COMMENTS

"IS" V. "OUGHT," OR HOW I LEARNED TO STOP WORRYING AND LOVE THE RESTATEMENT*

I. INTRODUCTION

Before 1960, there was no such thing as strict liability for products.[1] There were cases that had taken breach of warranty, a contract theory, and applied it on behalf of injured consumers without the normal prerequisite of contractual privity.[2] But notwithstanding these rumblings in the hills, the case law was a desert for producers' strict liability.[3] Then, in 1965, the American Law Institute (ALI) promulgated the *Restatement (Second) of Torts*.[4]

Section 402A of that Restatement, which gave a black-letter formulation of strict liability for suppliers of defective products,[5] is probably the most obvious example of the influence a restatement can exert on the courts.[6] William L. Prosser drafted the

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1. *See* Herbert W. Titus, *Restatement (Second) of Torts Section 402A and the Uniform Commercial Code*, 22 STAN. L. REV. 713, 719 (1970) (explaining that prior to 1960, no court had done away with contractual warranty remedies in favor of strict liability in tort for product defects).

2. *See, e.g.*, Henningsen v. Bloomfield Motors, Inc., 161 A.2d 69, 101–02 (N.J. 1960) (applying implied warranty of merchandisability against auto dealer and manufacturer); Baxter v. Ford Motor Co., 12 P.2d 409, 411–13 (Wash. 1932) (applying contract theories in a products liability case).

3. *See* Titus, *supra* note 1, at 719 (explaining that by 1964, only two jurisdictions had done away with warranty theory for products in favor of strict liability in tort).

4. RESTATEMENT (SECOND) OF TORTS § 402A (1965).

5. *Id.* Section 402A provides that

> (1) One who sells any product in a defective condition unreasonably dangerous to the user or consumer or to his property is subject to liability for physical harm thereby caused to the ultimate user or consumer, or to his property, if
>
> (a) the seller is engaged in the business of selling such a product, and
>
> (b) it is expected to and does reach the user or consumer without substantial change in the condition in which it is sold.
>
> (2) The rule stated in Subsection (1) applies although
>
> (a) the seller has exercised all possible care in the preparation and sale of his product, and
>
> (b) the user or consumer has not bought the product from or entered into any contractual relation with the seller.

Id. Section 402A's "open-ended" language has been both celebrated as lending flexibility and derided as boundless. James A. Henderson, Jr. & Aaron D. Twerski, *The Politics of the Products Liability Restatement*, 26 HOFSTRA L. REV. 667, 686 (1998).

6. *See* Andrew F. Popper, *Restatement Third Goes to Court*, 35 TRIAL 54, 56 n.12 (1999) (describing

provision in the near-complete absence of supporting case law: "Dean Prosser could point to virtually no case authority and relatively little scholarship to tease out the application of the core concept of strict liability in tort to the variety of contexts in which products could harm consumers, let alone bystanders."[7] Perhaps belying the term "restatement," the ALI dauntlessly blazed a new trail in the law.[8]

Forty-six years later, section 402A has been cited more than any other restatement section ever published,[9] enjoying a seismic effect in the area of products liability.[10] State courts adopted the Restatement provision at a shocking rate, surprising even Dean Prosser, who had predicted a period of up to fifty years before it would become the dominant viewpoint.[11] The history of section 402A shows that a restatement provision can bring about major shifts in the law, but it also illustrates how important it can be to practitioners and other stakeholders to influence the balance between stating what the law is and what it ought to be at the time of the restatement's drafting.[12]

When the case law is unclear or conflicting, that presentation becomes increasingly delicate.[13] Should the draft restatement strictly present the established doctrine, or should it take a stand in describing ways the law can be revised? In the face of such tension, the ALI has made its decision of what to restate in part on what direction it determines the law will likely take in the future.[14]

The newly propagated *Restatement (Third) of Property: Servitudes* presents a ready example of the degree to which a restatement can move into novel territory in the face of tangled doctrine.[15] Academic scholars are running out of insults with which to

section 402A "as a . . . high-water mark of ALI influence").

7. David A. Logan, *When the Restatement Is Not a Restatement: The Curious Case of the "Flagrant Trespasser"*, 37 WM. MITCHELL L. REV. 1448, 1457 (2011); *see also* Titus, *supra* note 1, at 719 (showing that decisions doing away with warranty theory for products liability actually postdated the draft language accompanying section 402A).

8. Logan, *supra* note 7, at 1457.

9. Popper, *supra* note 6, at 56 n.13.

10. *See* James A. Henderson, Jr. & Aaron D. Twerski, *Will a New Restatement Help Settle Troubled Waters: Reflections*, 42 AM. U. L. REV. 1257, 1259 (1993) (describing the section 402A language as "the anthem for the [products liability] revolution" and "a liberating force"); Logan, *supra* note 7, at 1457–58 (describing how state courts quickly adopted section 402A); Popper, *supra* note 6, at 56 (stating that in rapid succession, state courts considered and adopted section 402A as "a necessary step forward"); Charles W. Wolfram, *Bismarck's Sausages and the ALI's Restatements*, 26 HOFSTRA L. REV. 817, 820 (1998) (positing that section 402A "can fairly be described as launching—for better or worse (with undoubtedly some of both)—the products liability field of litigation").

11. Logan, *supra* note 7, at 1458.

12. *See* Wolfram, *supra* note 10, at 820–21 (using section 402A and its impact on case law as an example of why some nonparties to a litigation try to mold the law through attempting to reach a restatement in its preliminary drafts); See *infra* Part II.A.3 for a review of the debate over whether restatements should descriptively restate existing doctrine or provide normative suggestions for reform.

13. John P. Frank, *The American Law Institute: 1923–1998*, *in* THE AMERICAN LAW INSTITUTE SEVENTY-FIFTH ANNIVERSARY 1923–1998 7, 18 (1998); *see also* E. Allan Farnsworth, *Ingredients in the Redaction of the* Restatement (Second) of Contracts, 81 COLUM. L. REV. 1, 6 (1981) (explaining that a dearth of cases or mistaken analysis blur the line between descriptive restatement and normative reform).

14. Frank, *supra* note 13, at 18–19.

15. See *infra* Part II.B for a discussion of the confused state of traditional servitudes law and the reformist response of the *Restatement (Third) of Property: Servitudes*.

describe traditional servitudes law,[16] and the ALI has responded with a product containing several bold suggestions for change.[17] This particular Restatement therefore presents a unique backdrop—it is a plainly normative source that fails to function as a strict "restatement" of the law in many circumstances, but it covers a body of doctrine for which reform has been widely recognized as desirable. What result?

This Comment will explore to what extent, if any, a restatement's reception in courts involves the distinction between restating what the law is and restating what the law should be, using the *Restatement (Third) of Property: Servitudes* as a lens. Section II will begin with a brief history of the American Law Institute, the restatement project, and the ongoing concern over the encroachment of outside voices into the restatement drafting process. Section II will then give an overview of the core debate over the purpose of the restatement—whether it is, indeed, to "restate," or if it is to reform. Section II will then consider one idea espoused by several commentators in that core debate—that a restatement would not only betray its purpose if it did not closely restate the law, it would also be ignored by future courts as a result of its adventurousness.

Section III will show that reception in courts of certain sections of the *Restatement (Third) of Property: Servitudes* indicates some superficial support for this idea but also demonstrates that it is a skin-deep assertion, deaf to a range of subtlety and of limited predictive value for those contemplating whether to argue along restatement lines. Ultimately, there is a vast array of potential reasons why a restatement may be followed, rejected, or ignored. Section III will conclude by reasoning that those reasons that contemplate the characteristics of courts as receivers of the restatements, rather than the content of the restatements themselves, may present the better, more flexible method of approaching these sorts of questions. Section IV will conclude.

II. OVERVIEW

A. The ALI and the Restatement Movement

This Part supplies a brief history of the ALI's founding. The Part then turns to an explanation of how a new restatement is drafted, focusing on recent debates over outside influence in that process and the assumptions upon which those debates operate, including assumptions regarding the purpose of the restatement movement. It will then discuss the contrasting theories of what that purpose should be—whether a restatement should narrowly reflect existing law or should attempt to push the law in new directions. Finally, it will explore the assertion of some scholars that beyond matters of purpose, the ALI should avoid a progressive stance in the restatements because their influence in courts will diminish as their reformist character increases.

16. See *infra* Part II.B.1 for a discussion of traditional servitudes law and the criticism it has faced in academic circles.

17. See *infra* Part II.B.2 for a discussion of examples of sections in the *Restatement (Third) of Property: Servitudes* that depart from the common law.

1. The Founding of the ALI

In 1923, "a meeting the likes of which may neither before nor after have occurred in America" established a new organization within the American legal profession.[18] Its leaders were concerned with what they perceived as the unhindered growth in the volume of reported common-law cases, haphazardly drawn statutes, and multifarious administrative regulations that threatened to confound the profession.[19] The ALI, hoping to address this "uncertainty and complexity" detected in the law,[20] declared its founding purpose "to promote the clarification and simplification of the law and its better adaptation to social needs, to secure the better administration of justice, and to encourage and carry on scholarly and scientific legal work."[21] The group's first task would be the creation of a "Restatement of the Law," which was asserted to be the most ready solution to the flaws identified.[22] The first project, the *Restatement of Contracts*, was completed in 1932.[23]

Building upon the eminence of the ALI's members, the restatements have found a singular position in the courts.[24] Indeed, "[t]he Institute's strengths are its members and its deliberative processes, stature, independence, and dedication to quality,"[25] and those factors have earned the restatements an elevated status in American law:

> [I]t is clear that the American Law Institute's reputation is important to the success of [the restatements], its most significant product. Because of the high level of respect that the American Law Institute has earned, the Restatements' taking a certain position is likely to influence the development of the law . . . . [T]he American Law Institute itself represents that "[m]any Institute publications have been accorded an authority greater than that imparted to any legal treatise, an authority more nearly comparable to that accorded to judicial decisions."[26]

18. Frank, *supra* note 13, at 9. The meeting included "Chief Justice Taft and [Associate] Justices Holmes and Sanford[,] . . . five judges of circuit courts of appeals, 28 judges of state supreme courts, and special representatives of the American Bar Association and the National Conference of Commissioners on Uniform State Laws." *Id.*

19. *Id.*

20. *Id.*

21. AM. LAW INST., CERTIFICATE OF INCORPORATION (1923), *available at* www.ali.org/doc/charter.pdf.

22. Frank, *supra* note 13, at 10. The ALI's creation is directly attributable to findings of the thirty-five-member "Committee on the Establishment of a Permanent Organization for the Improvement of the Law," *ALI Overview: Creation*, ALI: AM. L. INST., http://www.ali.org/index.cfm?fuseaction=about.creation (last visited Feb. 25, 2013), which could boast members the likes of Benjamin Cardozo, Learned Hand, Roscoe Pound, and John Wigmore, Frank, *supra* note 13, at 9.

23. Frank, *supra* note 13, at 13.

24. *See* Popper, *supra* note 6, at 56 ("ALI restatements convey an air of authority, and, to be sure, they are entitled to some deference. They bear the pedigree of the ALI's decades of distinguished work on law reform and the imprimatur of a well-respected organization of judges, academics, and senior members of the bar.").

25. Michael Traynor, *The First Restatements and the Vision of the American Law Institute, Then and Now*, 32 S. ILL. U. L.J. 145, 164 (2007).

26. Kristen David Adams, *The Folly of Uniformity? Lessons from the Restatement Movement*, 33 HOFSTRA L. REV. 423, 436–37 (2004) (fourth alteration in original) (footnote omitted) (quoting *Overview: How ALI Works*, AM. LAW INST., http://www.ali.org/index.cfm?fuseaction=about.instituteworks (last visited Feb. 25, 2013)); *see also* Wolfram, *supra* note 10, at 817 (stating that "neither statutes nor Restatements are

Perhaps predictably for a source of authority sitting at the proverbial right hand of judge-made law, the result is that the restatements have, at times, been main characters in the storyline of American legal doctrine.[27] Practitioners and industry leaders, in an attempt to nudge the development of doctrine, may therefore have an interest in reaching a new restatement at its earliest stages.[28]

2. The Restatement Drafting Process and the Debate Over Outside Influence

The drafting process starts in earnest with the selection of a Reporter, who takes primary responsibility for coaxing a restatement to life.[29] The Reporter, a prominent expert in the area to be restated, will be assisted by a core group of well-versed Advisers in preparing drafts for the review of the ALI Council,[30] which is a "board of directors" of sorts for the ALI.[31] After circulating drafts between the Council and the Reporter, the drafts are finally sent along to the public at large and the full ALI membership for consideration at their annual meeting.[32]

An invasion of special interests into this deliberative process is a clear indication that lawyers continue to recognize the restatements as an engine of influence in the law.[33] It also further informs an understanding of both the ALI's functioning[34] and the appropriate role for the ALI in the broader panoply of American law.[35]

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elective consumables" in that statutes will be followed if constitutional and restatement provisions are commonly followed by courts despite parties' assertions that the restatement is incorrect); David B. Massey, Note, *How the American Law Institute Influences Customary Law: The Reasonableness Requirement of the Restatement of Foreign Relations Law*, 22 YALE J. INT'L L. 419, 424–25 (1997) (explaining that the *Restatement (Third) of the Foreign Relations Law of the United States* stands a real chance of shaping the development of customary international law, thus demanding a heightened level of care in assuring that the project transparently represents the state of the law). *Hofstra Law Review* stands out as a rich source of scholarship for analysis of the restatement movement; its *Symposium on the American Law Institute: Process, Partisanship, and the Restatements of the Law*, 26 HOFSTRA L. REV. 567 (1998), and other pieces have been of invaluable research value.

27. *See* Wolfram, *supra* note 10, at 820 (describing a restatement provision as "launching . . . the products liability field of litigation").

28. *See* Charles Silver, *The Lost World: Of Politics and Getting the Law Right*, 26 HOFSTRA L. REV. 773, 785 (1998) (explaining that interested practitioners chose to oppose a proposed provision of the *Restatement (Third) of the Law Governing Lawyers* prior to its adoption in order to "possibly keep the war [in the courts] from starting").

29. Lawrence J. Latto, *The Restatement of the Law Governing Lawyers: A View from the Trenches*, 26 HOFSTRA L. REV. 697, 699 (1998).

30. Frank, *supra* note 13, at 12–13.

31. Latto, *supra* note 29, at 698.

32. Frank, *supra* note 13, at 13. The account of the drafting process above is very rudimentary. *See* Latto, *supra* note 29, at 699–701 (giving an in-depth account of the mechanics of the drafting process).

33. *See* William T. Barker, *Lobbying and the American Law Institute: The Example of Insurance Defense*, 26 HOFSTRA L. REV. 573, 573–74 (1998) (explaining that it is foreseeable that a proposed restatement provision will be of "intense interest" to practitioners who deal with its subject matter frequently).

34. *See, e.g.*, *id.* at 575–78 (describing the ALI and the restatement creation process in the context of debates over outside influence).

