want to undo some of her predecessor’s promises. But at the same time, we recognize that the promisee will often be disserved if she

23, 29 (1936).

25. See, e.g., RESTATEMENT (SECOND) OF CONTRACTS § 89 (no consideration needed for contract modification so long as the modification is fair or equitable given circumstances not anticipated by the parties). For a typical application, see *Angel v. Murray*, 113 R.I. 482, 493–94 (1974).

It is interesting to note that one of the more interesting proposals to abolish the touch and concern requirement while acknowledging the problem that I emphasize that it was designed to handle—that parties obliged by their predecessors’ promises might well want to undo those promises—was a proposal that in some sense could be said to dissolve some of the distinctions between Contract and Property law on the renegotiation issue. Land use planning agreements would last only a limited time (30 years) and then would dissolve, though parties would have an obligation to negotiate in good faith to extend, revise or terminate the initial agreement. This obligation to engage in good faith negotiations to extend, revise, or allow a covenant or equitable servitude to expire substantially echoes the obligations that parties to any contract who wish to renegotiate terms bear. See *Touch and Concern, The Restatement (Third) of Property: Servitudes and a Proposal*, *supra* note 6, at 953.

cannot rely on ongoing performance and that this problem may be especially acute in relation to land use planning promises because promisees may often make site-specific, non-fungible investments, relying on the stability of the environment in which they invest, that make them vulnerable to opportunistic exploitation, to the expropriation of the quasi-rents that their site-specific investments have generated.

What costs, then, do we bear when we allow burdens *or* benefits to run, knowing that new parties may often have different preferences than their predecessors? What costs would we bear if we *did not* allow them to run, knowing that promisees have made site-specific investments relying on the ongoing performance of promises? Shouldn't we really compare the transaction costs and distributive injustices that will occur if promisees have to renegotiate (that is to say, make new) deals each time the promisor's property is conveyed with the transaction costs and distributive injustices that will occur if successors have to *undo* unwanted deals their predecessors saddled them with? In thinking about the distributive injustices, we must attend to the interests of both the promisees (who have paid for something, believing with more or less good reason that it will be theirs perpetually) and the promisors (who are bound to contracts that they did not explicitly make).

In thinking about problems of opportunism that arise if promises must be re-done when property is transferred to a new owner, consider the following deliberately simplified illustration. Homeowner H decides he wants to install solar panels to provide himself with electricity. He has no environmental or ethical principles at all in this over-simplified hypo; he is just trying to save money. He can supply the electricity he desires either by installing solar panels that cost \$100,000 or installing a gas-powered generator at the cost of \$150,000; each will meet his needs equally well. The solar system will not work, however, if his neighbor N builds a light-blocking second story, so H goes to N and proposes to contract with him to refrain from building a second story. H would pay no more than \$50,000 for this agreement (and might pay less, depending on how the bargaining goes between H and N); that is all he saves by using the solar panel system. Let's say he agrees to pay \$40,000 in ten \$4000 installments. Once he has built the panels, though, what would he pay to stop N from breaking the contract? If the panels have no salvage value (that is to say, the investment in the solar panels is completely site-specific and non-fungible), he would pay up to \$150,000 to *continue* the contract because it would cost him that much now to get electricity by installing the generator if N builds the second story. So, N

might seek to renegotiate the contract to ask for payments far greater than those initially agreed to in order to keep his initial promise.²⁶

In thinking about promises that would now be undone, focus on the promisor, who may be saddled with an expensive-to-keep promise if they are bound by their predecessor's promises. They would get out of the promise at low cost but for two problems: first, the transaction costs of undoing a promise (especially when there are multiple promisees) may preclude such renegotiation and leave the parties with a contract

26. There is nothing unique about the opportunism problem that arises when a successor comes into possession of the burdened party's land that does not arise in any contractual situation in which a promisor seeks to undo or renegotiate a contract. Because the successor has (at best) weakly assented to be bound, though, we might well, absent concerns over this sort of opportunism, be prone simply to terminate the initial deal. These problems arise whenever the promisee has made investments that are not readily deployed in all settings. Prototypically, such quasi-rent-generating investments are *physically* site-specific, but they need not be—they may, for instance, involve human capital investments that cannot be utilized outside a particular work setting.

Consider the following example in which an investment is physically site-specific: Power Company P contracts to supply electric power in a region of an economically less prosperous country that has very limited power supply. The government of that country (G) promises to pay P \$x/kilowatt hour for power that is ultimately utilized. Company P projects that if it is paid \$x/kilowatt hour and usage is in the range that it anticipates that it will be, the project is worth undertaking: the company will make a profit given both the very high initial fixed costs of building generating facilities (\$y hundred million) and the incremental costs of generating electricity once the facilities are built (\$z/kilowatt hour). (Incremental costs come from, e.g. fuel costs and labor costs.) G has every reason to break/renegotiate the contract once the generating facility is built: if, as is likely the case, the generating facility has nearly no salvage value if P tried to remove and relocate it. G will want, going forward, to pay no more than some small increment above \$z/kilowatt hour. If they do that, P will have lost a huge amount on the project since it will not recover the \$y hundred million dollars spent on creating the facility, but it is still prospectively rational for P to agree to any payments that more than compensate P for its incremental production costs. Of course, if parties in G's position could always do this (e.g. because we are in a legal regime with very weak contractual enforcement or because we have very permissive renegotiation rules), the Ps of the world would be reluctant to make investments that would be rational for both buyer and seller whose value the seller could not readily recapture outside the particular relationship with the buyer.

And then consider an example where there is an employer-specific (though not location constrained) human capital investment: a college grad prepares over the summer for his fall job as an SAT tutor. He might "invest" \$7000 in improving his value as a tutor to the firm by \$10,000 but once he's made the investment—and it is of no use to him in any job outside tutoring for the organization he is going to work for—the employer may seek to renegotiate his employment contract. Assume that Graduate G's market wage rate without investing in acquiring the particular, specialized skills to do the particular job is \$50,000/year but, if he makes specific investments in the tutoring job he has contracted to take on, he merits \$60,000 a year and that is the wage the tutoring company contracted to pay him. Once he's done the training, the employer is clearly tempted to act opportunistically and renegotiate, offering him anything in excess of \$50,000, which is all that he could make at an alternative job.

that diminishes the joint value of their properties. Moreover, the promisee might well, if unmoved by personal inclination or non-legal obligation to forego purely selfish opportunistic behavior, charge the successor most of the presumptively high *cost* of compliance rather than the presumptively lower *value of compliance to the promisee* to waive the obligation. The opportunism problem is especially acute if the promisor's agreement will be specifically enforced—if they face an injunction to perform certain expensive acts or are prohibited from doing certain things of great value to them. But even if the current benefits of compliance outweigh the current costs—and they tautologically do so if damages are greater than compliance costs so that the promisor's successor would choose to perform *if* the promise is enforceable—we still may be suspicious that a contract with the precise reciprocal obligations established in the initial deal would be ones the successor would have agreed to.²⁷

