Fall 2016

Fixing a Broken Common Law -- Has the Property Law of Easements and Covenants Been Reformed by a Restatement?

Ronald H. Rosenberg
William and Mary Law School

Follow this and additional works at: https://ir.law.fsu.edu/lr

Part of the Property Law and Real Estate Commons

Recommended Citation
https://ir.law.fsu.edu/lr/vol44/iss1/4

This Article is brought to you for free and open access by Scholarship Repository. It has been accepted for inclusion in Florida State University Law Review by an authorized editor of Scholarship Repository. For more information, please contact bkaplan@law.fsu.edu.
FIXING A BROKEN COMMON LAW—HAS THE PROPERTY LAW OF EASEMENTS AND COVENANTS BEEN REFORMED BY A RESTATEMENT?

RONALD H. ROSENBERG*

I. INTRODUCTION .................................................................................................. 144
   A. The Background and Utility of Land-Based Agreements .......................... 144
   B. The Growth of Common Law Rules for Servitudes and the Need for Reform................................................................. 145
   C. Developing the Restatement (Third) of Property: Servitudes .......... 149
   D. Making the 'Third Restatement a Reality' .............................................. 150
   E. What the Third Restatement Did ............................................................ 151

II. THE RECEPTION OF THE THIRD RESTATEMENT IN THE COURTS ...................... 153
   A. Research Design and Methodology............................................................ 154
      1. Building the Third Restatement Case Decision Database ............. 154
      2. Classification of the Judicial Reaction to the Third Restatement .... 156
      3. Explaining the Typology of 'Degree of Impact on Outcome' Classifications ................................................................. 157
   B. Assessing the Patterns in Judicial Opinions Discussing the Third Restatement............................................................................................... 159
      1. Identifying the Frequency and Distribution of Judicial Citation and the Discussion of the Third Restatement ....................... 159
      2. State and Regional Patterns in the Frequency of Case Decisions Citing the Third Restatement........................................... 162
      3. The Distribution of Case Decisions Reaching Different Levels of the Courts ................................................................. 163
      4. Description of Judicial Acceptance or Rejection of the Third Restatement in Reported Case Decisions ........................................... 164
      5. Comparisons of State Scaled-Score Averages Reflecting Judicial Reception of the Third Restatement in Reported Case Decisions....... 165
      6. Acceptance and Rejection of the Third Restatement at the Extremes 166
   C. Analysis of the Most Commonly Discussed Restatement Provisions .......... 167
      1. Section 4.1: “Interpretation of Servitudes” .......................................... 169
      2. Section 1.2: “Easement and Profit Defined” ........................................ 171
      3. Section 4.10: “Use Rights Conferred by a Servitude” ..................... 173
      4. Section 2.17: “Servitudes Created by Prescription” ........................... 175
      5. Section 4.8: “Location, Relocation, and Dimensions of a Servitude” .. 177
      6. Section 2.16: “Servitudes Created by Prescription: Prescriptive Use” 179
      7. Section 2.15: “Servitudes Created by Necessity” .............................. 181
      8. Section 4.9: “Servient Owner’s Right to Use Estate Burdened by a Servitude” ................................................................. 182
      9. Section 1.1: “Servitude Defined; Scope of Restatement” .................. 184
     10. Section 4.13: “Duties of Repair and Maintenance” .......................... 185
   D. Conclusions to Be Drawn from the Case Analysis .................................... 186

III. DID THE THIRD RESTATEMENT ACHIEVE ITS PURPOSE? ................................. 190

* Chancellor Professor of Law and Associate Dean for Graduate Programs, William and Mary Law School
I. INTRODUCTION

A. The Background and Utility of Land-Based Agreements

The Anglo-American common law of property has developed over many centuries creating legally-recognized private property rights that have become the background principles of land ownership and use. While numerous justifications have been given explaining or supporting the institution of private property,1 private ownership of land and buildings has become a fundamental element of the economic and social structure of American society as well as many others.2 Within the general concept of land ownership, many different, land-based legal ownership principles exist defining the existence and limits of private rights. One of the most practical and significant sets of these rules concerns the enforcement of private land use arrangements, otherwise known in the law as easements, real covenants, and equitable servitudes.3 The law relating to these non-possessory land rights forms an important cornerstone of American real estate law and has been of great practical significance to land owners and developers, securing “economic, aesthetic, and personal advantages to the owners . . . of land.”4 Having a lengthy pedigree reaching back to early English and Roman law,5 these common law doctrines have been adopted in every American state and have been found to be extremely useful in facilitating modern land development for a range of purposes in residential, commercial, and other contexts.6 Represent-