35. *See, e.g.*, Monroe H. Freedman, *Caveat Lector: Conflicts of Interest of ALI Members in Drafting the Restatements*, 26 HOFSTRA L. REV. 641, 660 (1998) (stating that improper lobbying of ALI members has "called into question the integrity of ALI Restatements of the Law" such that the restatements should not be relied upon by courts); Silver, *supra* note 28, at 798 (concluding that the ALI resembles "a private legislature"

The arguments over outside involvement are varied. Some claim that interest group lobbying during the deliberative process threatens the ALI concept at its core,[36] since it is "one of [the organization's] cherished traditions—that all ALI members leave their clients at the door."[37] Others point to rational justifications for increasing the base of opinion that fuels restatement creation; for instance, the scholarly debate that the ALI purports to seek is said to demand a robust and uncensored intellectual interchange.[38] Persuasive input from outside the ALI need not always stem from a sinister motive.[39]

But what is most interesting about the debate over external involvement in restatement creation, beyond the degree to which it testifies to the continued relevance of the ALI's work to outsiders,[40] are the assumptions upon which some of the debaters operate. There are at least two. First, commentators assume that the restatements will be adopted by the courts,[41] even though it should be clear that not all restatement provisions will enjoy the same reception as section 402A.[42] Second, commentators often give passing analysis to the ultimate function of the restatements themselves.[43] The fundamental purpose of the restatements, whether it is to restate existing law or to advocate for what it should be, has been argued since before the ALI's founding eighty-nine years ago.[44]

in an argument that outside influence is desirable).

36. *See* Silver, *supra* note 28, at 798 ("An overt campaign to manipulate a vote would cause people to wonder how deeply devoted to scholarship the ALI really is.").

37. Wolfram, *supra* note 10, at 828. Although "the ALI has not been a stranger to the attention of interest groups," the scholarship canvassed on this subject deals primarily with the proposed (but ultimately discarded) section 215 of the *Restatement of the Law Governing Lawyers*, which had significant implications for the tripartite relationship between lawyers, insurance companies, and insureds. *Id.* at 820–21. The details of this particular debate, beyond its illustrative effect on the importance of the restatement drafting process to practitioners, are well beyond the scope of this Comment. "Insurance is more fun than a tonsillectomy, but it's not for everyone." Silver, *supra* note 28, at 779.

38. Henderson & Twerski, *supra* note 5, at 668.

39. *Id.* at 668–72. Henderson and Twerski defended the openness of the frequently heated discussions concerning the *Restatement (Third) of Torts: Products Liability*. *Id.* at 694–95. "It was a substantive debate about what courts have been, and should be, doing. Those who eloquently opposed our views are demeaned by characterizing their efforts and ours in crass political terms. We met openly on the battlefield of ideas, not in smoke-filled back rooms." *Id.* at 695.

40. *See* Barker, *supra* note 33, at 574 (explaining that interest groups lobby the ALI because of the restatements' influence in courts).

41. *See id.* (stating that "[t]he ALI and its Restatements are enormously influential in the courts" and describing the difficulty in trying "to persuade courts, one by one, to reject a Restatement which takes an opposing view" without any explanation as to why or how the restatement will be adopted); Silver, *supra* note 28, at 789 (stating without explanation that lobbying against a proposed restatement provision "was the only way we could see to preserve the integrity of an important body of law").

42. *See* Wolfram, *supra* note 10, at 820 (calling courts' rapid acceptance of section 402A "rare"). See *supra* notes 1–12 and accompanying text for a discussion of the profound influence section 402A had on courts.

43. *See, e.g.*, Silver, *supra* note 28, at 797–98 (declaring that the restatements are "value-laden" and the result of "social choice processes" without considering whether the restatements are to describe the common law or prescribe changes to it); Barker, *supra* note 33, at 590–91 (assuming that restatements should not be used to restate dicta).

44. Logan, *supra* note 7, at 1454.

3. The Descriptive-Normative Debate

Among the most common points of contention in analysis of the restatement movement is the degree to which the restatements should strictly restate existing law or should be drafted more assertively as a vehicle for reform.[45] As a preliminary matter, this discussion of whether a restatement should be descriptive or normative must be engaged with a substantial degree of caution.[46] It is important to note that as labels, descriptive and normative may not be relied upon for mathematical certainty.[47] There can be considerable argument over what exactly constitutes a descriptive or normative restatement provision,[48] but for the functional purposes of this Comment, "descriptive" will refer to a restatement provision that aligns with a majority of the jurisdictions that have reached the issue or that represents the traditional or generally accepted view; "normative" shall refer to a position that does not solidly command a majority of jurisdictions or is a divergence from the traditional common law.[49]

There does not appear to be any published formulation to guide this "is/ought" question beyond the ALI's statement of purpose.[50] Nonetheless, a commonly cited authority in this area is an article from former ALI Director Herbert Wechsler.[51] Professor Wechsler felt that the descriptive-normative distinction is oversimplified when the task of the common law is to both follow precedent and adapt it to new situations.[52] A restatement should consider all of the same factors as a common-law court would.[53] Professor Wechsler concluded that the restatement drafters, in asking what a court would do in a given area of the law, could not fully separate what the law

45. Kristen David Adams, *Blaming the Mirror: The Restatements and the Common Law*, 40 IND. L. REV. 205, 206 (2007). The conservative critique of adventurous restatements presents a striking parallel to charges of judicial activism or legislation from the bench that a court faces when it chooses not to follow precedent. *Id.* at 267–69. Professor Adams comes to the conclusion that the criticisms the ALI faces may be thinly veiled critiques of the broader system of the common law, and that these complaints apply with equal force to both the restatements and the legal regime in which they operate. *Id.* at 265.

46. *See* Adams, *supra* note 26, at 439 (showing that the line between restating the law and stating what it should be is dim).

47. *Cf.* Symeon C. Symeonides, *The Judicial Acceptance of the Second Conflicts Restatement: A Mixed Blessing*, 56 MD. L. REV. 1248, 1261 (1997) (warning that "pigeonholing" courts into analytically distinct groups is a difficult endeavor and subject to "disagreement among reasonable people").

48. *See* Wolfram, *supra* note 10, at 818–19 (describing how a restatement can be descriptive for one jurisdiction while normative for another).

49. It should additionally be cautioned that "momentum" in the trend of decisions can have a significant effect on the state of case law. *See* Symeonides, *supra* note 47, at 1276–77 (explaining that the *Restatement (Second) of Conflict of Laws* is followed in courts in part because of its momentum). The history of section 402A is also illustrative. See *supra* notes 1–12 and accompanying text for a discussion of section 402A's drafting in the face of expanding warranty theory.

50. *See* Adams, *supra* note 45, at 261 (stating that the ALI often faces criticism in its lack of clear engagement with the "is/ought" question); Latto, *supra* note 29, at 712 (expressing unawareness of any "precise official formulation" for the function of a restatement).

51. Herbert Wechsler, *Restatements and Legal Change: Problems of Policy in the Restatement Work of the American Law Institute*, 13 ST. LOUIS U. L.J. 185 (1968); *e.g.*, Latto, *supra* note 29, at 712–13; Wolfram, *supra* note 10, at 818 n.5.

52. *Id.* at 189.

53. *Id.* at 190; *cf.* David V. Snyder, *Private Lawmaking*, 64 OHIO ST. L.J. 371, 382 (2003) (speculating that the restatement is law in the Holmesian sense of being an accurate predictor of what future courts will do).

is from what it should be.[54] Though at least one commentator has called Wechsler's formulation "well-settled" as to what restatement provisions may provide,[55] the continuing debate seems to suggest otherwise.[56]

a. The Normative Argument: The Restatements Should Serve as Mechanisms for Reform

Some prominent ALI members have thought of their work as a special opportunity to move the law forward.[57] Their reform-minded critique is that the ALI would be forfeiting a golden opportunity for law reform in failing to draft progressive restatements,[58] and conjuring a crystal lattice of formalist rules might be quixotic as an attempt to clarify the law anyway.[59] According to this group, conservatively drafted, descriptive restatements may be stale, lacking in imagination, or even the province of "older and less intelligent scholars."[60] They may be useless as unembellished statements of the "obvious."[61]

Instead, the proper role for a restatement in these scholars' minds is a "judicial one and would not ignore opportunities to fill gaps in the law."[62] Indeed, in describing his role as Reporter for the *Restatement (Second) of Property* in the early 1980s, James Casner explained: "past judicial decisions that do not rest on a solid current foundation

54. Wechsler, *supra* note 51, at 190. Other pragmatists have nimbly sidestepped the descriptive-normative debate in focusing on the ALI's ends—creating a product that will be of use to practitioners and judges for a significant period of time, Traynor, *supra* note 25, at 164, and providing recommendations that future courts will hopefully follow, Wolfram, *supra* note 10, at 819. These formulations leave room for both descriptive and normative restatement provisions. *Id.*

55. Latto, *supra* note 29, at 712–13. It is interesting that Mr. Latto cites Professor Wechsler in support of the idea that, in broad terms, the ALI is *required* to restate clear majority positions. *Id. But see* Wolfram, *supra* note 10, at 818 n.5 (quoting Professor Wechsler for the assertion that the ALI is not and has not been required to restate clear majority positions without weighing other considerations). This requirement, according to Mr. Latto, may be tempered by consideration of the age of decisions and whether there is a "trend" toward a "plainly more desirable minority position." Latto, *supra* note 29, at 712–13.

56. *See* Adams, *supra* note 45, at 249 (describing one "view" of the restatements' function as that of incremental, moderate reform in the same mode as a common-law court).

57. Alex Elson, *The Case for an In-Depth Study of the American Law Institute*, 23 LAW & SOC. INQUIRY 625, 627–28 (1998); *see also* Adams, *supra* note 45, at 247–48 (showing that there is evidence in the philosophical leanings of the ALI's prominent leadership that may go further to explain the reform-minded character of much of the restatements). Monroe H. Freedman has stated that a rule followed by ten jurisdictions "is more than sufficient for Restatement purposes." Freedman, *supra* note 35, at 648. As Professor Freedman explains, "the law that purports to have been 'restated' may be wholly novel." *Id.* at 648 n.43. In a different context, the Reporters for the *Restatement (Third) of Torts: Products Liability* went so far as to say "we plead guilty to the charge that we did not restate existing case law. One could hardly be expected to restate gibberish." James A. Henderson, Jr. & Aaron D. Twerski, *Drug Designs Are Different*, 111 YALE L.J. 151, 180 (2001).

58. *See* Adams, *supra* note 45, at 215 n.51 (asserting that a "conservative" approach to the restatements diminished their potential influence).

59. James Gordley, *European Codes and American Restatements: Some Difficulties*, 81 COLUM. L. REV. 140, 140 (1981).

60. Adams, *supra* note 45, at 244.

61. *Id.* at 255 (citing NEIL DUXBURY, PATTERNS OF AMERICAN JURISPRUDENCE 148 (1995)).

62. Massey, *supra* note 26, at 422; *see also* Adams, *supra* note 45, at 249 (suggesting that the ALI operates in the same manner as a court when drafting a restatement).

may and should be overruled either retroactively or prospectively."[63] As Professor Casner further remarked, "the *Restatement* should not give these decisions longer life by recognizing them as representing what the law is that is to be restated."[64] The restatements are to "stay[] ever alert to minority-view innovation and may in time divert 'the stream of decisions.'"[65]

b. The Descriptive Rebuttal: Failure to Accurately Restate the Law Oversteps the ALI's Role

Opposing voices critique the normative view by explaining that significant departures from the common law in the restatements are ill-advised and even dangerous for the health of the law.[66] For instance, Professor Ronen Perry has presented a detailed argument against the Reporters' decision to include the famous Hand Formula[67] and its purported fealty to efficiency in a proposed draft of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*.[68] Before arguing that the Hand Formula is in fact "seldom applied by American courts," Perry claims that "[t]he American Law Institute's traditional position is that Restatements are predominantly positive and only incrementally normative," and "[a]ny divergence from this tradition may be deemed illegitimate, or at least pretentious."[69] Some have taken issue with restatement provisions that, in their determination, take on a normative stance in failing to accurately reflect prevailing common law.[70]

According to this more conservative camp, the danger is that practitioners and courts, relying upon the restatements as accurate representations of precedent in fashioning precedential opinions, would, like alchemists, make "misstatements of law" into mandatory authority.[71] Considering the amount of influence the restatements can

63. A. James Casner, Restatement (Second) of Property *as an Instrument of Law Reform*, 67 IOWA L. REV. 87, 96 (1981).

64. *Id.*

65. Anita Bernstein, *Restatement Redux*, 48 VAND. L. REV. 1663, 1668 (1995) (reviewing JANE STAPLETON, PRODUCT LIABILITY (1994)) (quoting Arthur L. Corbin, *The Restatement of the Common Law by the American Law Institute*, 15 IOWA L. REV. 19, 27 (1929)); *see, e.g.*, Massey, *supra* note 26, at 421–22 (stating that in the 1940s, the ALI began adopting restatement provisions contrary to a majority viewpoint that they found to be faulty).

66. *See* Ellen Wertheimer, *The Third Restatement of Torts: An Unreasonably Dangerous Doctrine*, 28 SUFFOLK U. L. REV. 1235, 1255–56 (1994) (arguing that the *Restatement (Third) of Torts* hinders the law as a result of its diversion from existing cases, all while claiming to restate the law).

67. *See* United States v. Carroll Towing Co., 159 F.2d 169, 173 (2d Cir. 1947) (explaining duty in tort as a function of whether the burden of adequate precautions is outweighed by the product of the probability and severity of potential injury).

68. Ronen Perry, *Re-torts*, 59 ALA. L. REV. 987, 988 (2008). Acknowledging that the Hand Formula "may be found in all contemporary torts casebooks," Perry himself concedes that his "argument may be deemed somewhat subversive, if not outright heresy." *Id.*

69. *Id.* at 993.

70. *See, e.g.*, Massey, *supra* note 26, at 422 (citing critics of certain provisions in the *Restatement (Second) of the Foreign Relations Law of the United States*, which are claimed to diverge from the current state of international law).

71. *Id.* at 424–25.

have as the product of a distinctly undemocratic institution,[72] the ALI may be open to criticism for "set[ting] sail in uncharted waters" by diverting from well-established rules at common law.[73] These conservative critics have claimed that as a near-judicial body, the ALI improperly laces up as an advocate for one side when a restatement is not carefully grounded on an extensive foundation of existing case law.[74]

c. The Practical Rebuttal: The Restatements Will Lose Influence as They Become More Normative

Beyond the pitfalls of departure from the ALI's mission of restating the law, there is another voice among conservative critics of the restatement movement claiming that divergence from well-settled common law will lead to loss of influence in the courts.[75] This view begins with the recognition that "no ALI pronouncement binds any judge,"[76] and that ultimately, whatever its formulation, "the level of influence accorded a restatement rule is determined in the rough and tumble of litigation in coming years."[77] These commentators stretch the descriptive-normative discussion beyond doctrine, beyond the restatement movement's purposes, and into the underlying mechanics of the restatement's actual reception in courtrooms.[78]

For example, practitioner Lawrence Latto, in *The Restatement of the Law Governing Lawyers: A View from the Trenches*, provided a detailed discussion of the array of available causes of action against an attorney for legal malpractice and the treatment of those causes of action in a new Restatement.[79] As part of that discussion, Latto lamented that "many of the debates—too many—have focused more on the desirability of the rule of law under consideration than upon the accuracy of how that rule has been restated," because "[t]he credibility of the Restatements depends heavily upon the fact that their black letter sections are, indeed, restatements of what the law is."[80] That the restatements reflect the prevailing common-law view is important not

72. Logan, *supra* note 7, at 1482.

73. *Id.* at 1473. Professor Logan brings this charge in the context of the *Restatement (Third) of Torts: Liability for Physical and Emotional Harm*. *Id.*

74. *See, e.g.*, Popper, *supra* note 6, at 55 (arguing that the ALI has become "one of the participants in the debate" in the context of tort liability). It is here where the argument between descriptive and normative bleeds into the argument over outside influence in ALI deliberation. *See, e.g.*, Henderson & Twerski, *supra* note 5, at 667–69 (defending against claims of being tainted by outside interests for restatement provisions that make a shift from prevailing law); Frank J. Vandall, *The American Law Institute Is Dead in the Water*, 26 HOFSTRA L. REV. 801, 814 (1998) (arguing, after demonstrating that new products liability restatement provisions depart from the current state of the law, that "[t]he Restatement (Third) is more like a trade journal" for manufacturers).