C. *Regulatory Options That Protect the Successor*

What regulatory schemes can we use to deal with the possibility that the successor is not just bound to a deal she would not have made but will now face opportunistic exploitation if she tries to renegotiate and undo the initial deal? There are, at core, three possibilities:

- We can rely on the initial contracting parties to figure out when they think the burden on the successor will outweigh the benefits to the promisee (or benefitted successors). The initial promisor will compare how much more the initial promisee will give her to make the promise bind successors with the amount she will lose if prospective purchasers, the successors, offer less for the property if bound by the promises than they would offer if unbound.²⁸ And we can rely on

27. It is difficult to speculate about the relative transaction costs of remaking rather than undoing a deal: The simple transaction costs of each likely depend, above all, on whether there are multiple promisees on the one hand or multiple promisors and whether hold-out problems are more credible for one side of the deal than the other if there are multiple parties.

28. *See infra* Section C. It is not inevitable that they would offer less, even on the assumption I explore in the text and notes below that successors do not actually bargain to be compensated for the burdens of taking on obligations when they purchase a “bundle” of property and a set of attached promises. Some of the promises might simply not be burdensome at all. Moreover, if it is the case that successors take on promises as part of a web of reciprocal, identical promises made by neighbors (as in the typical CIC context), the value of the parcel burdened (and reciprocally benefitted) by the promises the successor is bound to perform might well be higher than the value of the property in a

the notice system to protect the buyers from exploitation: because they know that they will be bound to their predecessor's promises that those predecessors intended would bind them, then those who are burdened by taking on the obligation will be compensated for the losses they suffer if made to comply because they will pay less for the property than they otherwise would. This is the intent and notice system, associated, as I noted, with Professor Epstein in its pure form and with the Third Restatement in the bulk of cases.

- We can wait and see whether the benefit/burden balance shifted dramatically and either free the promisor's successors from the obligations taken on by their predecessors, modify the deal so as to preclude the use of injunctive relief and the concomitant possibility of charging (nearly) as much to undo a promise as it would cost to perform, or modify it in some other way that brings costs and benefits into closer alignment. We might, in other words, extinguish interests *based on factors other than conveyance to a new party*: not only might we look directly at changing circumstances or relative hardship,²⁹ but we could impose time limits on promises or require periodic re-recording for the promise to remain in force, believing that only promises still valuable to the promisee would be re-recorded, given the costs of re-recording.
- We can make some determinations looking at the subject matter of the initial contract that the contract is one that parties would most typically want to undo, contracts in which the chances were low that the initial parties and those successors who seek to be unbound have (at least roughly) similar beliefs about the burdens and benefits of the contract. In this view, the touch and concern requirement is the main mechanism we use to identify promises in which we would expect the parties to have similar preferences. The Third Restatement identifies another class of cases in which successors are unlikely to share their predecessor's tastes and are therefore

community without such binding rules.

29. Or, to borrow from the traditional law of easements, a historically distinct servitude, we might look to see whether the costs of compliance increased because the dominant tenement overused the easement, creating what would have been thought of as an illegitimate "surcharge" on the easement. For a typical application of rules limiting intensification of the use of an easement by the dominant tenement holder, see *Hall v. City of Orlando*, 555 So. 2d 963, 966 (Fla. Dist. Ct. App. 1990) (installation of a larger drain pipe that would double the flow of water over drainage easement impermissible).

likely to want to undo the promise: promises that are “idiosyncratic.”³⁰ But while I think it is worthwhile to hold that idiosyncratic preferences do not run,³¹ not all promises that fail to touch and concern the land are idiosyncratic by any means. First, take two unrealistic but instructive cases; imagine a promise intended to bind successors to give money each year to a particular political cause or a promise to reduce the consumption of plastic containers on the successor’s land. The desire to have others give to a political cause or to be environmentally responsible in a fashion that is not tied to ownership of a particular parcel is by no means idiosyncratic (or, to take another Third Restatement category of illegitimate promise, “spiteful”), but it is one where any assumption that the successor would share her predecessor’s preferences would be unwarranted. To take a more realistic case, it might well be that we should hold that promises to pay annual fees for sports facilities physically proximate to the successor’s parcel (rooftop gyms, golf club memberships) do not touch and concern without any regard to the question of whether the promises should be deemed idiosyncratic.

The first critical substantive question that we should address is whether we should *ever* police these sorts of agreements at all, whether *ex post* or *ex ante*. The second, of course, is whether policing, if done, should only be done *ex post*.³²

As I have emphasized, many would argue that the question of whether either benefits or burdens should run should be left up to the original contracting parties, so long as those to whom they convey their properties have notice, particularly of burdens (promises they will be bound to keep by virtue of being successors to earlier promisors).

30. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 (AM. L. INST. 2000).

31. Professor Reichman was the first academic commentator to make this point forcefully, and justify it, as I do the touch and concern requirement, largely by reference to the unlikelihood that successors would want to make the promise the predecessors made. See Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1232–33 (1982).

32. Courts looked to features observable at the time of an initial deal not only in determining whether the burdens of a covenant or equitable servitude ran to successors but whether the benefits of an easement could be assigned to a third party. Although parties could explicitly disclaim the default rule, there was indeed a default rule that a *personal* (as opposed to commercial) in gross easement was not assignable. See Alan D. Hegi, *The Easement in Gross Revisited: Transferability and Divisibility Since 1945*, 39 VAND. L. REV. 109, 119–21 (1986).