3. The English courts had recognized four variations of these private land-based agreements: easements, profits á prendre, real covenants, and equitable servitudes. For purposes of this discussion, easements and profits á prendre will be considered together since they both possess similar doctrinal features.
6. Professor Gerald Kornegold has noted: “Developers use easements, real covenants, and equitable servitudes to increase efficient use of land, create neighborhood ambience, foster cooperation and dispute resolution among neighbors, and enhance personal satisfaction of owners. Residential subdivision developments typically grant the owners rights in common areas, restrict the construction and uses of the lots, require payment of maintenance assessments from the owners, and so create a private government of owners to enforce and supervise the residential plan. Easements and covenants are used in shopping centers and industrial and office parks to restrict business operations, control construction,
ing potentially permanent property rights binding successive owners and not bilateral contracts only linking two bargaining parties, servitudes have become vital property interests establishing rights and duties that, when properly formed, can have powerful effects on the ownership and use of land. The significance of these common, law-created land ownership rights cannot be overstated.

B. The Growth of Common Law Rules for Servitudes and the Need for Reform

The law related to these land-based rights has developed largely as judge-made legal principles, finding their main doctrinal focus in nineteenth- and twentieth-century English and American case decisions. Although many practical overlaps exist between these three devices, the common law case development has treated them as distinct legal categories possessing different doctrinal elements. With these theoretical differences applying to functionally-equivalent land interests, some judicial and academic commentators have expressed their frustration with the incoherence of the legal doctrine and requested clarification and simplification in order to improve their utility. One such mid-century critic, Charles E. Clark, a twentieth-century scholar and federal judge, found that “no consistent body of legal principles has developed with respect to them; and the applicable rules of law, both anciently and now, are confused and diverse.”

create reciprocal rights, and allocate expenses for commonly shared facilities . . . and maintenance.” GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 1.01 at 1-2 (1990); see also French, Toward a Modern Law, supra note 4, at 1263-64.


8. As noted by Professor Susan F. French, the Reporter for the Third Restatement of the Law of Property (Servitudes): “Easements, covenants and equitable servitudes serve the same general purpose—they create rights, obligations and restrictions affecting ownership, occupancy and use of land. However, each has a distinct set of rules governing its formation and application. Why the common law developed three doctrinally separate devices to accomplish similar and overlapping functions is a matter of history rather than of logic or necessity.” French, Toward a Modern Law, supra note 4, at 1264.

9. Academic writing has criticized the incoherence of this area of law with striking language. See Jan Z. Krasnowiecki, Townhouses with Homes Associations: A New Perspective, 123 U. PA. L. REV. 711, 717 (1975) (“Unfortunately, the law that relates to affirmative covenants presents the ordinary mortal with one of the most confounding intellectual experiences he can suffer.”). Even Professor French found this confusing when teaching the subject to law students. See Susan F. French, Comment, The Touch and Concern Doctrine and the Restatement (Third) of Servitudes: A Tribute to Lawrence E. Berger, 77 NEB. L. REV. 653, 656 (1998) (describing her first time teaching real covenants and equitable servitudes as being a “nightmare”).

He concluded that “[c]onfusion results from the fact that essentially the same interest may be treated under some circumstances as any one of these things.”

Beyond doctrinal confusion, antiquated terminology as well as inadequate or unexpressed policy justifications limited the modern utility of these devices in the nineteenth and early twentieth centuries. Some case precedent actually discouraged the use of servitudes by reinforcing doctrinal barriers that barred certain useful techniques.

Started in 1923, the American Law Institute (ALI) embarked on its essential project to “restate” the law in volumes of thoughtfully-prepared description. A first Restatement of Property effort was undertaken in 1927, where the plan was to restate the existing common law in an “orderly statement.” Emphasizing clarity of terminology and uniformity of principles, its main function was to be a unified description of existing rules with limited advocacy of doctrin

11. Id. at 5. Judge Clark’s effort to clarify and improve the law by writing persuasive books was apparently met with only limited success. Professor Myres S. McDougal, in his review of Clark’s second edition, finds “continued confusion” and “unslaked bewilderment in judicial opinion and decision” of the area reinforced by a failed Restatement (First) of Property: Servitudes that was issued in 1936-1940. Myres S. McDougal, Book Review, 58 YALE L.J. 500, 501 (1949). Academic critique of this area of law continued for several decades. See Edward H. Rabin, Fundamentals of Modern Real Property Law 489 (1974) (calling post-1930s First Restatement servitude law an “unspeakable quagmire”).