75. Adams, *supra* note 26, at 438 n.60.

76. Logan, *supra* note 7, at 1482.

77. *Id.*

78. *See* Adams, *supra* note 26, at 437–38 (finding the relationship of a restatement provision to the state of the common law and its effect on its reception in a court intriguing in light of the ongoing debate over the ALI's purpose).

79. Latto, *supra* note 29, at 717–31.

80. *Id.* at 717. Latto stated his understanding of the "well-settled Institute rule that applies to what the black letter sections may state" to be:

In general, where there is a significant majority position and a small minority position concerning a

only for their doctrinal quality, but also to ensure that their provisions will be heeded.[81]

The argument appears again in the debate that raged over the proposed (and eventually adopted) section 2(b) of the *Restatement (Third) of Torts: Products Liability*.[82] Coauthors Guido Calabresi and Jeffrey O. Cooper, in *New Directions in Tort Law*, stated that "the Restatement's influence depends on whether courts pay attention to it, which in turn depends on whether the Restatement actually reflects what is happening in the courts."[83] Along the same lines, Frank Vandall, concluding a blistering assault on the ALI and section 2(b) in *The American Law Institute Is Dead in the Water*, asserted that "[t]o maintain its neutrality *and effectiveness*, the ALI must ask how it might return to its mission of restating the common law and avoid becoming merely another conservative voice for tort reform."[84] These commentators have gone beyond the question of whether a Reporter *may* restate a minority (or completely new) rule, moving into the question of whether they *should*.[85]

d. Whether a Normative Restatement Provision Will Be Ignored: The Need for Further Research

Discussing the viewpoints of Latto, Calabresi and Cooper, and Vandall, Professor Adams notes the need for further exploration: "The assertions of each of these scholars that the power of the Restatements is in their functioning as reliable re-statements of the common law . . . raise the question of whether the ALI's new[, normative] path will

> specific doctrine or principle, the Institute must, and does, adopt the majority position. Where the decisions are closely divided, however, a strict majority rule does not apply. Here what is regarded as the better reasoned rule may be adopted: where the available decisions are few in number, the necessity to count is even weaker. Even where there is a strong majority, the age of the decisions may be taken into account, and if the Reporters and the Institute can detect a trend in the direction of the plainly more desirable minority position, that position may be adopted.

Id. at 712–13.

81. *See id.* at 717 (arguing that the restatement must be shown to be more than the mere opinion of an isolated group of well-regarded lawyers).

82. RESTATEMENT (THIRD) OF TORTS: PRODS. LIAB. § 2(b) (1998). Section 2(b) provides the following:

> [A product] is defective in design when the foreseeable risks of harm posed by the product could have been reduced or avoided by the adoption of a reasonable alternative design by the seller or other distributor, or a predecessor in the commercial chain of distribution, and the omission of the alternative design renders the product not reasonably safe . . . .

Id.

83. Guido Calabresi & Jeffrey O. Cooper, *New Directions in Tort Law*, 30 VAL. U. L. REV. 859, 866–67 (1996).

84. Vandall, *supra* note 74, at 815 (emphasis added) (footnote omitted); *see also* Daniel B. Bogart, *Good Faith and Fair Dealing in Commercial Leasing: The Right Doctrine in the Wrong Transaction*, 41 J. MARSHALL L. REV. 275, 282 (2008) (claiming that "more aggressive" restatements engendered pushback from the bench and practitioners); David A. Thomas, *Restatements Relating to Property: Why Lawyers Don't Really Care*, 38 REAL PROP. PROB. & TR. J. 655, 664 (2004) (asserting that the restatement is most commonly cited only for foundational principles). The same charge, that restatements will only be followed so long as they are accurate representations of the common law, has been extended to the field of foreign relations law as well. Massey, *supra* note 26, at 443 (noting that the usefulness of an entire restatement is depleted if the authority of one its critical sections is questioned).

85. *See* Freedman, *supra* note 35, at 648 n.43 (discussing an example of the adoption of a novel legal rule).

be self-defeating."[86] She posits that "[t]he question may remain open, in other words, to what extent a normative Restatement can continue to assert influence, good or bad."[87] These scholars' collective assertion presents a fertile ground for further research for a number of reasons.

First, there appears to be only limited systematic study or other analysis upon which it is founded.[88] Professor Adams has discussed two state cases and one federal case that lend explicit credence to the idea that a normative restatement will result in it being less influential, but she recognizes that these decisions only "tend to support" the argument.[89] Professor David A. Thomas conducted a survey of cases citing the Restatements of Property in July 2003 showing that the five most recent cases all used the Restatements only in conjunction with other authorities for essentially mundane points of law,[90] but Professor Thomas's brisk survey does not address whether normative restatements have not been cited *because* they are normative.[91] Though there has been a constellation of reasons given to explain the mechanics of a restatement's influence,[92] this dearth of analysis may stem from the inherent difficulties attendant to testing an idea so dependent on empirical support for its soundness,[93] or it may

86. Adams, *supra* note 26, at 438 n.60.

87. *Id.*

88. *See, e.g.*, Latto, *supra* note 29, at 717 (citing no authority for the assertion that a restatement's influence is dependent on being descriptive rather than normative); *cf.* Calabresi & Cooper, *supra* note 83, at 866–67 (failing to cite any authority for its assertion that in the context of tort law, a restatement's authority is largely dependent on whether courts heed its propositions); Vandall, *supra* note 74, at 815 (citing no authority for proposition that ALI must restate common law to be effective). In fact, at least one study focusing on the *Restatement (Second) of Contracts* reached a contrary conclusion, finding that courts adopted several normative provisions of that Restatement. Gregory E. Maggs, *Ipse Dixit: The Restatement (Second) of Contracts and the Modern Development of Contract Law*, 66 GEO. WASH. L. REV. 508, 542 (1998); *see also* Snyder, *supra* note 53, at 381–82 (citing Maggs, *supra*, at 512–13) (arguing that although there are exceptions, it is generally true that restatement provisions are adopted by courts). Professor Maggs goes so far as to predict that a majority of courts will adopt these sections of the *Restatement (Second) of Contracts* when presented with an appropriate case, though he tempers this prediction with caveats regarding his survey methodology. Maggs, *supra*, at 542. The survey conducted in this Comment, while similarly calling into question the viewpoints of Latto, Calabresi and Cooper, and Vandall, additionally serves to underline the degree to which "[m]aking predictions of this sort . . . involves some hazards." *Id.*

89. Adams, *supra* note 26, at 443–44.

90. Thomas, *supra* note 84, at 664 n.31.

91. For instance, another plausible explanation may be that mundane points of law simply come before courts more frequently than novel questions. *Cf.* Adams, *supra* note 45, at 249 (explaining that some interpret both restatements and courts as engines of creeping rather than sweeping reform).

92. *See, e.g.*, Adams, *supra* note 26, at 443–45 (exploring the arguments that the restatements lend predictability to case law, provide the "general common law of the United States," and lend uniformity in a federal system as reasons for the restatements' adoption); Randy E. Barnett, *The Death of Reliance*, 46 J. LEGAL EDUC. 518, 527 (1996) (stating that the *Restatement (Second) of Contracts* gives a "safe-haven framework"); Maggs, *supra* note 88, at 527–31 (suggesting that courts have followed normative provisions of the *Restatement (Second) of Contracts* for reasons of precedent, policy, statutory mandate, and convenience); Symeonides, *supra* note 47, at 1269–77 (giving six rationales for why courts may have adopted the *Restatement (Second) of Conflict of Laws*—it gives judges discretion, it requires no in-depth analysis, it is divorced from ideology, it is self-contained, it is from a well-regarded source, and it tracks the trend of decisions).

93. *See* Adams, *supra* note 45, at 260 (recognizing that empirical study in law is difficult and can involve substantial financial costs); *cf.* Marshall S. Shapo, *Products Liability: The Next Act*, 26 HOFSTRA L.

demonstrate that the relationship these scholars assert is more useful as rhetoric than as a move towards understanding the mechanisms of the common law.

Second, it flies directly in the face of the anecdotal example of the ALI's most famous success, section 402A of the *Restatement (Second) of Torts*, which was enormously influential despite being founded on little in the way of case law.[94] In fact, the broad arc of both the more conservative first and more reformist second series of Restatements appears to show the same trend, the latter generally seeming to enjoy greater general acceptance in courts than the former.[95]

Finally, if true, it offers a compelling utilitarian rebuttal to those hoping to use the restatements as instruments of reform. It is all well and good to refuse to restate "gibberish,"[96] but the value of even the most brilliantly constructed restatement rule will be diminished if the courts do not listen.[97]

This Comment considers the relationship between the normative character of a restatement provision and its adoption in the courts, and it addresses the predictive quality of the contention that a normative restatement provision will not be followed. Examples from the *Restatement (Third) of Property: Servitudes* are useful for their character as normative suggestions that address a much-maligned area of law.[98]

B. The Restatement (Third) of Property: Servitudes

Drafted in response to the "unspeakable quagmire" of common law servitudes doctrine,[99] the *Restatement (Third) of Property: Servitudes*, nursed into being by

REV. 761, 766 (1998) (explaining that despite the currently popular belief that the study of law is a simple matter, "squads of veteran observers cannot agree on the meaning of decisions about mundane events that superficially appear to be written in plain English"). In his study of the *Restatement (Second) of Conflict of Laws*, Professor Symeonides also notes the important point that empirical study of a restatement can mask the fact that courts do not simply adopt or ignore a restatement. Symeonides, *supra* note 47, at 1262. Rather, a court response to a restatement provision, even if it appears to be an adoption, may be subject to varying levels of commitment. *Id.* When a court gives only passing mention or completely ignores a restatement, the analysis is further complicated. *See* Andrew Russell, Comment, *The Tenth Anniversary of the Restatement (Third) of Property, Servitudes: A Progress Report*, 42 U. TOL. L. REV. 753, 766 (2011) (noting the difficulty in ascertaining a particular court's motivation for ruling in a specific manner without an explicit statement of its intent).

94. See *supra* notes 1–12 and accompanying text for a discussion of section 402A.

95. *See* Logan, *supra* note 7, at 1454–59 (describing leading contemporary thinkers' push away from conservatism in the *Restatement (Second) of Torts* and the subsequent, explosive adoption of section 402A); Adams, *supra* note 45, at 242–49 (exploring the criticisms that the restatement movement is a conservative reaction, based largely on the experience with the first series, and that the restatement movement is a progressive engine, based on the second series). *But see* Bogart, *supra* note 84, at 282 (giving a brief, opposite interpretation that adoption of the restatement project became more grudging as it became more progressive over time).

96. Henderson & Twerski, *supra* note 57, at 180.

97. *See* Harold G. Maier, *The Utilitarian Role of a Restatement of Conflicts in a Common Law System: How Much Judicial Deference Is Due to the Restaters or "Who Are These Guys, Anyway?"*, 75 IND. L.J. 541, 548 (2000) (explaining that restatements have no binding force of their own and will only have a bearing on a controversy if the courts choose to adopt them).

98. RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000). See *infra* Part II.B.2 for a discussion of the *Restatement (Third)*'s utility as a research vehicle.

99. Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L.

Reporter Susan F. French, was officially and finally published in 2000.[100] A rich source for normative restatement provisions, the *Restatement (Third)* is thus useful in exploring the relationship between a restatement's normative character and its treatment in the courts. In brief, the *Restatement (Third)* presents an interesting juxtaposition in that it restates an area of law widely thought to be in need of reform,[101] but its normative provisions should nonetheless not be widely adopted if the contention discussed by the restatement commentators above—that a normative restatement will be ineffective in influencing courts—is true.[102]

1. The "Unspeakable Quagmire" and the Birth of the *Restatement (Third)*

"The . . . law of servitudes is confusing."[103] The common law in this area is made up of formalistic labels constructed over many years in order to meet differing, often conflicting, substantive needs.[104] It has also suffered withering criticism from legal commentators,[105] who have bemoaned the "clumsy grip" servitudes law has on present-day courts.[106] Though an exhaustive review of the common law of servitudes has been well handled elsewhere,[107] and is beyond the scope of this Comment, a cursory outline is appropriate in order to understand the context in which the *Restatement (Third)* came into being.[108]

Servitudes are nonpossessory rights in the land of another, binding upon future owners and possessors, which are the result of private agreement.[109] They are conceptually unusual in that they hold effect over future landowners who were not privy to the original agreement; the burden and benefit of the agreement are said to "run[] with the land."[110] Servitudes consist of three main categories: easements, real

REV. 1261, 1261 n.1 (1982) (quoting EDWARD H. RABIN, FUNDAMENTALS OF MODERN REAL PROPERTY LAW 489 (1974)).

100. *See id.* at 1261–62 (laying out the doctrinal groundwork for the *Restatement (Third)*). *See generally* RESTATEMENT (THIRD) OF PROP.: SERVITUDES.

101. See *infra* Part II.B.1 for a review of traditional servitudes law and the criticism it has faced.

102. See *supra* Part II.A.3.c for a discussion of the claim that restatement provisions lose their effectiveness the more normative they become.

103. JOSEPH WILLIAM SINGER, PROPERTY LAW: RULES, POLICIES, AND PRACTICES 318 (4th ed. 2006).

104. *Id.*

105. French, *supra* note 99, at 1261 n.1.

106. Curtis J. Berger, *Some Reflections on a Unified Law of Servitudes*, 55 S. CAL. L. REV. 1323, 1337 (1982).

107. *See, e.g.*, Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1183–1241 (1982) (providing a comprehensive history of the development of servitudes law in England and the United States).

108. It is important to note that the review presented below is brief and omits many of the exceptions, alternative labels, and other complications that make servitudes law such a "morass." Paula A. Franzese, *"Out of Touch:" The Diminished Viability of the Touch and Concern Requirement in the Law of Servitudes*, 21 SETON HALL L. REV. 235, 237 (1991).

109. *Id.* at 235 (citing R. CUNNINGHAM ET AL., THE LAW OF PROPERTY § 8.1, at 435 (1984); J. DUKEMINIER & J. KRIER, PROPERTY 825 (2d ed. 1988); Reichman, *supra* note 107, at 1181).