What reasons might there be to be suspicious of a pure intent plus notice regime? There are three broad sorts, but only the third seems to me of much moment:

- “Paternalistic” protection of the original contractors from their own errors of judgment about whether purchasers of their property will demand deeper discounts than the original promisors anticipate because the land they sell is burdened by promises that are unwanted and costly to perform, yet expensive to undo.³³ Whatever one thinks of the general merits and demerits of paternalistic intervention,³⁴ one would think that parties would be atypically vulnerable to error in this class of cases only because the promises bind for very long time periods and the ability to foresee the preferences of would-be buyers into the distant future is limited (given shifting tastes and circumstances). But one might best use a system that simply mandated good faith renegotiation of promises with mandatory expiration dates³⁵ if the problem the initial promisors are incapable of handling properly is the problem of making sensible long-term predictions.
- It is arguably cheaper (or more efficient) for some public authority to kill the promises than for private parties to bear the costs of undoing them. While costs of undoing promises may indeed sometimes be high—especially given the possibility of hold-out problems when there are multiple parties needed to waive the initial deal³⁶—the administrative costs of having

33. See Stake, *supra* note 14, at 934–35, 939–41.

34. For a defense of the propositions that contract law generally both frequently is and should more frequently be paternalistic, see Duncan Kennedy, *Distributive and Paternalist Motives in Contract and Tort Law, with Special Reference to Compulsory Terms and Unequal Bargaining Power*, 41 MD. L. REV. 563, 572, 588–90, 624–29, 631–49 (1982). And, of course, it may not be feasible to distinguish between paternalistic interventions and interventions grounded in the recognition that many parties have inter-temporally inconsistent preferences so that relying solely on articulated choices is not defensible because it is impossible to be responsive to each instantiation of a divided, often-mistaken self with deeper welfare-seeking goals than the subject articulates in expressing more particular preferences. See generally, e.g., Cass R. Sunstein & Richard H. Thaler, *Libertarian Paternalism Is Not an Oxymoron*, 70 U. CHI. L. REV. 1159 (2003). Mark Kelman, *Choice and Utility*, 1979 WISC. L. REV. 769, 769–72, 778–87.

35. See *Touch and Concern, The Restatement (Third) of Property: Servitudes, and a Proposal*, *supra* note 6, at 938, 953–56 (arguing that this is generally the best way to deal with the problem of running burdens).

36. In situations in which there are multiple promises—most typically the case in the context of CICs—we may facilitate the extinguishment of unwanted promises by allowing elected Boards to undo binding promises in declarations or previous by-laws. (They may amend declarations or enact new by-laws.) For a sage discussion of the

courts declare a promise dead are hardly trivial either, so it's not clear how plausible this efficiency rationale really is.

- “Anti-exploitation” principles are almost surely the most serious ones. What we are concerned with in this regard is the need to protect the successor conveyees, rather than the original promisors, because these successors at least arguably do not get an “adequate” discount to shoulder the promise they are burdened with.

The optimistic view of “running” burdens is that the *implicit* contracts that successors make with the beneficiaries of the promise are indistinguishable from the explicit contracts that any initial promisor and promisee make with one another, except that the successors receive their direct reciprocal benefit for foregoing their baseline pre-contractual legal privileges from their predecessors rather than the promisees. If the promisor is given \$40,000 to forego building a second story as long as he owns a parcel, so would a successor demand and be given the same \$40,000 to forego building, in the form of a discount on the purchase price of the parcel, if he has the same tastes and expectations as the original promisor. And if the promise is *more* burdensome to the potential successor than it was to the initial promisor (he wants a second story more, he expects to stay on the parcel longer, so he finds restrictions more onerous in that sense), he would receive more (by virtue of paying still less).

In thinking about the familiar question of whether we should equate explicit contracts with these more implicit ones, it is helpful to do a simple thought experiment. Your neighbor would prefer that you paint your house in a limited range of colors, forebear from having pets or using a satellite dish, or make sure that you maintain a yard with grass of a certain height. Wouldn't we be significantly more confident that you were adequately compensated—for the lost freedom of action, the disutility of not picking your favorite color paint, or the annoyance of having to cut the lawn more often than you would like—if you made a focused, explicit agreement with your neighbor to do or not do a particular thing for which you received something in exchange than if a large set of promises were bundled together? And wouldn't we be even more significantly confident that you'd been adequately compensated if the promises were not just bundled together as part of a single deal with the neighbor but that they were terms (even assuming that you were fully

promises and considerable limits of an approach that puts the onus on Boards to undo dated or unwanted use regulations, see Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 BROOK. J. L. & POL'Y 767, 805–13 (2014).

aware of all of them) that were attached to the purchase of your house, bundled not just with one another but with the purchase of the home? And still less confident that you were compensated if the promises were bundled together (with one another *and* with the purchase of the home) and you were aware of them only to the more limited degree you carefully read a very long report (from your realtor or a title insurance company) that made reference to the bevy of promises?³⁷ And still less confident if one of the terms you agreed to when you purchased your home gave some party (e.g., a Neighborhood Association) unbridled discretionary authority to adopt rules just like those your neighbor would have wanted you to comply with³⁸ and you might (at best) have some

37. There is plenty of reason to believe that homebuyers do not read the CC&Rs (Covenants, Conditions & Restrictions) contained in the many documents they are given the opportunity to read when purchasing a home or condo. Some good summaries of the literature finding that people do not read form contracts are found in Margaret Jane Radin, Commentary, *Boilerplate Today: The Rise of Modularity and the Waning of Consent*, 104 MICH. L. REV. 1223, 1231–32 (2006). Humorous illustrations of this abound. For instance, 98% of experimental subjects agreed to give up their first born in exchange for access to a fictitious social network when the term was embedded in a lengthy terms of service agreement. See Jonathan A. Obar & Anne Oeldorf-Hirsch, *The Biggest Lie on the Internet: Ignoring the Privacy Policies and Terms of Service Policies of a Social Networking Services*, 23 INFO., COMM'N & SOC'Y 128, 143 (2020).

There is a long-standing debate between those who believe that buyers are protected from undesirable terms even when few read them by the marginal “term-sensitive” buyer and those who are skeptical of the claim. A particularly rosy view of the capacity of those who read and shop to protect those who don't can be found in G. Marcus Cole, *Rational Consumer Ignorance: When and Why Consumers Should Agree to Form Contracts without Reading Them*, 11 J.L. ECON. & POL'Y 413, 413 (2015). The canonical piece presenting the hypothesis that an informed minority could impose market discipline on sellers was Alan Schwartz & Louis L. Wilde, *Intervening in Markets on the Basis of Imperfect Information: A Legal and Economics Analysis*, 127 U. PENN. L. REV. 630, 655 (1979). A far more pessimistic view is presented in Yannis Bakos et al., *Does Anyone Read the Fine Print? Consumer Attention to Standard-Form Contracts*, 43 J. LEGAL STUD. 1 (2014). It is also plausible that sellers are disciplined less by a minority of shoppers than they are disciplined by a (relatively) small group of people who complain that they have purchased bad products or been subjected to onerous terms; their complaints (particularly when they publicize them) may be costly to the seller. The argument for this proposition is cogently set out in Yonathan A. Arbel & Roy Shapira, *Consumer Activism: From the Informed Minority to the Crusading Minority*, 69 DEPAUL L. REV. 233 (2019).