14. The establishment of the American Law Institute in 1923 was heralded as “an effort to unite elite practitioners and professors in the cause of a particular sort of law ‘reform,’ namely the overhauling of the corpus of common law subjects to respond to the perceived problems of ‘uncertainty’ and ‘complexity.’” G. Edward White, The American Law Institute and the Triumph of Modernist Jurisprudence, 15 LAW & HIST. REV. 1, 29 (1997).

15. RESTATEMENT (FIRST) OF PROP. Vol. I, intro. at viii-ix (AM. LAW INST. 1936). The reporters for each of the five volumes represented the academic luminaries of their day including Harry Bigelow (University of Chicago), Richard Powell (Columbia Law School), James Casner (Harvard Law School), Barton Leach (Harvard Law School), and Oliver S. Rundell (University of Wisconsin). Professor Rundell was responsible for the fifth and final volume on servitudes. Id. at x, xii; Vol. III at v, Vol. IV at v-vi; Vol. V at v.

16. The ALI Restatement project also emphasized a more scientific view of the law, using a more precise language of the law. Employing the Hohfeldian classification terminology of “right, privilege, power, and immunity,” to describe fundamental legal concepts, the First Restatement of Property attempted to use this phrasing to establish a uniform system of legal concepts or classifications. See White, supra note 14, at 30.
nal reform. The drafting committee completed its work with a five volume treatise, including servitudes, in 1944. Coming on the heels of the First Restatement of Property, which had generally reinforced existing practices and failed to revitalize or reform the state of the law, some commentators expressed dissatisfaction with such a limited approach. Judge Clark’s book—Real Covenants and Other Interests Which Run with the Land—stated a stronger view that demanded a strategic overhaul of the existing legal regime. He was not alone. In the post-war era, criticism of the prevailing legal structure mounted, yet state legislatures and state courts did little toward accomplishing systematic and comprehensive reform.

17. A contemporaneous review described the First Restatement in the following terms: “[It] is not only an accurate, clear and succinct presentation of the common law, as it exists in the United States today, but in addition, statutory changes have been considered and the law under existing statutes stated. . . . Where uniformity among the decisions does not exist, the conflicting rules are stated and the reasons in support thereof are considered. Unless the authorities in support of a rule are too imposing, the rule most consonant with reason is adopted.” Louis S. Herrink, Book Review, 23 VA. L. REV. 742, 742-43 (1937). This limited law reform attitude focused more on unification of the law than advocacy or reform of the law into new patterns.

18. The First Restatement functioned as a clear declaration of American property law with citations to case decisions in the West reporter system and to law review articles that had cited previous drafts of the Restatement. Some contemporaneous commentators approved of the form and substance of the Restatement. See, e.g., George F. James, Book Review, 47 YALE L.J. 1238, 1241 (1938) (“[The first two volumes] are clear, well organized, well indexed and highly usable.”); John P. Maloney, Book Review, 12 ST. JOHN’S L. REV. 1, 21 (1937) (“The Restatement . . . is the most scientific system, from the standpoint of arrangement and classification of the common law of property, that we know of. . . . [I]t is apparent that a real contribution to the science of law will have been made when the entire field will have been covered.”); Merrill I. Schnebly, Book Review, 37 COLUM. L. REV. 881, 881 (1937) (“The Hohfeldian system of legal terminology is incorporated in toto. In general, the adoption of this terminology is to be commended, for in the field of property law especially it conduces to accuracy and clarity of expression.”).

19. Tarlock, supra note 13, at 806 (viewing the First Restatement as a “failed reform exercise” taking a “dim view of covenants running with the land”). Professor Tarlock noted further that due to its restrictive attitude regarding the running of affirmative covenants, the Restatement was “largely ignored by [the] courts. . . never enjoy[ing] the prestige of the Restatements of Contracts and Torts and consequently, never becom[ing] an important source of doctrinal reform.” Id.

20. See generally CLARK, supra note 10.

21. Percy Bordwell, Book Review, 51 HARV. L. REV. 565, 566 (1938) (“Not content with its new-found independence, [in summarizing English common law principles but providing a more modern American view,] however, the [ALI] seems to have gone wild.”); Myres S. McDougal, Book Review, 32 ILL. L. REV. 509, 513 (1937) (“To assume that the judicial handling of property problems in contemporary America can be made more predictable by an authoritative canonization and rationalization of ancient, feudal-conditioned concepts . . . is little short of fantastic.”); Schnebly, supra note 18, at 881 (“In some instances . . . rigid adherence to a scheme of scientific organization has impaired the practical value of the work.”); William R. Vance, Book Review, 86 U. PA. L. REV. 173, 178 (1937) (“The plan of the Restatement is based upon the misconception that ‘the law’ is static and capable of formulary statement; that it is subject to still photography.”).