110. SINGER, *supra* note 103, at 317; *see also* Franzese, *supra* note 108, at 237 ("[T]he value of any given servitude resides primarily in its ability to bind successors, thereby enduring changes in ownership without the need for renegotiation or assignment.").

covenants, and equitable servitudes.[111]

Easements typically allow another to access the owner's land for transit or other purposes.[112] In England, where there was no recording system for real property transactions until 1925, courts fashioned rigid restrictions for the prevention of unfair surprise and for the provision of notice to future purchasers of burdened land.[113] Due in large part to these limitations, private parties began fashioning evasive, broader solutions within the realm of contract law.[114]

These alternative agreements are known as real covenants.[115] Real covenants grew out of *Spencer's Case*[116] along with the two doctrines of "touch and concern" and "privity of estate"[117] that have so frustrated modern American legal theorists.[118]

The touch and concern requirement defies precise definition,[119] but the most influential modern interpretation of the rule is the Bigelow test.[120] In 1914, Professor Harry Bigelow explained that a real covenant touches and concerns the land when the agreement affects the value of the parties' interests as landowners, as opposed to their interests as members of the public at large.[121] What this articulation seems to mean is that a real covenant touches and concerns the land so long as it touches and concerns the land—the test is circular.[122] Though many believe that the touch and concern test serves no useful analytical function anymore,[123] there are others who argue that it continues to serve as a useful umbrella tool for judges to screen the substance of covenants so that they may "giv[e] effect to community understanding" of liability under a covenant to future landowners.[124] In other words, the touch and concern test has been interpreted to be a vehicle for judicial policy concerns.[125]

111. Franzese, *supra* note 108, at 235–36.

112. SINGER, *supra* note 103, at 341.

113. *Id.* at 346. Potential purchasers could view affirmative easements by inspecting property for a road or other physical evidence, whereas a negative easement would more often than not have no outward characteristics. *Id.* Similarly, courts traditionally favored appurtenant easements because easements in gross were thought to multiply uncertainty as to who held rights in the burdened land. *Id.* at 353.

114. *Id.* at 365.

115. *Id.* at 366.

116. (1583) 77 Eng. Rep. 72 (K.B.) 72; 5 Co. Rep. 16 a.

117. SINGER, *supra* note 103, at 366.

118. James Gordley, *The Common Law in the Twentieth Century: Some Unfinished Business*, 88 CALIF. L. REV. 1815, 1868 (2000).

119. *See* A. Dan Tarlock, *Touch and Concern Is Dead, Long Live the Doctrine*, 77 NEB. L. REV. 804, 813 (1998) (arguing that the touch and concern test retains present-day utility precisely because of the flexibility it enjoys from its vagueness).

120. *Id.* at 819.

121. Harry A. Bigelow, *The Content of Covenants in Leases*, 12 MICH. L. REV. 639, 645–46 (1914).

122. Tarlock, *supra* note 119, at 819.

123. *Id.* at 820.

124. Lawrence Berger, *A Policy Analysis of Promises Respecting the Use of Land*, 55 MINN. L. REV. 167, 206 (1971); *see also* Stewart E. Sterk, *Freedom from Freedom of Contract: The Enduring Value of Servitude Restrictions*, 70 IOWA L. REV. 615, 646–47 (1985) (claiming that the touch and concern test's amorphousness lends it to a broad range of uses).

125. *See* Sterk, *supra* note 124, at 622 (citing claims that the touch and concern test functions as a way for courts to limit servitudes that would create "external diseconomies").

In contrast, the requirement that there be privity of estate for real covenants, particularly the requirement for horizontal privity,[126] has been thoroughly denounced in the contemporary age.[127] Privity of estate concerns the legal relationships between the covenanting parties and between their assigns.[128] Vertical privity refers to the relationship between the original parties to the agreement and the subsequent owners of each property.[129] It is satisfied in most jurisdictions by relaxed vertical privity, that is, any future possessor of the land may be benefited or burdened by the covenant.[130]

Horizontal privity, the relationship between the original covenanting parties, is satisfied by a grantor-grantee relationship.[131] For neighbors unwilling to convey their properties outright, the horizontal privity requirement can be circumvented by use of a straw transaction.[132] The privity requirement has been explained as an early method of providing notice to future owners[133] and protecting land marketability.[134] However, horizontal privity has wreaked havoc on neighbors in subdivided developments, who purchased their lots relying on reciprocal servitude restrictions without the grantor-grantee relationship necessary to enforce them.[135] Horizontal privity is also the single distinction between real covenants and equitable servitudes, two legal devices that are becoming one in American courts.[136]

Courts answered the privity of estate problem with yet more evasion by fashioning the equitable servitude as an independent property right.[137] Equitable

126. *See* James L. Winokur, *Ancient Strands Rewoven, or Fashioned Out of Whole Cloth?: First Impressions of the Emerging Restatement of Servitudes*, 27 CONN. L. REV. 131, 134 (1994) (lauding the *Restatement (Third)* for following the argument of "most [scholarly] authority" written since the first *Restatement of Property* that horizontal privity serves no modern purpose).

127. *See, e.g.*, Reichman, *supra* note 107, at 1220–21 (showing that after the establishment of a recording system in the U.S., "the privity rule ceased to serve any practical purpose"). As Professor Reichman explains in his assault on privity of estate: "The privity requirement does not serve as a safeguard against overencumbrancing. Intolerable restrictions should be struck down after a meritorious review. Instead, the technical privity rule is designed to invalidate even the most beneficial restrictions. Furthermore, the rule is ineffective . . . ." *Id.* at 1221–22.

128. *Id.* at 1218.

129. SINGER, *supra* note 103, at 386.

130. *Id.* In some jurisdictions, "strict" vertical privity is required in that the future possessor must not own an interest in the land inferior to that of the original covenantor. *Id.* For instance, a tenant does not enjoy strict vertical privity to his landlord. *Id.*

131. *Id.* at 384–85. This is so-called "simultaneous" privity, the extension of the mutual privity relationship prominent in the United Kingdom. *Id.* at 385.

132. *Id.*

133. Reichman, *supra* note 107, at 1220.

134. Winokur, *supra* note 126, at 135.

135. *See* SINGER, *supra* note 103, at 385, 387, 394–95 (describing how this problem manifests itself).

136. *Id.* at 366–67; *see also* Winokur, *supra* note 126, at 135 (stating that the distinction between real covenants and equitable servitudes is "senseless").

137. *See* SINGER, *supra* note 103, at 366. Equitable servitudes find their genesis with *Tulk v. Moxhay*, an English case concerning the purchase of a house on Leicester Square subject to a covenant to tend to the Square and other restrictions. (1848) 41 Eng. Rep. 1143 (Ch.) 1143–44; 2 Phillips 774, 774–76. The court was able to issue an injunction to enforce the servitude despite a lack of privity by finding that with notice, subsequent purchasers had a good-faith obligation to respect the expectations of the dominant owner. *Id.* at 1144.

servitudes are functionally equivalent to real covenants, save that they may technically be enforced only through equitable remedies rather than by remedies at law,[138] and they require no privity of estate to be created.[139] These differences notwithstanding, it has been observed that courts are increasingly enforcing both real covenants and equitable servitudes either in equity or at law as the situation merits, thereby diminishing the operative distinction between the two devices.[140]

In light of this meandering development of servitudes law, it is unsurprising that the legal academy has welcomed a reform movement in the area: "The whole structure of common law land-use interests has the image of rococo design. So, when . . . the Reporter [of the *Restatement (Third)*] . . . states that she intends to restructure servitude law, . . . she is unlikely to start anyone's blood boiling."[141] It was amid pervasive academic disapproval of the current status of servitudes law that the *Restatement (Third)* found its birth.[142]

In 1982, *Southern California Law Review* published its Symposium on servitudes law, providing a thorough, updated, scholarly treatment that laid the intellectual foundation for the *Restatement (Third)*.[143] It consisted of comprehensive articles by Professor Uriel Reichman[144] and Professor Susan F. French,[145] with additional commentary from other scholars.[146] From these articles emerged an agreement that common-law servitudes were ripe for unification and reform.[147]

Professor Reichman, after conducting a brisk survey of the historical development of servitudes in the United States,[148] concluded that many of the distinctions between servitude categories no longer served any functional purpose and should be discarded.[149] Professor French arrived at the same result by considering the policy

138. Berger, *supra* note 124, at 187.

139. Reichman, *supra* note 107, at 1226.

140. SINGER, *supra* note 103, at 367.

141. Gregory S. Alexander, *Freedom, Coercion, and the Law of Servitudes*, 73 CORNELL L. REV. 883, 883 (1988) (footnote omitted) (citing J. DUKEMINIER & J. KRIER, PROPERTY 959 (1981)).

142. *See* Gordley, *supra* note 118, at 1868 (explaining that the Restatement (Third) project grew out of scholars' rethinking the purposes of servitudes law while leaving aside strange "inherited distinctions").

143. Symposium, 55 S. CAL. L. REV. 1177–1448 (1982).

144. *See generally* Reichman, *supra* note 107 (arguing that the three varieties of servitudes should be considered as one broad concept).

145. *See generally* French, *supra* note 99 (proposing a modern conception of the law of servitudes).

146. *See, e.g.*, Allison Dunham, *Statutory Reformation of Land Obligations*, 55 S. CAL. L. REV. 1345, 1346 (1982) (arguing that "judicial activism" is not the best method of reforming servitudes law); Richard A. Epstein, *Notice and Freedom of Contract in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1358 (1982) (commenting on Professors Reichman's and Professor French's conclusion that servitudes law should be unified and asserting that freedom of contract is the superior method of ex post regulation); *see also* Michael F. Sturley, *The "Land Obligation": An English Proposal for Reform*, 55 S. CAL. L. REV. 1417, 1418–47 (1982) (reviewing English servitudes reform and showing that a restatement would be an appropriate reform vehicle in the United States).

147. *See, e.g.*, Epstein, *supra* note 146, at 1353 (stating with approval that the Reichman and French articles show a "remarkable unity of purpose" in the accounting for the history of servitudes law, its present state, and the need for unification).

148. Reichman, *supra* note 107, at 1183–1230.

149. *Id.* at 1260.

objectives that a body of servitudes law should seek to promote.[150] Arguing that private land-use agreements should "focus on the intent of the parties, the fair operation of the arrangement during its life, and timely determination that the arrangement has outlived its utility," she came to the independent conclusion that servitudes law could be boldly merged and reshaped.[151] The end product of the Symposium was a concerted determination that servitudes law was ready for reform.[152] Professor French was subsequently named the Reporter for the *Restatement (Third)* in 1986.[153]

2. The *Restatement (Third)* as a Normative Research Vehicle

Growing from this consensus, the *Restatement (Third)* contains several provisions that make significant, purposeful departures from the common law.[154] Professor French has been careful to couch her project as a housecleaning rather than a slash-and-burn effort.[155] She could point to an enduring loyalty to the traditional, fundamental principles of servitudes law in the blooming *Restatement (Third)*; it was simply some of the mechanisms through which that law operated that she was altering.[156] But despite her marketing efforts, the *Restatement (Third)* has not been immune to its own "is/ought" debate in that commentators have often couched their evaluations of the project in terms of how closely it parallels common-law doctrine.[157] It is true that

150. French, *supra* note 99, at 1319.

151. *Id.*

152. *See, e.g.*, Bernard E. Jacob, *The Law of Definite Elements: Land in Exceptional Packages*, 55 S. CAL. L. REV. 1369, 1369 (1982) (agreeing that "reformulation of the law of easements, real covenants, and equitable servitudes is long overdue").

153. Susan F. French, *Servitudes Reform and the New Restatement of Property: Creation Doctrines and Structural Simplification*, 73 CORNELL L. REV. 928, 930 n.10 (1988). After a restatement project has been approved by the ALI's officers and Council, a Reporter is typically chosen by virtue of his or her expertise in the area of scholarship to be restated. *Overview: How ALI Works*, *supra* note 26.

154. Professor William Brewbaker has provided a colorful analogy: "[O]ne might compare the Restatement (3d) Property (Servitudes), which is anything but a 'Restatement,' to a 1960s-style urban renewal that razes old buildings and even neighborhoods to permit the construction of a gleaming concrete-and-steel structure (without windows that open)." William S. Brewbaker III, *Law, Higher Law, and Human Making*, 36 PEPP. L. REV. 581, 595 (2009).

155. Susan F. French, *Highlights of the New Restatement (Third) of Property: Servitudes*, 35 REAL PROP. PROB. & TR. J. 225, 226 (2000) ("Despite the many changes this Restatement will bring to the way we think about and teach servitudes law, it leaves intact the essential core of this body of law.").

156. Susan F. French, *Tradition and Innovation in the New Restatement of Servitudes: A Report from Midpoint*, 27 CONN. L. REV. 119, 119–20 (1994). Professor French operated under the idea "that servitude arrangements should be enforceable unless there is a demonstrable reason to the contrary." French, *supra* note 153, at 931. She structured the *Restatement (Third)* based on two main principles, that "no doctrine restricting the creation of a servitude should be retained unless it can be justified by current or future needs," and that "servitude doctrines addressing particular problems should give way to doctrines of more general application that satisfactorily address the same problem." *Id.* at 932. These principles justify, for example, the substitution in the *Restatement (Third)* of the Statute of Frauds for the independent writing requirement that is required at common law for all expressly created servitudes. *Id.*

157. *See, e.g.*, Alexander, *supra* note 141, at 904 (declaring that a simple "[t]idying" of the law that the *Restatement (Third)* represents, which does not acceptably reach foundational philosophical values, will not be enough to make the project a success); French, *supra* note 155, at 242 (lauding the *Restatement (Third)* as revolutionary in the way it changes servitudes law doctrines to be simpler and more useful); Tarlock, *supra* note 119, at 834 (claiming that the *Restatement (Third)* may have handled problems with the touch and

regardless of their merits, many provisions in the *Restatement (Third)* may be considered significant normative departures from the traditional common law.[158] Three examples are especially pertinent.[159]

First, the *Restatement (Third)* unequivocally discards the horizontal privity requirement with section 2.4.[160] This provision is interesting in that it leaves traditional servitudes doctrine behind,[161] but it nonetheless finds significant support in some of the standing case law.[162] In spite of that foundation, at least one scholar has noted that the *Restatement (Third)* "cites about as much authority supporting the continued vitality of the privity rule as authority rejecting it," characterizing the Reporter's conclusion that horizontal privity is no longer an element of case law as an "overstatement[]."[163] Thus, although the privity requirement has been roundly derided in academic circles,[164] its elimination may still be termed a more normative provision in the face of court fibrillation in regard to the traditional common-law rule.[165]

Second, section 3.1 of the *Restatement (Third)* enacts a complex substitution of a

concern test more effectively by restating the law and allowing common-law development to continue); Winokur, *supra* note 126, at 154 (stating that the *Restatement (Third)* has achieved valuable changes in servitudes law but its "accomplishment is complicated" by its equivocal departure from the touch and concern doctrine); Note, *Touch and Concern, the Restatement (Third) of Property: Servitudes, and a Proposal*, 122 HARV. L. REV. 938, 959 (2009) (concluding that though the *Restatement (Third)* reflects both congruence and divergence from the common law, it is sufficiently divergent that courts will be reluctant to adopt it without legislative approval).

158. *See, e.g.*, Thomas, *supra* note 84, at 687 (pointing to the *Restatement (Third)* as an example of the continuing trend towards a reformist ideology in the ALI).