One would suspect that even those drawn to the idea that market discipline exists, either *ex ante* from discerning buyers or *ex post* from complaining consumers would emphasize distinctions among the broad class of land use planning deals that may or may not bind successors: Some of the deals are rather customized (particular to the particular predecessor and promise) and one would expect that the prospect of market discipline in the cases of customized terms would diminish considerably since the terms are not really marketed to large numbers of parties, many of whom can buy the same good or set of terms. See, e.g., Cole, *supra* note 37, at 456.

38. Note that these bundling problems occur as well when a home or condo purchaser, the initial promisor, merely weakly assents to be bound by the terms of the

shaky estimates of the probability that any particular costly-to-comply-with rule would be adopted?³⁹

The thought experiment is designed to clarify a simple but important point that those who worry that those bound by non-explicit contracts are less likely to benefit from the purported deal: there are weaker and stronger forms of assent to binding oneself to an otherwise unwanted set of obligations and greater and lesser odds that one was adequately compensated for being bound.

There are, at core, two fundamental problems with these implicit contracts: one is that the bound parties may lack usable information about the terms they are agreeing to and hence have no real reason to demand compensation that is adequate to account for the costs of compliance

declaration, establishing both substantive land use regulations and procedures for altering these regulations. That weak assent should and does make us more wary of enforcing all the promises in declarations: at times, courts can be fairly wary of “unreasonable” rules embodied in declarations, especially when the regulations might be thought to intrude on the exercise of legal rights that could not be abridged by state actors. For a discussion emphasizing the need to police the substance of CIC regulations to a greater degree than courts typically now do, see Boyack, *supra* note 36, at 831–38.

39. It is, of course, possible to frame this last case as one in which the successors are not being properly compensated for the imposition of the ultimately-adopted rules but *are* being properly compensated for being subjected to a regime where they are subject to the discretion of others. We can imagine, in this regard, that some risk-averse successors adequately informed about the possibility of adverse discretionary decisions will demand steeper discounts to be subject to discretion than they would have demanded to be free from the rules that were actually ultimately adopted, while some will be under-compensated, relative to the compensation they would demand to be subject to the ultimately-adopted rules. Whether we think of “the perils of discretionary regimes” as a good/quasi-commodity that could itself be aptly priced or not, it is at best a good or “commodity” distinct from the particular land use promise that a successor now finds herself bound to, which would, if negotiated directly now, have its own apt price (sufficient to compensate the bound party for the disutility of being bound).

The argument that terms granting more or less discretion to a party will themselves be properly priced was a significant aspect of old debates in corporate law over whether initial share issuers would internalize costs of adopting charters that share purchasers thought inadequately constraining or whether it was appropriate for courts to review mid-stream exercises of unrestrained discretion by Boards more critically than they reviewed exercises of authority that were more specified at the time of stock purchase because we should be more sanguine that offering prices properly incorporated beliefs about specified powers than they incorporated beliefs about unspecified ones. Commentators like Easterbrook and Fischel argued that we need not worry about terms in corporate charters that many other commentators thought restrained inefficient management—e.g. antitakeover provisions—because initial purchasers would bid less for initially offered shares to the extent these provisions were inefficient but did worry about mid-stream adoption of these sorts of provisions, even though initial share purchasers could have adjusted bid prices to account for the *risk* that such antitakeover provisions could be adopted. See FRANK EASTERBROOK & DANIEL FISCHEL, *THE ECONOMIC STRUCTURE OF CORPORATE LAW* 32–34 (1991).

with the promise. At worst, it may not only be the case that they scarcely know the terms they have ostensibly assented to (think of my hypothetical long report on a house filled with boilerplate, but reasonably important, terms about closing dates and closing costs and escrow as well as lists of particular obligations associated with ownership), but that it would often be unreasonable to expect them to know them.⁴⁰ This may be especially true if there are terms that bind them to obligations that they would not expect to bear by virtue of owning a particular piece of property. Lawrence Berger argued, in fact, that the touch and concern requirement was meant in significant part to identify promises that initial promisors did not truly intend to bind successors and that these successors would not believe that they had made because they were not about issues that they associated with landholding.⁴¹ Even if the obligations that purport to bind them are *available*, they may not be especially *salient*.⁴²

Problems of ensuring that a promisor knows more precisely what she is agreeing to—even setting aside the problem that she may have no ready way to decouple the particular promise from the decision to purchase the property—would intensify whenever the promisor is asked to evaluate multiple proposals at once. It is far easier to know what one would have to be offered to lose the freedom to paint one’s home whatever color one wanted than to know how much one would have to be paid to do that *and* give up a satellite dish *and* agree to maintain the lawn

40. Professors Merrill and Smith have argued that one of the prime benefits of limiting the forms of ownership, e.g. through the *numerus clausus* rule limiting the sorts of estates in land that can be created, is that would-be owners will bear lower costs in ascertaining their obligations if the benefits and burdens of ownership are standardized. Though they do not emphasize this point (and arguably ignore it in declaring that property “ownership” comes in few forms) obligations created through complex land use promises are (even less) standardized (and hence readily known) than the obligations created through trespass law, for sure, and at least arguably nuisance law. *See generally*, Thomas L. Merrill & Henry E. Smith, *Optimal Standardization in the Law of Property: The Numerus Clausus Principle*, 110 *YALE L.J.* 1 (2000).

41. *See* Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 *MINN. L. REV.* 167, 208–11, 219–20 (1970).

42. Perhaps the most cogent, brief argument that a successor who has formal access to information about the promises that her predecessor makes might still be uninformed because none of the information was salient can be found in Molly Shaffer Van Houweling, *The New Servitudes*, 96 *GEORGETOWN L. J.* 885, 898–900 (2008).

Berger’s argument, Berger, *supra* note 41, at 224, could profitably be reframed in terms of salience as well. In any case, the point can be put in broader terms: any time a successor would be surprised to learn that she had taken on an obligation when she purchased a particular property, it is troubling to say that she made an informed choice to take on the obligation or that she likely adjusted the price she offered for the property to reflect the losses she would suffer if forced to fulfill an (unknown) obligation.

and agree to restrict noise in particular ways *and* to submit all plans for home remodels to an Architectural Review Board whose formal powers and practices in turning down plans (of the sort you may someday have) are indeterminate *and* not to have pets. Bundling *terms*—separate from the issue of bundling terms with property acquisition—raises a host of problems: above all, informational overload,⁴³ but also difficulty rendering distinct losses commensurable at worst or readily summed at best.⁴⁴

The second, and likely more severe, problem occurs not because the land use promises are bundled together with one another but because they are inextricably linked with the purchase of the property. There is very good reason to believe that buyers will inadequately adjust offering prices for a parcel to account for the actual disutility of promise-compliance once they have set an offering price for the parcel based on its significant features as a residence (e.g., size, aesthetics, location). People typically anchor their beliefs about “accurate” quantities (and price is most readily thought of in this context as just another quantity) even to wholly arbitrary initial estimates of the accurate number, so that if one first estimates one will offer \$750,000 for a home (based on its important features, based on its listing price, whatever), one is likely to

43. A simple way to think about one version of the overload problem is to think about whether one would predictably accept the same price for a basket of goods you were selling (apples, bananas, chocolate bars, detergent etc.) if one had to assess the offer’s acceptability for each item, one item at a time (perhaps on different days) as one would take for all of the hypothetical 26 items were they put in the basket at once. The question of whether this form of misevaluation leads to accepting bids that are too low or rejecting ones that are actually “too high” though is not determinate, and if we are worried about exploitation of promisors, we would worry only that they under-estimated the price they would need to be paid. The question, then, is whether it is a common (or at least unduly common response) to overload simply to ignore aspects of a problem: to fail, for instance, in my hypothetical, to demand anything at all for item 26 (zinc tablets) because there are simply too many items to assess or whether one is prone (as seller) to demand inadequate compensation for something bad when it is bundled with good things or (as buyer) to overpay for a bundle that contains a mix of good and bad things. (We can conceive of the successor either as a buyer overpaying for the property because it contains a mix of the home, a positive term, with a bunch of negative restrictions or as a seller of a series of privileges to engage in free, unregulated action.) Looking at the psychological literature on bundling, my (weak) conclusion is that in the apples . . . zinc problem, a buyer would tend to demand too much if apples were a highly valued good and zinc a low-valued good and too little if goods were more highly valued as one went further down the sequence. Erika Knutsson, *Bundling for Consumers? Understanding Complementarity and its Effect on Consumer’s Preferences and Satisfaction*, 79 UMEA UNIV. 188 (2011).

44. There are plainly especially difficult problems of information if we expect parties to make apt self-interested choices about subjecting themselves to grants of more or less unbridled discretionary authority. It is quite unlikely that home buyers will have any information that permits anything but the loosest predictions about how this authority will be exercised in ways that matter to the purchaser.

stay close to that figure even if one learns things that make the estimate less rationally plausible (because one will take on atypically bothersome burdens if one owns the parcel). It is likely that they anchor even more strongly to a non-arbitrary estimate of value.⁴⁵

Taken together, the two “bundling” problems—a set of better and worse promises are bundled with one another; all of the promises taken together are bundled with the purchase of the house—are prone to lead to under-compensation of the successor who is hurt if he is bound to honor his predecessor’s promises.⁴⁶ It might be possible that the cost of

45. For a general discussion of the anchoring and adjustment heuristic and some applications to bundled choices, see, e.g., Manjit S. Yadav, *How Buyers Evaluate Product Bundles: A Model of Anchoring and Adjustment*, 22 J. CONSUMER RSCH. 342 (1994). MARK KELMAN, *THE HEURISTICS DEBATE* 22–24, 38–42, 44 (2011).

Shaddy et. al. contrast what they call “extreme” problem solving with “mixed” multi-factor problem solving. “When people adopt mixed solutions for resolving trade-offs, they endorse outcomes that partially satisfy multiple considerations; when people adopt extreme solutions, they endorse outcomes that satisfy a single consideration at the complete expense of another.” Franklin Shaddy, Ayelet Fishbach, & Itamar Simonson, *Trade-Offs in Choice*, 2021 ANN. REV. PSYCH. 181. The anchoring and adjustment heuristic is a quasi-extreme decision-making mechanism. Those using it (mostly) ignore all features of the situation other than the anchor; in this way it is a form of what the authors call “highlighting” although they are referring largely to decision makers who highlight one goal rather than another. *Id.* at 184. The home buying situation has some (though by no means all) of the characteristics of situations in which people use extreme strategies (like the anchoring heuristic) though it is not nearly so obvious that it would elicit an extreme response (in this case highlighting the most salient feature of the bundle) as one elicits extreme responses when people confront “sacred” goods that should never be traded off for other more secular ones (*id.* at 185–86) or pursue a single goal because they are proximate to achieving that goal rather than others (*id.* at 184).

Still, the home buying situation is one in which there are reasons to believe that an extreme strategy would be observed: First, we would expect people to have limited mental resources to compute the projected costs of the wide range of terms they are being asked to evaluate. *See id.* at 192–93, for a discussion of the role of mental resources. More significantly, they are likely both to solve the problem of coming up with a bid price sequentially (evaluating the virtues and flaws of the house *before* examining the binding covenants) and in a positive-to-negative order (highlighting virtues that make it attractive to bid on the house before dealing with the less desirable obligations), and each of those features contributes to the use of an extreme strategy. *Id.* at 191, 193.

46. *See, e.g.,* Yadav, *supra* note 45, at 351. Once again, the most typical realistic situation in which the successor would be *helped* (rather than either unharmed or damaged) by taking on an obligation would be in situations in which her taking on the obligation triggered (or was at least inextricably associated with) reciprocal obligations in others (again, as would typically be the case in a CIC). But, of course, a successor could be benefited by complying with a promise if, for instance, fulfilling the promise permitted him to receive some good or service in return (e.g., obligations to pay fees to use recreational facilities when the successor values access to the facilities more than the fee). It might also be possible that the cost of compliance with promises A-Z together is lower than the sum of the cost of compliance with each of the promises had they been made separately. Just as purchasers of bundled goods might well pay more for the bundle than the sum that they would pay for each item bought separately because the bundled products

compliance with promises A-Z together is lower than the sum of the cost of compliance with each of the promises had they been made separately. Just as purchasers of bundled goods might well pay more for the bundle than the sum they would pay for each item bought separately because the bundled products are complementary, so might obligations be complements in an analogous way.⁴⁷ But it is also the case that parties might demand less to be saddled with promises linked with one another and with a home purchase than they would have to be paid to contract to make those promises specifically and individually (or, to put it another way, pay more for the property than they ought to given that they cannot unbundle the home purchase from the promise-keeping obligations) without any regard to the objective effects that bundling has on the costs or benefits of the bundle relative to the sum of the costs or benefits of each deal, looked at on its own. Even setting aside the quite powerful impact of the “anchoring and adjustment” heuristic—which would inexorably dampen the impact of negative contractual terms on price offers—there is strong evidence that people treat offered bundles with positive traits (like the house itself, and even, in thinking about the CIC context, the reciprocal promises that one is glad bind one’s neighbors) and negative traits (the unwanted, burdensome promises) differently than they would treat offers of each of the traits absent bundling. Most parties make a higher (explicit or implicit) bid for a bundle with good and bad features than they would make if one summed their bids for the items offered individually.⁴⁸

are complementary, so might obligations be complements in a parallel way (e.g., it could be cheaper to comply with promises both to purchase renter’s insurance and to install fire sprinklers than the sum of the costs of complying with each promise, absent having made the other).