159. The sections considered below are by no means the only normative examples from the *Restatement (Third)*. The *Restatement (Third)*'s entire structure shows a fundamental reordering of servitudes doctrine by eschewing the prior, overlapping individual servitudes devices and treating the entire body of servitudes law by the same general set of rules unless otherwise noted. French, *supra* note 155, at 227. Similarly, since it involves a perpetual tug-of-war between respecting the intent of the original parties and protecting the future availability of land, Michael J.D. Sweeney, Note, *The Changing Role of Private Land Restrictions: Reforming Servitude Law*, 64 FORDHAM L. REV. 661, 696 (1995), servitudes law has been described as an oscillation between contract and property theories, Michael Madison, *The Real Properties of Contract Law*, 82 B.U. L. REV. 405, 447–48 (2002). Many of the traditional servitudes rules reflect the distinctly property-based alienability concern that "[t]he supply of land, allowing for forces of nature and the ambition of the Dutch, is relatively constant." Sterk, *supra* note 124, at 638. But section 4.1 of the *Restatement (Third)* provides that in interpreting servitudes, the intent of the parties is the controlling factor. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 (2000). It represents the normative character of the *Restatement (Third)* insofar as it shifts the balance of servitudes law definitively into the contract realm. *See, e.g.*, Sterk, *supra* note 124, at 615–17 (showing that the contract-based approach of allowing the parties' intent free roam would be a troublesome shift in servitudes law).

160. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4.

161. *See, e.g.*, RESTATEMENT (FIRST) OF PROP.: § 534 (1944) (restating horizontal privity requirement as the result of common law and legislation).

162. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 reporter's note (compiling cases discarding or ignoring the horizontal privity requirement).

163. Winokur, *supra* note 126, at 134–35.

164. See *supra* notes 126–27 and accompanying text for examples of scholarly derision of the horizontal privity requirement.

165. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 reporter's note (eliminating horizontal privity after dividing cases into categories of those not requiring horizontal privity, those expressing doubt or diluting the doctrine's requirements, and those following to the doctrine).

variety of policy mechanisms for the touch and concern test,[166] which is superseded via section 3.2.[167] The touch and concern test is replaced by the general rule of creation that a servitude "is valid unless it is illegal or unconstitutional or violates public policy."[168] The *Restatement (Third)* rule then provides a nonexhaustive list of servitude attributes that could be violative of public policy.[169]

As evidence of the definitive turn towards contract doctrine in the *Restatement (Third)*,[170] section 3.1 creates a presumption of servitude validity and a concomitant burden of persuasion on the party seeking to invalidate to show that the servitude in question does not serve these substituted policies.[171] By superseding the touch and concern test and funneling judicial analysis into more discretely labeled categories,[172] the particularized considerations of section 3.1 place limits on those advantages of the older doctrine that fueled its "diligent[], if incoherent[]," use in courts[173]: its flexibility to meet a range of policy needs,[174] the protection it lends future generations,[175] and the substantive bulwark it provides "to protect subsequent purchasers who have behaved foolishly and to prevent promisors and their successors from behaving opportunistically."[176] The *Restatement (Third)*'s structure for approaching the questions the traditional touch and concern test sought to answer displays a normative

166. *Id.* § 3.1.

167. *Id.* § 3.2.

168. *Id.* § 3.1.

169. *Id.*

170. *See id.* § 3.1 reporter's note (stating that section 3.1 applies freedom of contract theory to servitudes law).

171. French, *supra* note 155, at 233. However, there is some question whether section 3.1 has accomplished any real simplification of the doctrine. Tarlock, *supra* note 119, at 811; Note, *supra* note 157, at 947. There is a class of commentators that has asked whether the problems of the touch and concern test are truly addressed under the *Restatement (Third)* when a servitude may still be invalidated for violating public policy. *See* Tarlock, *supra* note 119, at 811 (claiming that the *Restatement (Third)* formulation expands rather than contracts unpredictable judicial discretion to invalidate servitudes); Winokur, *supra* note 126, at 138 (commenting on a tentative draft of the *Restatement (Third)* and asking if its provisions "truly clarify and reform servitudes law" (emphasis omitted)). It does appear from the Reporter's explanation that the *Restatement (Third)*'s target is as much the rhetorical superstructure of the touch and concern test as the substantive inquiries it channels in the case law. *See* French, *supra* note 153, at 939–40 (explaining the circumstances in which courts use the touch and concern doctrine to invalidate a servitude and asserting that addressing these circumstances "separately and directly" is preferable to the indirect touch and concern language).

172. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 cmt. a (explaining that the result of replacing the touch and concern test with the inquiry laid out in section 3.1 serves to "reformulate the inquiry" into tests for specific prohibited servitude attributes).

173. Tarlock, *supra* note 119, at 810.

174. *Id.* at 834.

175. *Compare* Sterk, *supra* note 124, at 634–35 (explaining that countering dead-hand control is among the main concerns of the law of property and including the touch and concern test in the group of servitudes doctrines that "reflect in part a persistent if not easily quantifiable concern for intergenerational fairness"), *with* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.4 (disallowing only those servitudes that directly restrain alienation through being unreasonable), *and id.* § 3.5 (allowing servitudes that indirectly restrain alienation unless irrational).

176. Alexander, *supra* note 141, at 897.

realignment of the analysis courts use in evaluating servitude validity.[177]

Third, section 4.8(3) provides a discrete example of a normative departure from the majority common-law rule in allowing unilateral modification of an easement by a servient owner.[178] The modification is allowable so long as it is not prohibited by the easement terms, does not lessen the usefulness of the easement for the dominant owner, does not burden the dominant owner in "use or enjoyment" of the easement, and does not "frustrate the purpose for which the easement was created."[179] In so doing, section 4.8(3) endorses the minority viewpoint as to unilateral easement relocation by servient owners.[180] It closely follows Louisiana's civil-law rule, which is also followed in "a few other states."[181] The rule was included despite its near-complete absence from the Symposium discussion that led to the *Restatement (Third)*'s formation.[182] Section 4.8(3) of the *Restatement (Third)* presents an openly normative departure from the weight of prior common law.[183]

These three examples are the exact sort of restatement provisions that should be ignored as a result of their normative departures from prior law according to the scholarship asserting that a normative restatement will not be followed.[184] And yet there has been a clamor for change in servitudes law, implying favorable reception of a reform work in the courts.[185] That the *Restatement (Third)* aggressively deals with an area of law that has been so roundly denounced provides an ideal field in which to explore what effect the normative character of a restatement has on its reception in courts.[186]

177. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1 cmt. a; *see also* Russell, *supra* note 93, at 762 (explaining that the *Restatement (Third)* contemplates allowing courts to move directly to a rational result without contorting their analysis to the traditional touch and concern test).

178. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8(3).

179. *Id.*

180. *Id.* § 4.8 cmt. f.

181. *Id.* In fact, it appears that only Louisiana and Kentucky embraced the civil-law position prior to the promulgation of section 4.8(3). John A. Lovett, *A Bend in the Road: Easement Relocation and Pliability in the New Restatement (Third) of Property: Servitudes*, 38 CONN. L. REV. 1, 27 n.134 (2005). Professor Lovett called the majority rule a "virtual common law orthodoxy." *Id.* at 27.

182. Lovett, *supra* note 181, at 2–3.

183. *Id.* at 3 (quoting JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 7:17 (2001)). Professor John V. Orth has gone so far as to say that the rule in section 4.8(3) "is based on a radical, if unacknowledged, reconceptualization of the nature of an easement" in that the formulation "denies the easement owner the right to determine the easement's utility." John V. Orth, *Relocating Easements: A Response to Professor French*, 38 REAL PROP. PROB. & TR. J. 643, 653 (2004).

184. See *supra* Part II.A.3.c for a discussion of the claim that restatement provisions lose their effectiveness the more normative they become.

185. *See, e.g.*, Alexander, *supra* note 141, at 883 (claiming that the reform effort of the *Restatement (Third)* will meet little opposition); Gordley, *supra* note 118, at 1868 (asserting that adoption of the *Restatement (Third)* approach to servitudes "seems likely"); Jacob, *supra* note 152, at 1369–70 (stating that there is little standing in the way of courts moving away from the old doctrines of servitudes law if they can be pushed to do so); Sterk, *supra* note 124, at 660 (saying that a desire for servitudes law reform "is not surprising"); Winokur, *supra* note 126, at 134 (lauding the *Restatement (Third)* because "[i]t will promote some genuine substantive change").

186. Of course, it is also possible that the subject matter of the *Restatement (Third)* and its relative youth may limit the strength of conclusions drawn from this Comment. *See* Thomas, *supra* note 84, at 656 (asserting

III. DISCUSSION

A review of the courts' treatment of the *Restatement (Third)* thus far lends only spotty support to the notion that a normative restatement provision will be the instrument of its own irrelevance. A general discussion of how the *Restatement (Third)* has been viewed by certain courts and commentators paints a mixed picture.[187] From this review, the notion that a restatement provision's treatment in the courts is governed by the function of its normative or descriptive character appears to be, at best, a simplification and, at worst, a distortion. True, it is easy to point to more descriptive provisions from this Restatement that have been cited frequently and without fanfare.[188] But analysis of court treatment of three particular normative departures in the *Restatement (Third)*—the elimination of horizontal privity,[189] the substitution of specific invalidation doctrines for the touch and concern test,[190] and especially the conditional allowance for unilateral easement relocation by a servient owner[191]—demonstrates that though a more normative restatement provision may generally be likely to be cited less, such a notion bypasses the importance of complex doctrinal discussions in the court opinions themselves. The inadequacy of this notion to explain the dynamics of the restatements in courts suggests the superiority of alternative approaches.[192]

A. The Restatement (Third)'s Reception Generally

Thus far, the *Restatement (Third)* has been cited in at least four hundred cases.[193] Its most frequently cited provision has been section 4.1, stating that the parties' intent is to take first importance in the interpretation of servitudes.[194] Its most cited chapter is chapter two, covering doctrines delineating the creation of servitudes, cited in nearly one hundred fifty cases.[195] Its least cited chapter, chapter five, has been cited in fewer

that over the course of over eight decades, the Restatements of Property have not generally enjoyed success). This is another example of the difficulty in parsing cause and effect in such a multifarious area. See *supra* note 93 and accompanying text for a discussion of these empirical difficulties.

187. See *infra* Part III.A for a general discussion of the court reception of the *Restatement (Third)*.

188. See *infra* notes 200–02 and accompanying text discussing courts' ready citations to *Restatement (Third)* provisions that are advertised as restating the prevailing common-law rule.

189. See *infra* Part III.B.1 for a discussion of court treatment of section 2.4.

190. See *infra* Part III.B.2 for a discussion of court treatment of sections 3.1 and 3.2.

191. See *infra* Part III.B.3 for a discussion of court treatment of section 4.8(3).

192. See *infra* Part III.C for a discussion of suggestions for further study.

193. These survey figures, offered with a significant helping of caution, are derived from consulting the ALI Case Citations notes accompanying the *Restatement (Third)* along with the use of the KeyCite citation research service available through WestlawNext. See *infra* Appendix for lists of decisions citing *Restatement (Third)* sections 2.4, 3.1, 3.2, and 4.8(3).

194. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.1 (2000). Section 4.1 has been cited in at least fifty-six state and federal court decisions, spanning at least twenty-three jurisdictions. *See, e.g.*, Eastling v. BP Prods. N. Am., Inc., 578 F.3d 831, 837 n.4 (8th Cir. 2009) (citing section 4.1 and other sections in predicting that Minnesota would follow the *Restatement (Third)* in the case at bar); Coll. Book Ctrs., Inc. v. Carefee Foothills Homeowners' Ass'n., 241 P.3d 897, 901 (Ariz. Ct. App. 2010) (explaining that Arizona interprets covenants along the lines that the *Restatement (Third)* provides).

195. RESTATEMENT (THIRD) OF PROP.: SERVITUDES ch. 2 (providing rules and cases that define how servitudes are created).

than twenty cases and concerns succession to servitude benefits and burdens.[196]

Scholarly observations of the adoption of the *Restatement (Third)* have been mixed. There are some followers that have praised the clip at which the *Restatement (Third)* is being adopted in United States courts. For example, Professor Alfred L. Brophy noted the "refreshingly wide range of areas" in which the *Restatement (Third)* has been embraced.[197] Similarly, Scott E. Seitter, a practitioner, has remarked that although Missouri has been slow to follow the *Restatement (Third)*'s guidance, other jurisdictions have done so, and Missouri should as well.[198] But there are others who have taken a less sanguine view. Student reviews of its adoption have concluded that courts have not yet welcomed the *Restatement (Third)*'s formulations with anything approaching open arms, particularly its more progressive sections.[199]

It is a simple matter to find several *Restatement (Third)* provisions that, in restating the "traditional"[200] or "generally accepted"[201] rule, have been cited frequently and without fanfare as compared to other provisions.[202] However, such broadly supported rules are not always adopted as a matter of course.[203] Whether a restatement provision descriptively adheres to the general rule is only one part of the puzzle.

B. Court Treatment of Three Normative Provisions from the Restatement (Third)

Court treatment of sections 2.4, 3.1 and 3.2, and 4.8(3) of the *Restatement (Third)* tells a deeper—but more complicated—story about how normative provisions are received. Section 2.4, which abolishes the horizontal privity requirement, has been mentioned only tangentially by courts, though the reasons are more intricate than that light treatment may suggest. Sections 3.1 and 3.2, considered in tandem along with other parts of the *Restatement (Third)*, which replace the touch and concern test with presumptive servitude validity unless illegal, unconstitutional, or contrary to public policy, have met similarly sparse—and confused—treatment. Finally, the treatment of section 4.8(3), which gives a servient owner the conditional, unilateral right to relocate

196. *Id.* ch. 5 (discussing the rules governing succession to servitude benefits and burdens along with case examples).

197. Alfred L. Brophy, *Contemplating When Equitable Servitudes Run with the Land*, 46 ST. LOUIS U. L.J. 691, 692 n.8 (2002).

198. Scott E. Seitter, *Timeless Matters: Anti-Competition Restrictions in Real Property Deeds*, 63 J. MO. B. 191, 192 (2007). The most convincing cheer for the *Restatement (Third)* comes from Connecticut, where one commentator has suggested that the ALI's work will soon gain supremacy in at least that state. Gordon H. Buck, *The Ancient Strands, Rewoven*, 75 CONN. B.J. 160, 162 (2001) (reviewing RESTATEMENT (THIRD) OF PROP.: SERVITUDES (2000)). Connecticut has cited the *Restatement (Third)* more than any other jurisdiction thus far, followed closely by Colorado, Massachusetts, and Arizona. These four states represent approximately one-quarter of all citations in case law to the *Restatement (Third)*. See *supra* note 193 for a discussion of the research methodology used to generate these findings.

199. Russell, *supra* note 93, at 774; *see also* Note, *supra* note 157, at 938 (observing the limited number of cases that have followed the *Restatement (Third)* revisions of the touch and concern test).

200. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.11 reporter's note.

201. *Id.* § 4.10 reporter's note.

202. *Compare, e.g.*, *id.* §§ 4.10–4.11 (cited in at least twenty cases), *with, e.g.*, *id.* § 3.2 (cited in five cases). See *supra* note 193 for a discussion of the research methodology used to generate these findings.