47. See, e.g., Michael W. Lawless, *Commodity Bundling for Competitive Advantage: Strategic Implications*, 28 J. MANAGEMENT STUD. 267, 274 (1991) (discussing the role of complementarity in increasing demand for bundled goods). See also Bari A. Harlam et al., *Impact of Bundle Type, Price Framing, and Familiarity on Purchase Intention for the Bundle*, 33 J. BUS. RES. 57 (1995). One should note that under the conception of the touch and concern requirement I advance in the text, promises that touch and concern are in fact often complementary in this way: it is indeed often cheaper for the occupant of the parcel to fulfill a promise that touches or concerns than it would be for a random party to fulfill the promise so that bundling the home purchase with the promises does decrease the burden of promise compliance.

48. This phenomenon is illustrated most clearly in Katherine L. Milkman, Mary Carol Mazza, Lisa L. Shu, Chia-Jung Tsay, & Max H. Bazerman, *Policy bundling to overcome loss aversion: A method for improving legislative outcomes* 117 ORG. BEHAV. & HUM., DECISION PROCESSES 158 (2012) (bundled legislative proposals are more acceptable—i.e. evaluated more favorably—than the sum of the value of the component proposals when evaluators focus less on the losses in each component because the losses across bundled plans are offset by gains “of the same sort” promised by other features of the bundled

D. *Defining Touch and Concern to Address the Substantive Problems*

Assume, at least for argument's sake, that one is convinced successors may indeed be harmed if they are bound to promises their predecessors made that they would undo but for the transaction cost barriers and possibility of opportunistic hold-up. They are, in this view, not invariably adequately compensated for bearing an unwanted burden; the price for the parcel they acquire may well not drop by as large an amount as they would require to bear the burden had they had to be paid to bear that burden more directly and specifically. Two questions arise: (1) can we frame a touch and concern requirement that does a reasonably good job identifying promises that successors as a class would want to undo and that therefore ought not to run?; and (2) Is there any reason to maintain such a requirement so long as we have the authority to undo or modify promises that prove to be the sort that the parties would want to undo because the benefits to the promisor are lower than anticipated or the burdens of compliance higher?

Promises should run to successors only when there is good reason to believe that people occupying a particular status position—owner of a putatively burdened parcel—are markedly more likely to negotiate the same deal that their predecessors made with the promisees than people in the general population would be. If they are not, we should presume that, given heterogeneity of tastes and circumstances, the successor would not take on an obligation that would not typically bind people absent entering into a contract. Why would an occupant of the predecessor's parcel be more likely than the typical person to make, rather than undo, the deal with the promisee that the predecessor indeed made? As a first approximation, the successor would be more likely to make such a deal if the costs of compliance with the promise were (non-trivially) lower for an occupant than for a random putative promisor (so that he would demand less to make the deal) *and/or* if the benefits of compliance to the promisee were (non-trivially) higher because of the putative promisor's location, because the promisor occupied a particular parcel (so that the promisee would offer more).⁴⁹ Thus, the first approximation

plan; absent those sorts of loss offsets, negative features of plans are unduly salient).

49. An analogy might help: If we are trying to predict whether X would be more prone to make a deal to buy strawberries from Y than a random consumer would be, we would predict that he would if he could get strawberries at a much lower cost than others could. (And that could be true either if, say, X spent less to get them because it is cheaper for him to get to Y's strawberry stand than it is for others or because Y finds it atypically beneficial to sell strawberries to X perhaps because X is an "influencer" in the online fruit purchase world, and X "pays" him something to buy, in this case not by direct

of a sensible touch and concern “rule” that deals head-on with the only issue that the properly understood touch and concern requirement deals with—not the acceptability of the deal but its force in binding successors—would be that a promise touches and concerns the land if and only if it is *location-specific* in the sense that the benefits or burdens of fulfilling the promise are different if the bound party occupies a particular parcel than they would be for someone at other locations.

It will sometimes be perfectly clear, given this initial formulation, that a promise does not touch and concern the land. For instance, a promise to give money to a particular political organization or a promise to pay an unsecured debt would not touch and concern the land. There are also situations in which it will be crystal clear that a promise *is* location-specific: promisees care about the upkeep of neighboring homes far more than they care about the upkeep of random homes, promisors may find it markedly cheaper to deliver irrigation water to an adjacent farm, proximate to the ditch from which the promisor draws water than strangers would find it to deliver the same quantity of water to the promisee. At other times, it will not be instantly clear. If a tenant living in a small structure on the property of the landlord promises that he and his successors will be on call to do emergency child care for the landlord, one could imagine that the promise *is* location-specific in some cases—the landlord needs someone really physically proximate because they cannot wait for faraway babysitters to show up and/or it is markedly easier to get to the landlord’s home in an emergency if one lives on the premises. It is also possible to imagine that it is not locationally specific in other cases—the landlord could have made an equally beneficial arrangement with a wide range of potential babysitters who live relatively nearby, none of whom would find it more than trivially more costly to fulfill their promise than the tenant would.

The first approximation will do just fine in many cases, but if our goal is to free successors from promises that we identify at the time of formation as reflecting the particular situation of the parties to the initial

payment but by offering a discounted price.). If my general argument is correct that successors do not get an adequate discount when predecessor’s promises bind them to unwanted obligations, the successor will still be exploited if the promise runs, even when the deal, overall, is still one that generates a surplus. Unless the consideration for the promise was an ongoing reciprocal obligation, the successor will not be helped by the fact that the initial promise paid a good deal to elicit the promisor’s promise even though he would pay far less to elicit a “parallel” promise from a geographically random party. But even if we are not in a situation in which keeping the deal helps the successor, the deal still makes sense for the new parties because the promise values performance *from that landholder in particular* so highly. In the absence of transaction costs or opportunism, then, the deal would be remade.

deal, we must sometimes look more directly at that question. We must sometimes *first* weigh the finding that a promise has promisor-side, location-specific *features* against a finding that it has too many features that are not location-specific to be confident that the successors would be expected to have entered into the deal, and *then* if we find that we are not confident in that way, weigh that conclusion against our fear that we are making the promisees unduly vulnerable to *ex post*, opportunistic exploitation if we undo the promise. The “emergency babysitting” hypothetical could raise this issue: we might in the first instance believe that the promise is (at least modestly) location-specific in the sense that it is indeed cheaper for any tenant of the small structure to fulfill the promissory obligation than it would be for random people, but also believe that heterogeneous tastes about the burdens of babysitting or being available in emergencies vary so widely that assuming the successor tenant would make the relevant deal is a substantial stretch. But then, we must still determine whether we are opening the landlord up to undue opportunistic exploitation if the landlord may well have made site-specific investments relying on continuity of performance obligations by a property holder for whom there are, at best, imperfect substitutes.⁵⁰

Take a more realistic example that courts have indeed grappled with: should successors be bound by their predecessors’ promises to pay annual dues for sports facilities proximate to their property (e.g., gyms in condo buildings, memberships in golf clubs adjacent to housing set near the golf course).⁵¹ These promises may, in some cases, be plainly

50. Often substitutes will be imperfect because performance by a party occupying a different parcel will be inferior or even worthless. (A random party’s agreement not to build a second story will not preserve the promisee’s view or access to sunlight.) Other times, substitutes will simply be hard to find because even small distinctions in the cost of performance make it more credible that only occupants of the initial promisor’s parcel can be relied on to perform. This can be true even if performance by a random stranger would be equally valued. (Anyone *could* pay equally valued dues to maintain the common facilities of a neighborhood or condo building. But it is unlikely when considering whether to build them facilities that the developer can rely on outsiders to pay those dues, whether because they get nothing out of the facilities at all, or are prone to get *less* because they get only use privileges but not the benefits of property-value-appreciating facilities.)

51. Courts have dealt with the question of whether promises to pay recreational fees touch and concern the land. For examples of cases holding such promises do not touch and concern, see, e.g., *Chesapeake Ranch Club, Inc. v. C.R.C. United Members, Inc.* 483 A.2d 1334 (Md. Ct. Spec. App. 1984) and *Midsouth Golf, LLC v. Harborside Condominium Assn., Inc.* 652 S.E.2d 378 (N.C. Ct. App. 2007). For cases finding such promises do touch and concern, see, e.g., *Streams Sports Club, Ltd. v. Richmond*, 457 N.E.2d 1226 (Ill. 1983) and *Nickerson v. Green Valley Recreation*, 265 P.3d 1108 (Ariz. Ct. App. 2011).

location-specific in the sense that it is indeed cheaper for someone proximate to the facility to pay dues *if such dues are needed to maintain the facilities*; even if those proximate to the facility get no use value out of them, the net cost of compliance is lower because paying the dues to maintain the facility helps increase the value of their property. At the same time, given the heterogeneity of tastes, it seems somewhat strained to assert that *anyone* living in the building would want to pay the fee to join the rooftop gym. *Most* of the value of membership derives from the ability to use the recreational facilities and tastes for that privilege will not be location-sensitive. Even if we find, though, that the assumption that successors would inevitably remake the deal that their predecessors made would be weak, we might still want to bind the successors if the promisee reasonably relied on continuity of performance obligation in making a fixed, nonfungible investment (construction of the golf course or gym).⁵² Such reliance would be more reasonable if the promisee builder believed that the only dependable source of dues sufficient both to cover incremental service delivery costs and the high fixed cost of construction were the purchasers of housing units adjacent to the facilities. If such reliance was sensible (the Developer thought it economically sensible to build a \$1 million gym only because she knew she could cover the construction costs if everyone in the building had to pay annual fees and occupants were, at the very least, more likely than members of the broader community to value membership),⁵³ the promise might then run despite the fact that we would not presume that successors and predecessors had significantly homogenous tastes.⁵⁴

52. Presumably, the reliance would be reasonable only if most successors would realize that their predecessors had made a promise that is somewhat location specific. Even if we find that its non-locational aspects outweigh its location specific aspects so that we would be inclined to unbind successors, the fear of opportunism may preclude that judgment if the promisee indeed made non-fungible investments that made sense given the reasonable possibility that a court would conclude that the deal as a whole was indeed location-specific.

53. The developer of the recreational facilities gets nothing more out of performance by the promisor's successor than she would get out of performance by others. But at the moment she must decide whether to build the facility, she will do so only if the most obvious purchasers of the services the facility offers, the nearby occupants, are bound to pay. There is simply too much risk to bear if one has to rely on getting enough outsiders to purchase the services.

54. There may be an additional escape hatch for the successor here—changed circumstances or relative hardship doctrine. It might well be that looking at the deal *ex ante* that the promise/builder thought the only dependable source of an income stream of dues sufficient to generate profit given both fixed and incremental costs would be owners of adjacent units, but over time we learn that is not true. (There is, for instance, a long waiting list of people trying to buy memberships in the golf club or gym.) At that point, we might terminate the deal because of changed circumstances (the promise no

Even if we decide that there are indeed promises that do not touch and concern the land in the relevant sense that we can identify them as promises unlikely to be remade by successors whose non-performance does not unreasonably harm promisees who made fixed, non-fungible investments relying on continuity of performance without regard to conveyance to new occupants, one would still have to ask whether having the requirement is worth the bother given the availability of *ex post* defenses to performance that would permit us to wait and see whether the contract had degraded in the policy-relevant ways.⁵⁵ Unless, though, we substantially revised both changed circumstance and relative hardship doctrine to permit far more promises to be modified or extinguished, the *ex post* defenses to performance are simply not good substitutes for touch and concern. Again, start with the unrealistic cases. Take an example I already made reference to: a predecessor's promise to subscribe to an unwanted magazine would plainly not touch and concern the land. But the promise is by no means exceptionally burdensome (relative hardship), nor has it become worthless to the promisee journal (changed circumstances). And while there may be cases in which a recreational dues obligation has become especially burdensome to a promisor (e.g., the promisor cannot play golf anymore as a result of tendonitis), that question should be answered the same way whether the tendonitis sufferer is the initial promisor or her successor. On the other hand, we might think it is *not* a hardship of the sort we would want to attend to if the successor just did not like golf very much, but the fact

longer benefits the promisee) or, to follow the persuasive lead of the Third Restatement, modify the agreement so that promisors (and, perhaps, particularly successors) are not bound to pay the dues in years in which the clubs or gym are fully subscribed. Or we might terminate (or modify) the deal under the doctrine of relative hardship: only if the deal is now of little benefit to the promisee *and* is now substantially more burdensome to the promisor, e.g. because physical injuries preclude her from using the recreational facilities, will we free the promisor or successor.