203. *See* Joiner v. Sw. Cent. Rural Elec. Coop. Corp., 786 A.2d 349, 351 (Pa. Commw. Ct. 2001) (declining to follow section 4.11 and noting that the provision "has not yet been adopted").

an easement, has been remarkably positive in the face of a blatantly normative restatement provision. There is more at work here in the machinery of the common law than the *Restatement (Third)*'s normative character.

1. Section 2.4—Horizontal Privity is Not Required to Create a Servitude

Section 2.4 has been cited in three cases, discussed below. These cases show that while the *Restatement (Third)*'s normative recommendation of dispensing with horizontal privity has not yet won the day, section 2.4's normative character is insufficient to explain this phenomenon.

Marathon Finance Co. v. HHC Liquidation Corp.[204] involved a complex series of commercial transactions concerning a parcel upon which a hotel had been constructed.[205] The parcel was subject to several restrictions that limited the density and type of structures permissible, held for the benefit of the owner of two adjacent properties.[206] The owner of the servient parcel thereafter declared bankruptcy, and the trustee in bankruptcy joined in a settlement agreement with the mortgagor of the property to convey the parcel unencumbered by all but ten specific servitudes, none of which were at issue in the case.[207] A majority of the Court of Appeals of South Carolina found this agreement dispositive in responding to the property-based arguments in favor of recognizing the servitudes at issue: the servitudes could not be enforced because as a result of the settlement agreement, "these covenants and restrictions no longer exist[ed]."[208]

A tentative draft of the *Restatement (Third)* was quoted in a footnote in the separate opinion written by Judge Cureton.[209] Judge Cureton found as a matter of bankruptcy law that certain restrictions were not in fact destroyed by the bankruptcy proceedings,[210] since the restrictions also otherwise met the requirements for a restrictive covenant to bind future successors.[211] Judge Cureton's discussion of privity was limited entirely to this footnote, in which he stated after discussion of the traditional formulation of horizontal privity and the *Restatement (Third)*'s revision that he "[had] not found any South Carolina case which discusses this requirement" and that "[i]n any event, this element is satisfied here."[212] The horizontal privity requirement was dispensed with in one sentence without any detailed analysis,[213] a display of the exact sort of near-automatic satisfaction that led the Reporter to urge its retirement.[214] Though it is true that this court largely ignored section 2.4, it appears to be more a

204. 483 S.E.2d 757 (S.C. Ct. App. 1997).

205. *Marathon Finance*, 483 S.E.2d at 759–60.

206. *Id.* at 759.

207. *Id.* at 759, 761.

208. *Id.* at 762.

209. *Id.* at 765 n.3 (Cureton, J., concurring in part and dissenting in part).

210. *Id.* at 770.

211. *Id.* at 766.

212. *Id.* at 765 n.3.

213. *Id.*

214. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.4 cmt. a (2000) (explaining that the horizontal privity requirement has historically had "very little impact" from its limited usefulness).

result of ignoring the horizontal privity requirement itself than of disregarding the normative restatement provision.

Section 2.4 met similar treatment in *Sonoma Development, Inc. v. Miller*,[215] which cited a tentative draft of the provision in a footnote after recitation of the traditional horizontal privity requirement.[216] Unlike *Marathon Finance*, the existence of horizontal privity was the central issue in the case.[217] *Sonoma* concerned a three-foot easement preventing improvements from impeding maintenance of a wall on the dominant property that was created in conjunction with, but not on the same document as, the sale of one of two adjacent lots by Alfred and Mary Schaer to Girard and Lynn Miller.[218] Sonoma Development subsequently purchased the second, subservient lot from the Schaers, subject to the restrictions, and built improvements on it in violation of the easement, in response to which the Millers filed suit.[219]

The *Sonoma* court upheld injunctive relief through an extension of horizontal privity to circumstances where the restriction was "part of a transaction that also includes the transfer of an interest in land that is either benefited or burdened by the covenant," even if it was not a part of the same deed.[220] The court briefly cited to the *Restatement (Third)*, noting section 2.4's existence without acknowledging any obvious effect on the analysis.[221]

This does indicate that Virginia has kept the horizontal privity requirement alive and well despite the recommendation of section 2.4, but commentators have noted the perplexing conclusions of the *Sonoma* court on the horizontal privity issue.[222] Providing no reasoning, the court determined that the covenant in issue was a real covenant instead of applying equitable servitudes law.[223] Traditionally, this would indicate a remedy granted at law,[224] but the court upheld an injunction.[225] By blurring the line between real covenants and equitable servitudes and at least incrementally relaxing the grip of the horizontal privity doctrine by extending the grantor-grantee relationship beyond the boundaries of a single deed, the *Sonoma* court ignored the text of section 2.4 but seemed motivated by similar concerns as the Reporter.[226] As such,

215. 515 S.E.2d 577 (Va. 1999).

216. *Sonoma*, 515 S.E.2d at 579 n.3.

217. *Id.* at 579.

218. *Id.* at 578–79.

219. *Id.* at 579.

220. *Id.* at 580.

221. *Id.* at 579 n.3.

222. *See* Brophy, *supra* note 197, at 693 n.9 (claiming that the *Sonoma* decision is "difficult to understand" since the court used real covenant law rather than equitable servitudes law to justify injunctive relief); Michael V. Hernandez, *Property Law*, 34 U. RICH. L. REV. 981, 985 (2000) (explaining that the traditional equitable servitudes doctrine would have governed had the court chosen to apply it).

223. Hernandez, *supra* note 222, at 985; *Sonoma*, 515 S.E.2d at 579.

224. See *supra* notes 138–39 and accompanying text for an explanation that the only traditional differences at common law between real covenants and equitable servitudes are the privity requirement and the limitation of equitable servitudes to equitable remedies.

225. *Sonoma*, 515 S.E.2d at 581.

226. *See* RESTATEMENT (THIRD) OF PROP: SERVITUDES, § 2.4 cmt. a (2000) (arguing that horizontal privity should be abolished because unlike in English law, American law never unambiguously stated that real covenants could not provide equitable relief and thus, as a distinction between real covenants and equitable

the normative character of section 2.4 may explain the court's reluctance to consider the provision in depth or explicitly adopt it,[227] but it cannot explain the substance of the court's holding in relation to the grounding upon which the provision stands.

The last case to cite section 2.4 considered here is *Lake Limerick Country Club v. Hunt Manufactured Homes, Inc.*,[228] which discussed the provision in slightly more detail.[229] *Lake Limerick* concerned the failure by Hunt Manufactured Homes to pay dues, costs, and fees that were established by covenants in a Declaration of Restrictions for a lot it had purchased within a 1,300-lot development.[230] The court concluded that the covenants did run with the land and that Hunt would be liable for the payments due retroactive to the date it obtained ownership of the lot.[231]

Like in *Sonoma*, the Court of Appeals of Washington handled horizontal privity as a separate issue, inquiring into the puzzling question of "whether [it] is either inapplicable or satisfied."[232] Unlike *Sonoma*, the *Lake Limerick* court prefaced its analysis of the horizontal privity requirement with a discussion of the difference between real covenants and equitable servitudes, noting that Washington does not usually discriminate between the two.[233]

As to horizontal privity itself, the *Lake Limerick* court held that "[t]o whatever extent 'horizontal privity' might still [be] required, it is easily met here."[234] The court of appeals somewhat cryptically concluded "that 'horizontal privity' is not required, or that it is met by the original parties' grantor-grantee relationship."[235] This may be something less than an express adoption of the section 2.4 view on horizontal privity.[236] But the court's holding on this issue, in conjunction with its reliance on the *Restatement (Third)* throughout its discussion, shows that it has viewed section 2.4 positively despite the provision's frank, normative departure from traditional servitudes law.[237] Taken in aggregate with *Sonoma* and *Marathon Finance*, the openly favorable treatment of section 2.4 in *Lake Limerick* demonstrates that looking to this Restatement provision's normative character fails to consider all the factors necessary to understanding the Restatement's treatment in courts.

servitudes, horizontal privity is not useful).

227. See *supra* Part II.A.3.c for a discussion of the principle asserted by some scholars that the restatements will lose influence in courts as they become more normative.

228. 84 P.3d 295 (Wash. Ct. App. 2004).

229. *Lake Limerick*, 84 P.3d at 302. The court explained that "[i]n discussing such covenants, we pattern our terminology after that of the Restatement Third, Property (Servitudes)." *Id.* at 298.

230. *Id.* at 297–98.

231. *Id.* at 302–03.

232. *Id.* at 300.

233. *Id.* at 299. The court cites favorably to the *Restatement (Third)* in this section, lauding its sensible explanations. *Id.*

234. *Id.* at 302.

235. *Id.*

236. *Compare id.* (holding that horizontal privity does not apply or is met), *with* RESTATEMENT (THIRD) OF PROP.: SERVITUDES, § 2.4 (2000) (explaining that a servitude may be created even without a privity relationship between the parties).

237. *See* Dale A. Whitman, *Teaching Property – A Conceptual Approach*, 72 MO. L. REV. 1353, 1360 n.29 (2007) (citing *Lake Limerick* to show that "[t]he Restatement's view [concerning horizontal privity] is slowly gaining adherents").

2. Section 3.1—Validity of Servitudes: General Rule & Section 3.2 Touch and Concern Doctrine Superseded

An equally complicated picture arises when viewing how courts have handled the *Restatement (Third)*'s replacement of the touch and concern test. Only a small handful of courts appear to have cited to the final version of section 3.2,[238] while one additional line of cases has followed a preliminary draft.[239] The treatment of section 3.2 has been characterized largely by avoidance without passing any meaningful judgment on the substance of the provision, supporting the assertion that normative restatements will not be followed.[240] In *Refinery Holding Co., L.P. v. TRMI Holdings, Inc.* (*In re El Paso Refinery, LP*),[241] the Fifth Circuit bowed out of a policy argument urging adoption of section 3.2 because Texas had not yet spoken on the issue.[242] Likewise, in *Garland v. Rosenshein*,[243] the Supreme Judicial Court of Massachusetts refused to extend that line of cases following a previous draft of section 3.2,[244] deciding the case on statutory grounds.[245] The court felt that it "need not decide today whether to follow [the section 3.2] approach."[246] Finally, in an Order Amending Opinion in *1515–1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corp.*,[247] the Court of Appeals of Washington made it clear that it did not consider the *Restatement (Third)* formulation in its resolution of the case because it was not raised in a timely manner in the lower courts.[248] These decisions show the tendency of some courts to ignore a restatement not because of the substance of its provisions, but rather as a result of limits on the court's power.

It is also important to remember that section 3.2 contains no real positive doctrinal prescription of itself; it merely states that "[n]either the burden nor the benefit of a covenant is required to touch or concern land in order for the covenant to be valid as a

238. See *infra* Appendix for a listing of the cases that have cited to section 3.2 in its final form.

239. *See* Note, *supra* note 157, at 942 (stating that only one line of cases has followed section 3.2 and analyzing *Bennett v. Commissioner of Food and Agriculture*, 576 N.E.2d 1365 (Mass. 1991)).

240. *See id.* at 944 (using these cases as examples of courts using procedural explanations for not applying section 3.2).

241. 302 F.3d 343 (5th Cir. 2002) (applying Texas law).

242. *Refinery Holding*, 302 F.3d at 356 n.19.

243. 649 N.E.2d 756 (Mass. 1995).

244. *See Garland*, 649 N.E.2d at 758 (stating that the facts before the court did not constitute a time when "old common law rules barring the creation and enforcement of easements in gross have no continuing force" (quoting *Bennett*, 576 N.E.2d at 1367)).

245. *Id.* at 757.

246. *Id.* at 758 n.4. The court found the covenant at issue invalid because it gave no benefit to its holder beyond the price the holder could extract from the servient owner to destroy the covenant. *Id.* at 758. Such a limited benefit was not held to touch or concern the land. *Id.* Interestingly, Professor French analyzed this case and argued that had the court applied section 3.1, it would have reached the same holding in that the real problem with the covenant was not its failure to touch and concern the land but that it was "created out of spite." Susan F. French, *Can Covenants Not to Sue, Covenants Against Competition and Spite Covenants Run with Land? Comparing Results Under the Touch or Concern Doctrine and the Restatement Third, Property (Servitudes)*, 38 REAL PROP. PROB. & TR. J. 267, 292 (2003).

247. 17 P.3d 639 (Wash. Ct. App. 2000) [hereinafter *Lakeview Boulevard I*].

248. *Lakeview Boulevard I*, 17 P.3d at 640.

servitude."[249] It rather operates in conjunction with section 3.1 and other sections to create the web of policy and other considerations that replace the touch and concern test.[250] If we consider those cases that have cited to section 3.1 and other provisions that actually lay out the details of the liberalized *Restatement (Third)* alternative, it appears that the court reaction to the *Restatement (Third)*'s regime is sometimes less straightforward than the sparse treatment of the normative section 3.2 would suggest.[251] Three of these cases are particularly relevant.

Upon subsequent consideration of the lower court's Order Amending Opinion, the Supreme Court of Washington offered a more complex treatment of section 3.1 in *1515–1519 Lakeview Boulevard Condominium Association v. Apartment Sales Corp.*[252] Though the court agreed that the *Restatement (Third)* would not be addressed because the issue was not properly preserved,[253] the court still cited section 3.1, and the Reporter for the *Restatement (Third)* interpreted the court's holding as "eliminat[ing] the touch or concern [requirement] while purporting to apply it."[254] The court held that an exculpatory covenant leaving the city of Seattle immune to suit for damage from landslides[255] touched and concerned the land because "the covenant is limited to the reasonable enjoyment of the land and limits rights normally associated with ownership."[256] Professor French has attacked this holding by noting how virtually all servitudes limit a right, thus removing this factor as a meaningful consideration for validity purposes.[257] After all, the requirement of consideration in any servitude contract will guarantee that *some* sort of legal right is given up for expressly created servitudes.[258] The Supreme Court of Washington's very broad holding tends to parallel the reasoning and principal effect of section 3.1,[259] in that it goes far to create a presumption of servitude validity, calling into question whether a case that appears to ignore this normative provision from the *Restatement (Third)* has in fact implicitly followed it.[260]

249. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.2 (2000).

250. *Id.* (explaining that a servitude's validity is determined by the policies articulated in sections 3.1 and 3.4–3.7).

251. *See* Russell, *supra* note 93, at 765–66 (positing that inertia may be a main reason that a court may avoid the "revisionist" provisions in *Restatement (Third)*).

252. 43 P.3d 1233 (Wash. 2002) [hereinafter *Lakeview Boulevard II*].

253. *Lakeview Boulevard II*, 43 P.3d at 1238 n.4.

254. French, *supra* note 246, at 279.

255. *Lakeview Boulevard II*, 43 P.3d at 1235.

256. *Id.* at 1239.

257. French, *supra* note 246, at 278.

258. *Cf.* RESTATEMENT (SECOND) OF CONTRACTS § 71 (1981) (explaining that performance sufficient for consideration may include an "act," "forbearance," or "the creation, modification, or destruction of a legal relation").

259. See *supra* note 166–77 and accompanying text for a discussion of the changes section 3.1 imparts on the traditional touch and concern doctrine.

260. French, *supra* note 246, at 279. Professor French persuasively questions whether "all covenants that required a landowner to do something he would not otherwise be required to do" would satisfy the court's test, thus creating a de facto presumption of servitude validity in accord with the prescription of the *Restatement (Third)*. *Id.* at 278–79.

The same largely holds true in *Dunning v. Buending*,[261] which concerned a grant of summary judgment in favor of a defendant who claimed she had no knowledge of a common plan of development sufficient to provide notice for a covenant-prohibiting subdivision.[262] The court explained, after adopting the *Restatement (Third)*'s unification of real covenants and equitable servitudes outlined in chapter one,[263] that the Supreme Court of New Mexico had not yet formally done away with the traditional requirements for the enforceability of a running covenant.[264]

The *Dunning* court, therefore, went through the common-law touch and concern analysis using the Bigelow test,[265] finding that the defendant's arguments regarding notice "failed to make a prima facie showing that the covenant in the deed did not touch and concern the land."[266] The trial court was reversed.[267] By putting the burden on the party seeking to invalidate the covenant while still requiring the Bigelow test, the *Dunning* court made a halting step towards adopting the *Restatement (Third)*'s formulation that seemed to be limited more by its deference to higher courts[268] than by the *Restatement (Third)*'s normative nature of itself.[269] The bare assertion that a normative restatement will be self-defeating does not recognize this level of nuance.

Finally, in *Chambers v. Old Stone Hill Road Associates*,[270] the Court of Appeals of New York analyzed the validity of a single-family home restriction that plaintiffs sought to have enforced against the lessor of a telecommunications company, which had erected a cellular telephone tower on the land in question.[271] The defendant-lessor briefed on a public policy argument,[272] but the court decided in the plaintiffs' favor.[273] Here again, the court placed the burden on the invalidating party,[274] citing prior state case law[275] and section 3.1 for support.[276] The holding is interesting because the court stated that "[r]estrictive covenants will be enforced when the intention of the parties is clear and the limitation is reasonable and not offensive to public policy."[277] Yet this broad endorsement of servitude enforceability appears to ignore that the touch and

261. 247 P.3d 1145 (N.M. Ct. App. 2010).

262. *Dunning*, 247 P.3d at 1147–48.

263. *Id.* at 1149 (adopting the terminology of section 1.4).

264. *Id.*

265. *Compare id.* at 1150–51 (stating that touch and concern requirement turns on whether performance decreases the value of the covenantor's interest in land while increasing the value of the covenantee's interest in land), *with* Bigelow, *supra* note 121, at 645–46 (noting that touch and concern requirement focuses on change in parties' specific interest as landowners and not their general interest as members of the public).

266. *Dunning*, 247 P.3d at 1151.

267. *Id.* at 1152.

268. *See id.* at 1149 (citing New Mexico state law to show that the state's intermediate appellate courts must follow the decisions of its supreme court).

269. *See id.* (characterizing the *Restatement (Third)*'s clarifications favorably).

270. 806 N.E.2d 979 (N.Y. 2004).

271. *Chambers*, 806 N.E.2d at 980–81.

272. *Id.* at 981.

273. *Id.*

274. Russell, *supra* note 93, at 774.

275. *Chambers*, 806 N.E.2d at 981.

276. *Id.* at 984 n.2.

277. *Id.* at 981.

concern doctrine still has some life in New York as a roadblock to servitude validity.[278]

It remains to be seen to what degree New York courts will allow these two doctrines to coexist in the future, but *Chambers* brings home an important point in the descriptive-normative debate: a "normative" provision is not always so in every jurisdiction, and an argument that such a provision will be ignored must be restrained by consideration of the degree to which the section can reliably be said to depart from the traditional doctrine in a given jurisdiction. Like *Dunning* and *Lakeview Boulevard II*, *Chambers* illuminates the degree to which a simple statement that a normative restatement provision will be ignored, though enjoying some predictive weight in terms of raw citation, tends to make assumptions that bypass the complexity of the common-law process. Nowhere is this truer than in the court reception of section 4.8(3).

3. Section 4.8(3)—Location, Relocation, and Dimensions of a Servitude (Unilateral Relocation by the Servient Owner)

Section 4.8(3) allows a servient owner to unilaterally relocate an easement subject to restrictions respecting the dominant owner's use, which is a bold departure from the prior law in almost all states.[279] However, it is among the more cited provisions of the entire *Restatement (Third)* and has been followed in some form in roughly half of the state jurisdictions that have taken it up in reported opinions.[280] Similar to the courts' adoption of section 402A in the field of torts,[281] section 4.8(3)'s reception not only counsels restraint in relying on the predictive value of an asserted relationship between the increasing normative character of a restatement provision and its decreasing adherence in courts, it seems to attack that relationship outright.[282] As three cases adopting section 4.8(3) will further illustrate below, this normative departure from the majority rule serves as a counterexample to the idea that such a restatement provision will be self-defeating per se.[283]

Roaring Fork Club, L.P. v. St. Jude's Co.[284] is frequently cited by commentators as a representative example of the movement towards section 4.8(3).[285] St. Jude's

278. *See, e.g.*, Johnson v. Nisbet, 891 N.Y.S.2d 180, 182–83 (App. Div. 2009) (invalidating covenant because it does not touch and concern the land); Vill. of Phila. v. FortisUS Energy Corp., 851 N.Y.S.2d 780, 783 (App. Div. 2008) (same).

279. See *supra* notes 178–83 and accompanying text for a discussion of the content of section 4.8(3) and its departure from the prevailing law.

280. *See* BRUCE & ELY, *supra* note 183, at § 7:17 (finding section 4.8(3) the less attractive rule and stating that "[t]he Restatement (Third) position on easement relocation has received a mixed reception by the judiciary, but has had a noticeable impact on judicial decision-making"). See *infra* Appendix for a listing of cases citing section 4.8(3).

281. See *supra* notes 1–12 and accompanying text for a discussion of section 402A's normative character and its subsequent, near-universal adoption by state courts.

282. *See* Bogart, *supra* note 84, at 283–84 (citing court treatment of section 4.8(3) to illustrate that "yet, changes suggested by a revised Restatement can sometimes have a fast and profound impact").

283. *Cf.* Lovett, *supra* note 181, at 32 ("[I]t is clear that [section 4.8(3)] has significantly reshaped the common law landscape on the subject of easement relocation.").

284. 36 P.3d 1229 (Colo. 2001).

285. *See, e.g.*, Brophy, *supra* note 197, at 692 n.8 (using *Roaring Fork* as an encouraging example of the potential for the *Restatement (Third)* to gain further adherents); Susan F. French, *Relocating Easements: Restatement (Third), Servitudes § 4.8(3)*, 38 REAL PROP. PROB. & TR. J. 1, 2–3, 5 (2003) (using *Roaring Fork*

Company, operating a ranch, initiated a trespass suit against neighboring Roaring Fork Club, L.P., after Roaring Fork relocated three irrigation ditches that served both properties.[286] Roaring Fork was developing its property for a fishing and golf club.[287] The relocation came after failed negotiations by Roaring Fork with St. Jude's to purchase parts of St. Jude's easement rights or create "a ditch maintenance arrangement."[288] The trial court found for St. Jude's and allowed Roaring Fork, in equity, to choose either to relocate the ditches back to their original location or "to deliver, upon demand, water to [St. Jude's] in the amount and quality, and at the time consistent with, [St. Jude's] adjudicated rights."[289] The court of appeals reversed the injunction, finding it to be an inequitable reward to "a bad faith actor, for deliberate and conscious trespass."[290]

Upon a grant of certiorari, the Colorado Supreme Court undertook a lengthy and detailed discussion of the rights of a servient owner burdened by an easement that included a review of the *Restatement (Third)*.[291] The court found that the conditional allowance of unilateral relocation permitted in section 4.8(3) "represents the better approach to resolve the competing equities," and that section 4.8(3) is "most consistent with Colorado law,"[292] which the court had previously reviewed and described as "somewhat unclear" in honoring *both* the strong,[293] unfettered rights of ditch easement owners *and* the ability to relocate in certain circumstances if an alternative solution to providing the ditch benefit was provided.[294] Following a policy discussion in which it questioned whether arguments on behalf of the traditional rule still apply, the court held that the rule of section 4.8(3) will control in Colorado, subject to a declaratory judicial determination using section 4.8(3)'s "three-prong test."[295]

Roaring Fork Club represents a picture-perfect bridge between what the reformist and traditionalist founders of the ALI likely intended when seeking to simplify and clarify the law.[296] Section 4.8(3) made a bold departure from the majority common-law rule that servient owners could not relocate easements,[297] and yet it provides a firm answer to the lack of clarity and inherent tension between two trends in Colorado law. It may be argued that the presence of that tension partially lessens section 4.8(3)'s

to argue that the results under section 4.8(3) are superior to the contrary majority rule); Lovett, *supra* note 181, at 29–30 (pointing to *Roaring Fork* as evidence of "[f]urther erosion" of the common-law rule).

286. *Roaring Fork Club*, 36 P.3d at 1230.

287. *Id.*

288. *Id.*

289. *Id.* at 1231.

290. *Id.*

291. *Id.* at 1236–37.

292. *Id.* at 1236.

293. *See id.* at 1231–32, 1234 (explaining that easement rights are well protected as necessary for irrigation in an arid state like Colorado).

294. *Id.* at 1234.

295. *Id.* at 1237–38.

296. See *supra* Part II.A.3 for a discussion of the conflicting arguments as to whether a restatement should adhere closely to standing doctrine or advocate for changes in the doctrine.

297. See *supra* notes 178–83 and accompanying text for a discussion of the content of section 4.8(3) and its departure from the prevailing law.

normative character, at least in Colorado, but *Roaring Fork Club* nonetheless shows a restatement provision's potential to supersede a closely held common-law doctrine in the name of clarity and equity.[298] A declaration that a restatement's "effectiveness" depends simply on its staying true to "its mission of restating the common law" ignores this subtlety.[299]

M.P.M. Builders, LLC v. Dwyer[300] is another oft-cited case that did away with the common-law rule and adopted section 4.8(3).[301] The case arose when M.P.M. Builders approached Leslie Dwyer with an offer to relocate his easement over their land in order to facilitate their planned subdivision and development of their property for residential lots.[302] Though the offered relocation would have allowed him the same access as the prior easement, Dwyer refused consent, and M.P.M. Builders brought an action for declaratory relief "that it ha[d] a right unilaterally to relocate Dwyer's easement."[303]

The trial court judge found for Dwyer, declaring himself bound by the "'settled' common law" that he felt "may well be the result of unreflective repetition of a misapplied rationale."[304] The Supreme Judicial Court of Massachusetts agreed with the trial court's assessment of the standing law and expressly adopted section 4.8(3): "Regardless of what heretofore has been the common law, we conclude that § 4.8(3) of the Restatement is a sensible development in the law and now adopt it as the law of the Commonwealth."[305] The court, following the lead of *Roaring Fork Club*, added that a declaratory judgment is necessary before a servient owner exercises the unilateral right.[306]

The court's lengthy discussion of the appropriate legal rule for Massachusetts on relocation, which considered prior state law, other jurisdictions' treatment of the issue, scholarly articles, and the *Restatement (Third)*'s prescriptions, focused squarely on the merits of this unabashedly normative divergence from the common law.[307] After this discussion, the court felt "persuaded that § 4.8(3) strikes an appropriate balance between the interests of the respective estate owners" that were both supported in the state-law precedent.[308] It appears that, like in Colorado, the credibility of the *Restatement (Third)* has been unaffected by section 4.8(3)'s failure to fully restate

298. *See Roaring Fork Club*, 36 P.3d at 1236 (stating that the conclusion of the court in using the Restatement best synthesizes prior law and more adequately addresses parties' "competing equities").

299. Vandall, *supra* note 74, at 815. See *supra* note 86 and accompanying text for the assertion that for a restatement to be effective, it must restate the common law.

300. 809 N.E.2d 1053 (Mass. 2004).

301. *M.P.M. Builders*, 809 N.E.2d at 1057; *see, e.g.*, Bogart, *supra* note 84, at 283–84 & 284 n.20 (citing the case to show that section 4.8(3) "is controversial, but it has already been incorporated into the common law of several states in recent case opinions" (footnote omitted)); Lovett, *supra* note 181, at 31 (discussing the case as part of the history of the evolution of the servient owner's right to relocate); John V. Orth, *Who Judges the Judges?*, 32 FLA. ST. U. L. REV. 1245, 1250 n.27 (2005) (citing the case as an example of American courts' willingness to depart from the English common law).

302. *Id.* at 1055.

303. *Id.* at 1055–56.

304. *Id.* at 1056.

305. *Id.* at 1057.

306. *Id.* at 1059 (citing Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237–38 (Colo. 2001)).

307. *Id.* at 1056–59.

308. *Id.* at 1057.

"what the law is" in Massachusetts.[309]

As a final example, *St. James Village, Inc. v. Cunningham*[310] arose from nearly identical facts as *M.P.M. Builders*.[311] The Supreme Court of Nevada was urged to reconsider state precedent, which stated that "the location of an easement once selected, cannot be changed by either the landowner or the easement owner without the other's consent."[312] The court resolved that this statement was controlling, but it "nevertheless consider[ed] whether the rule stated . . . is overbroad and whether significant public policy considerations warrant[ed] [the] court's adoption of the modern section 4.8 of the Restatement (Third) of Property."[313]

The court found that the policy of "allowing full economic development of the servient estate"[314] ultimately trumped the two ideas of immutable rights in property and strict construction of express easements that "Nevada law has generally favored."[315] The court held that the *Restatement (Third)* provision is the better rule to answer "the practical realities of competing property uses and interests."[316]

St. James Village is the clearest example among these three cases of a court deliberately discarding existing state law in favor of section 4.8(3). Taking a step further than the courts in *Roaring Fork Club* and *M.P.M. Builders*, which tasked the courts with resolving and synthesizing competing trends in state law, the *St. James Village* court expressly found prior law to be controlling,[317] acknowledged that state cases have "generally favored fixed property rights" and the rigid construction of expressly created rights of way, and nevertheless adopted section 4.8(3) as the sounder rule.[318] This case therefore stands as a bright red flag to the assertion that the restatements will necessarily wither on the vine as a result of failing to closely depict the state of the common law.[319]

In the reception of the *Restatement (Third)* thus far, these three cases demonstrate

309. *See* Latto, *supra* note 29, at 717 (discussing the descriptive character of restatements). See *supra* notes 80–81 and accompanying text for the assertion that stating "what the law is" is essential to the restatements' credibility.

310. 210 P.3d 190 (Nev. 2009).

311. *See St. James Vill.*, 210 P.3d at 191–92 (arising when plaintiff developers sought declaratory relief against servient owners who refused easement relocation to accommodate plan of development); *M.P.M. Builders*, 809 N.E.2d at 1055–56 (same).

312. *St. James Vill.*, 210 P.3d at 191 (quoting Swenson v. Strout Realty, Inc., 452 P.2d 972, 974 (Nev. 1969)).

313. *Id.* at 194.

314. *Id.*

315. *Id.* at 195.

316. *Id.* However, this did not mean victory for St. James Village, since the court found that the easement location was described in the creating instrument with sufficient clarity so as to preclude the conditional, unilateral relocation allowed under section 4.8(3). *Id.* at 195–96. The court placed special emphasis on the introductory phrase in section 4.8(3) that conditioned unilateral relocation on times when "*the location and dimensions are* [not] *determined by the instrument or circumstances surrounding creation of a servitude*." *Id.* at 192 (quoting RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.8 (2000)).