55. Note that in looking at the traditional law of easements, we *sometimes* relied on *ex ante* predictions that the deal would degrade rather than waiting to see if a promise had indeed become more burdensome for the servient tenement and, on the other hand, sometimes waited to see if burdens had indeed increased. Absent express declarations to the contrary, we presumed the grantor of a personal, non-commercial in gross easement could not assign it to another, even though we could have waited to see if the assignee actually created a greater burden on the servient tenement. *See supra* note 32. On the other hand, we could have decided that appurtenant easements could not be subdivided without waiting to see if use by multiple dominant tenement occupants actually unduly increased burdens, but instead, we wait and see if burdens indeed unreasonably increase after sub-division. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.10 (AM. L. INST. 2000); *Cox v. Glenbrook Co.*, 371 P.2d 647, 655 (Nev. 1962) (holding that appurtenant easement may be subdivided but reserving question of whether use after sub-division "would constitute an illegal burden and surcharge on the servient estate.").

that the burdens of the promise may very much depend on location-insensitive tastes for playing golf may lead us to conclude that the promise does not touch and concern. An assignee of the tenant who had promised to do emergency babysitting for the landlord might not be so exceptionally averse to babysitting that we would invoke relative hardship doctrine to free him from his predecessor's promise. But if we think that assignees, in general, have markedly heterogeneous tastes about babysitting, we should not hold the assignee, absent strong reason to believe that assignees might exploit the landlord if permitted to redo the deal or that the landlord would be deprived of the opportunity to recapture site-specific investments if deprived of the services.

III. CONCLUSION

Touch and concern doctrine addresses a very particular problem: successors, at best, weakly assent to the promises that their predecessors made, and this weak assent provides us little reason to believe that the deal we may bind them to would be one that they would strike, with benefits to them that outweigh the burdens of compliance. Of course, whenever deals persist over time, it is possible that one or the other contracting party would no longer feel the deal is in her prospective self-interest, but the problem is more pronounced when the identity of the bound party has shifted, not just the tastes or circumstances of the contracting party. Moreover, the initial contractor receives compensation for the risk that her tastes or circumstances should change, so although there are good paternalistic reasons to protect her against unduly binding long-term contracts, as well as reasons to believe contractual systems will work better if there is room for long-term flexibility to renegotiate, we need not worry that the bound initial contractor will receive little or no compensation for bearing a burden.

Those who advocate abolishing the touch and concern requirement in favor of relying on initial contractors to figure out when it is sensible to make their promises run presume that successors *will* be compensated by paying less for property to account for the burdens of taking on unwanted obligations. This optimistic view is unwarranted: predecessor's promises are bundled together both with large numbers of land use planning promises and with the purchase of the property in ways that make it unlikely that purchasers will depress bids to account for the disutility of taking on each of the burdens.

If we looked only at the successor—the weakness of the assent that she has given, the strong possibility that she has not been adequately

compensated for taking on burdens either by paying less for the burdened property or prospectively receiving benefits that compensate her for meeting her ongoing obligations—we would probably just adopt a blanket rule that promises are terminated upon conveyance. But we need to protect the promisees (and their successors) as well: If they have made site-specific, non-fungible investments relying on the promisor and successors meeting the contractual obligations, they are subject to opportunistic exploitation if the contracts simply die upon conveyance.

We try to balance these concerns in the first instance by determining whether the deal the predecessor and promisee struck was one that the successor would likely undo or redo. Promises that touch and concern the land in this preliminary sense are ones that are location-specific (the benefits to the promisee are particularly high or the costs of compliance for the promisor atypically low because the promisor occupies a particular parcel). If this is true, the fact that the predecessor and successor are different people, with presumably heterogeneous preferences, may be outweighed by the objective factors that would tend to make their preferences converge: each inhabits a parcel whose features make the contract atypically sensible.

Alas, the initial formulation (though frequently sufficient to resolve a large swath of cases) may sometimes be inadequate. It may bind too many successors: a promise may be somewhat location-specific, but distinctions in preferences may swamp the preference-homogenizing effects of locational specificity. It *is* indeed cheaper for a successor to pay recreational fees to the parcel-adjacent golf course or rooftop gym than for someone inhabiting a random location because these successors receive property-value-enhancing benefits if the facilities are preserved, even if they get little use value. But if most of the value one receives from paying fees comes from access to the facilities, heterogeneity of preference to play golf or use the gym may make the proposition that pretty much *anyone* occupying the parcel would make the same deal untenable.

It may also bind too few successors. If the promise is location-specific from the promisee's vantage—benefits from fulfilling the promise are greater because of the promisor's location—and the promisee made location-specific investments premised on the reasonable belief that successors would be bound (not just because the initial contractors *stated* their intention that it run but because it is the sort of promise that has enough locational specificity that the prospect that it would run is not far-fetched), then the successor ought to be bound even though we are

by no means confident she would have made the deal she is being asked to observe. But we ought to be alert to the possibility that the promisee indeed has reasonable substitute contracting partners and will not be held up by the uniquely situated parcel owner: to follow up on the golf course example, there may be particular cases where there is adequate demand for club memberships from those outside the gated residential golf community to make it needless to rely on community residents for dues; where there is not, we may hold successors to dues-paying promises even though we are skeptical they would have contracted to pay those dues because we need to protect the developer's site-specific investment in creating the golf course.

The Third Restatement's contention that touch and concern is needless because we should rely instead on *ex ante* rejection of unreasonable promises and promises that are "idiosyncratic" or "spiteful" coupled with *ex post* reformation of promises in which benefits and burdens have dramatically shifted is unpersuasive.⁵⁶ It may be sensible to deem more promises unenforceable (e.g., because they unduly restrain competition or unduly interfere with the exercise of "rights"), but the decision to do so has nothing to do with the problem of binding successors. The initial promisor should be freed from these obligations as well. And while idiosyncratic promises should indeed be more problematic to enforce against successors than against those who made them, many promises that plainly should not touch and concern (e.g., promises to give to particular political causes or to consume particular items) are by no means idiosyncratic.

Relying exclusively on *ex post* reformation is a poor idea as well. If we retain our current views of the "changed circumstances" and the "relative hardship" doctrines, many promises that should not be deemed to touch and concern would still bind because neither burdens nor benefits have shifted dramatically enough. And if we reform those doctrines so that successors can shed obligations that they would not now take on because the burdens on them are higher than they were on their predecessor or the benefits of compliance have fallen enough that the promisees would no longer offer as much to compensate for bearing burdens as the initially offered, we will nullify too many deals that the promisees ought to be able to rely on.

56. In general, there is some scant empirical evidence that the Third Restatement has had less influence on both judges and practitioners than Restatements in other legal fields have had. See Thomas W. Merrill & Henry E. Smith, *Why Restate the Bundle?: The Disintegration of the Restatement of Property*, 79 BROOK L. REV. 681, 681-82, 694 (2014).