317. *St. James Vill.*, 210 P.3d at 194.

318. *Id.* at 195–96.

319. See *supra* note 83 and accompanying text for the assertion that adherence to a restatement provision depends on whether it "actually reflects what is happening in the courts."

that section 4.8(3) provides a strong restraining influence on the notion that, without more, a normative restatement provision will not be followed. The substantial variance of section 4.8(3)'s reception from the treatment of sections 2.4, 3.1, and 3.2 also illustrates the limited efficacy of using normative character to predict favorable consideration.[320] Though the comparatively scarce review of sections 2.4, 3.1, and 3.2 in courts does lend superficial support to the indirect relationship between adherence to a restatement provision and its normative character, deeper engagements with certain of those cases that have cited these sections also shows that a restatement provision's doctrinal closeness to the standing case law is only one factor that must be considered before deeming that provision desirable during the drafting process. Taken as a whole, the *Restatement (Third)*'s treatment in courts shows that it is broadly true that a normative restatement may have difficulty gaining adherents, but such a statement provides an insufficiently sensitive method by which to accurately predict how a given court will view that restatement.

C. Thoughts for Further Study

The continued importance of the restatements in American law underlines the need for continued discussion.[321] Effective framing is key—variation in the subject matter in restatements,[322] the malleability of terms like "descriptive" and "normative,"[323] and the difficulties of isolating causal relationships can all militate against solid conclusions stemming from this sort of content-based study.[324] Indeed, the experience of the *Restatement (Third)* in courts shows the limited utility of the simple assertion that a normative restatement will not be adopted.[325] The restrictions of approaching restatement study solely in terms of the restatements' function in courts as signaled by raw levels of citation are clear.

It may be true that a restatement is designed to inform the march of the common law,[326] but that aspect, informed by citation analysis, is only one way in which the restatements are valuable. For example, they may also provide an intriguing view of the adjudicative process. Professor Wechsler stated that a Restatement Reporter ideally will consider those same factors that a court might in formulating its black-letter

320. See *supra* Part III.B.1 and Part III.B.2 for a discussion of the court reception of sections 2.4, 3.1, and 3.2, and how that reception has been relatively sparse but still generous in nuance.

321. *See* Barker, *supra* note 33, at 573–74 (explaining that it is foreseeable that a proposed restatement provision will be of "intense interest" to practitioners who deal with its subject matter frequently).

322. *See, e.g.*, Maggs, *supra* note 88, at 541 n.237 (explaining that tort and contract doctrines are very different and thus, lessons concerning the *Restatement (Second) of Contracts* may not apply with equal force to *Restatement (Second) of Torts*); Thomas, *supra* note 84, at 656 (asserting that over the course of over eight decades, the Restatements of Property have not generally enjoyed success as compared to other restatements).

323. See *supra* notes 47–49 and accompanying text for a discussion of the fluid character of these labels.

324. See *supra* note 93 for sources contemplating the difficulty of empirical study in this area.

325. See *supra* Part III.A–B for an analysis of selected *Restatement (Third)* provisions' treatment in courts and the complicated picture that treatment paints. It also militates against the contrary conclusion that the restatements are likely to be followed no matter what. *See, e.g.*, Maggs, *supra* note 88, at 542 (explaining that courts follow the *Restatement (Second) of Contracts* with great deference).

326. See *supra* Part II.A.3 for a discussion of the descriptive-normative debate, which rests on the assumption that the restatements' purpose lies in influencing the courts.

rules.[327] Professor Adams has asserted that criticisms of the restatements might also be levied against the common-law system with equal force.[328] If these observations hold true, studying how restatements are made may also inform the sometimes opaque world of judicial decision making.

The number of times a restatement provision has been cited does not inform these sorts of inquiries. As a pedagogical tool, as a fresh review for old doctrine, as a court-laboratory, the restatement has a vibrant life in the law outside of its express adoption by courts.

IV. CONCLUSION

The restatements enjoy a unique position in the American court system.[329] They boast continued relevance in their potential to steer trends in case law.[330] They have also suffered from the drag of the ALI's elusive statement of purpose.[331] Many have weighed in on whether the ALI's restatements should carefully restate only the settled law, or if the works should take on the role of an agent of reform.[332] Some who suggest the former have cautioned that the more reformist a restatement becomes, the less courts will listen to its recommendations.[333]

Perhaps. The reception of the *Restatement (Third)* in courts thus far shows that despite a widely panned area of law and a generally lauded attempt at addressing it, restatement provisions can indeed be cited less frequently when they are normative.[334] But the experience of the *Restatement (Third)* also shows that a restatement need not necessarily lose influence from its normative character, and even in cases of an ostensibly indirect relationship between normative character and favorable reception, there are other factors that may have exerted an equal, if not greater, effect.[335] Section 4.8(3), a firmly normative provision of the *Restatement (Third)*, bucks the trend

327. Wechsler, *supra* note 51, at 190. See *supra* notes 51–54 for a discussion of Professor Wechsler's thoughts on what considerations should go into the drafting of a restatement.

328. Adams, *supra* note 45, 267–69. See *supra* note 45 and accompanying text for a discussion of Professor Adams's argument.

329. See *supra* notes 25–28 and accompanying text for consideration of the place the restatements hold in the United States.

330. See *supra* notes 33, 40, and accompanying text for a discussion of signs that point to the restatements' contemporary relevance.

331. *See* AM. LAW INST., *supra* note 21 (stating dual goals of "simplifying" and "clarifying" the law without explaining which is preferred); Adams, *supra* note 45, at 261 (stating that the ALI often faces criticism in its lack of clear engagement with the "is/ought" question); Latto, *supra* note 29, at 712 (expressing unawareness of any "precise official formulation" for the function of a restatement).

332. See *supra* Part II.A.3 for an analysis of the debate over the proper purpose of the restatement movement.

333. See *supra* Part II.A.3.c for a discussion of whether restatements lose influence as they become more normative than descriptive.

334. See *supra* Part III.A for general consideration of the *Restatement (Third)*'s treatment thus far and the idea that some of its generally accepted provisions are more frequently cited than other, more controversial sections.

335. See *supra* Part III.B for an analysis of certain *Restatement (Third)* provisions and the conclusion that their normative character often shows a clouded effect on their treatment in courts.

forcefully.[336]

To suggest a causative relationship in this area is therefore to suggest what is currently an impossible level of certainty. The empirical roadblocks, the difficulty in applying the lessons of one restatement to another, the problems of labeling and pigeonholing, all stand in the way of such a bold assertion. Nonetheless, the question of how and why restatements are adopted carries continued importance. Scholars that shift the lens to the courts and away from the restatements provide a more likely, more flexible means of arriving at an understanding of the kaleidoscopic dialogue between the two.[337] In so doing, they help to paint the picture of one of this country's most unique institutions, honoring its task of making the law simpler and easier to understand.[338]

336. See *supra* Part III.B.3 for a discussion of section 4.8(3) in the courts.

337. See *supra* Part III.C for thoughts on further study in this area.

338. *See* AM. LAW INST., *supra* note 21.

Appendix

Table 1. Cases Citing *Restatement (Third) of Property: Servitudes* § 2.4

1. Marathon Fin. Co. v. HHC Liquidation Corp., 483 S.E.2d 757, 765 n.3 (S.C. Ct. App. 1997) (Cureton, J., concurring in part and dissenting in part) (citing a tentative draft and stating that South Carolina has no cases discussing the horizontal privity requirement and that it would be satisfied on the facts before the court anyway).
2. Sonoma Dev., Inc. v. Miller, 515 S.E.2d 577, 579 (Va. 1999) (citing a tentative draft and stating that Virginia still recognizes the horizontal privity requirement but clouding the necessity for it by allowing equitable relief for a real covenant).
3. Lake Limerick Country Club v. Hunt Mfg. Homes, Inc., 84 P.3d 295, 302 (Wash. Ct. App. 2004) (finding after discussion of section 2.4 that the horizontal privity requirement is either inapplicable or satisfied by the parties' grantor-grantee relationship).

Table 2. Cases Citing *Restatement (Third) of Property: Servitudes* § 3.1

1. First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1122 (10th Cir. 2002) (citing section 3.1 comment d to show that the actions of the government pursuant to a deed fall under constitutional review).
2. Cebular v. Cooper Arms Homeowners Ass'n, 47 Cal. Rptr. 3d 666, 677 (Ct. App. 2006) (citing section 3.1 comment j to show that courts should not invalidate servitudes based on a finding that most actors would think they are a bad deal or are not effective).
3. Baccouche v. Blankenship, 65 Cal. Rptr. 3d 659, 664 (Ct. App. 2007) (citing section 3.1 to show that the instrument at issue was not an impermissible restriction on land use).
4. Clinger v. Hartshorn, 89 P.3d 462, 468 (Colo. App. 2003) (discussing section 3.1 as addressing the use of a servitude rather than the transaction that creates a servitude).
5. Garland v. Rosenshein, 649 N.E.2d 756, 758 n.4 (Mass. 1995) (declining to discuss whether to follow the recommendations of a tentative draft of sections 3.1 and 3.2).
6. Aragon v. Brown, 78 P.3d 913, 920 (N.M. Ct. App. 2003) (Bustamante, J., dissenting) (quoting section 3.1 and discussing with favor the limits it places on the types of valid servitudes).
7. Chambers v. Old Stone Hill Rd. Assocs., 806 N.E.2d 979, 984 n.2 (N.Y. 2004) (quoting section 3.1 comment i to argue that the principle of freedom of contract usually supports servitude validity); *see also id.* at 990 (Read, J., dissenting) (citing section 3.1 comments e and f to support the idea of public policy as a grounds for invalidating servitudes).
8. Beattie v. State (*ex rel*. Grand River Dam Auth.), 41 P.3d 377, 386 n.12 (Okla. 2002) (Opala, J., concurring) (quoting section 3.1 comment a as part of a brief explanation of the history of servitudes law).
9. Navasota Res., L.P. v. First Source Texas, Inc., 249 S.W.3d 526, 538 (Tex. App. 2008) (citing section 3.1 and other sections to support state case law and other jurisdictions holding that restraints on alienation are enforceable if reasonable).
10. 1515–1519 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 43 P.3d 1233, 1238 n.4 (Wash. 2002) (explaining section 3.1 and declining to consider it because it was not timely raised by the parties).

Table 3. Cases Citing *Restatement (Third) of Property: Servitudes* § 3.2

1. Refinery Holding Co., LP v. TRMI Holdings, Inc. (*In re* El Paso Refinery, LP), 302 F.3d 343, 356 n.19 (5th Cir. 2002) (refraining from addressing the parties' policy arguments because section 3.2 had not been adopted as Texas law).
2. Garland v. Rosenshein, 649 N.E.2d 756, 758 n.4 (Mass. 1995) (declining to discuss whether to follow the recommendations of a tentative draft of sections 3.1 and 3.2).
3. Dunning v. Buending, 247 P.3d 1145, 1149 (N.M. Ct. App. 2010), *cert. denied*, 263 P.3d 900 (N.M. 2011) (discussing the *Restatement (Third)* favorably but declining to analyze the case according to section 3.2 because the state's highest court had not rejected prior law).
4. 1515–1519 Lakeview Blvd. Condo. Ass'n v. Apartment Sales Corp., 17 P.3d 639, 640 (Wash. Ct. App. 2001) (amending prior opinion to add a footnote explaining that since there was no public policy brought up in briefing, section 3.2 would not be considered).

Table 4. Cases Citing *Restatement (Third) of Property: Servitudes* § 4.8(3)

Cases giving favorable treatment to section 4.8(3)

1. Roaring Fork Club, L.P. v. St. Jude's Co., 36 P.3d 1229, 1237 (Colo. 2001) (adopting section 4.8(3) "based upon the direction implicit and explicit in [the] case law and the practical realities of competing property uses").
2. McGoey v. Brace, 918 N.E.2d 559, 569 (Ill. App. Ct. 2009) (stating that section 4.8(3) presents the more correct interpretation of state precedent).
3. M.P.M. Builders, LLC v. Dwyer, 809 N.E.2d 1053, 1057 (Mass. 2004) (adopting section 4.8(3) as a "sensible development in the law").
4. R & S Invs. v. Auto Auctions, Ltd., 725 N.W.2d 871, 881 (Neb. Ct. App. 2006) (upholding use of section 4.8(3) as "not inconsistent" with Nebraska law).
5. St. James Vill., Inc. v. Cunningham, 210 P.3d 190, 191 (Nev. 2009) (adopting section 4.8(3) in the circumstances presented by the case).
6. Lewis v. Young, 705 N.E.2d 649, 653–54 (N.Y. 1998) (adopting a tentative draft of section 4.8(3) after considering the "underlying policy" of state precedent).
7. Goodwin v. Johnson, 591 S.E.2d 34, 37, 39 (S.C. Ct. App. 2003) (adopting section 4.8(3) for easements not expressly granted).
8. Burkhart v. Lillehaug, 664 N.W.2d 41, 43–44 (S.D. 2003) (upholding trial court's application of section 4.8(3)).

Cases giving neutral treatment to section 4.8(3)

1. Carrollsburg v. Anderson, 791 A.2d 54, 63 (D.C. 2002) (finding same result under either majority rule or section 4.8(3)).
2. Wells v. Sanor, 151 S.W.3d 819, 823–24 (Ky. Ct. App. 2004) (citing to section 4.8(3) and explaining that Kentucky "follows . . . [the] minority position," which goes beyond a requirement of mutual consent).
3. Beattie v. State (*ex rel*. Grand River Dam Auth.), 41 P.3d 377, 391 n.41 (Okla. 2002) (Opala, J., concurring) (stating that section 4.8(3) will lend "conditional support" to the plaintiffs on remand).

Cases giving negative treatment to section 4.8(3)

1. Teitel v. Wal-Mart Stores, Inc., 287 F.Supp.2d 1268, 1276–77 (M.D. Ala. 2003) (declining as a federal court to follow the Restatement as contrary to state law).
2. Alligood v. LaSaracina, 999 A.2d 836, 839 (Conn. App. Ct. 2010) (discussing and declining to follow section 4.8(3), despite acknowledging the "increased flexibility" it offers).
3. Herren v. Pettengill, 538 S.E.2d 735, 736–37 (Ga. 2000) (discussing and declining to follow a tentative draft of section 4.8(3) because the majority rule better "promote[s] stability").
4. McColl v. Anderson, 567 S.E.2d 203, 206 (N.C. Ct. App. 2002) (declining to

consider section 4.8(3) in an interlocutory appeal as contrary to state law).

5. McNaughton Props., LP v. Barr, 981 A.2d 222, 229 (Pa. Super. Ct. 2009) (declining to adopt section 4.8(3) as it represents a "significant departure" from state law "best left to our Supreme Court or the Pennsylvania legislature").
6. Sweezey v. Neel, 904 A.2d 1050, 1058 (Vt. 2006) (rejecting adoption of section 4.8(3) after discussion of other states' decisions).
7. MacMeekin v. Low Income Hous. Inst., Inc., 45 P.3d 570, 579 (Wash. Ct. App. 2002) (refusing to adopt section 4.8(3) because state supreme court dicta indicates adherence to the majority rule).
8. AKG Real Estate, LLC v. Kosterman, 717 N.W.2d 835, 845 (Wis. 2006) (refusing to apply section 4.8(3) in order to "safeguard property rights").