22. See French, Toward a Modern Law, supra note 4, at 1262 n.3 (listing critical scholarship both pre- and post-1950).
in dealing with these problems should not be surprising, since revision of this complex area of the law would require a comprehensive adjustment to centuries of common law judicial opinions. This would not be possible through the usual method of case-by-case lawmaking. The ALI did undertake a second Restatement of Property, but it was focused on landlord/tenant law in the 1970s and on donative transfers in the 1990s and 2000s. Neither project reconsidered the topic of servitudes nor many of the other subjects contained in the First Restatement. Rather than merely describing the state of the law, the Second Restatement affirmatively advocated new legal and policy positions and guiding concepts that were advanced to shape the future course of the law.

The confusing condition of the common law of servitudes remained as a subject for future attention by the ALI. Ultimately, what was believed to be necessary was a detailed and comprehensive blueprint for the revision of state law; yet none would be forthcoming until 2000, when the Third Restatement was published in final form. Curiously, the use of privately-developed land use arrangements—often termed covenants, conditions, and restrictions (CC&Rs)—actually gained momentum in the post-World War II period, and these devices were increasingly employed to create a private governing structure

23. Professor Horwitz captured the sense of gradual evolution in the common law when he wrote that, “[c]hange in common law doctrine . . . is rarely abrupt, especially when a major transformation in the meaning of property is involved. Common lawyers are more comfortable with a process of gradually giving new meanings to old formulas than with explicitly casting the old doctrines aside. Thus, it is not surprising that, in periods of great conceptual tension, there emerges a treatise writer who tries to smooth over existing stresses in the law. Some such writers try to nudge legal doctrine forward by extracting from the existing conflict principles that are implicit but have not yet been expressed.” MORTON J. HORWITZ, THE TRANSFORMATION OF AMERICAN LAW, 1780-1860 38 (1979).


26. As Professor Lance Liebman, then the director of the ALI, wrote in 2000, “The underlying law is largely judge-made. Doctrine varies around the country. Few scholars, practitioners, or judges have had the incentive to propose coherent and policy-based reform.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES, Foreward at X (AM. LAW INST. 2000).
for residential communities in the form of homeowner associations in subdivisions and condominium projects. Courts found creative ways to permit these emerging practices, often struggling against the weight of existing legal doctrine.

C. Developing the Restatement (Third) of Property: Servitudes

Nearly four decades after the publication of the First Restatement, Professor Susan F. French confronted the complex issue of comprehensive servitude doctrinal revision in her academic scholarship. She published a highly significant law review article that proposed a simplification for the law of servitudes and set forth the outlines of broad doctrinal modernization that would “provide significant benefits to both the public and the legal profession.” While many law scholars critique specific aspects of existing legal doctrine in their work, few attempt to propose a comprehensive reform to a large, traditional area of the law. However, Professor French chose that formidable task. In the spring of 1986, several years after her earlier law review work, she was appointed to serve as the Reporter for the ALI’s Restatement (Third) of Property: Servitudes.

A year later, she announced the outlines of a proposal for a general doctrinal revision regarding land-based servitudes that consolidated the common law variants into one unified legal concept called

---

28. Stoebuck & Whitman, supra note 1, at 513-14. Professors Stoebuck and Whitman described these innovative, yet supportive, decisions to be “second-generation” cases which might “invite[] speculation as to its theoretical base.” Id. at 513. Reflecting realistically on judicial motivations they wrote: “Whether one wants to label this reasoning a departure from traditional running covenant theory or simply the appending of other doctrines to such theory, it opens up a new dimension for subdivision restrictions. Clearly, here is another case in which American courts are persuaded of the socioeconomic utility of private land use controls.” Id. at 514.
29. French, Toward a Modern Law, supra note 4, at 1265. Professor French’s article was part of an impressive array of legal scholarship published in this law review issue, including pieces authored by Curtis J. Berger, Lawrence Berger, Allison Dunham, Richard A. Epstein, Bernard E. Jacob, Carol M. Rose, and Michael F. Sturley. In part III, Professor French provided “Outlines of a Modern Law of Servitudes” that established the groundwork for her later draft of the Restatement (Third) of Property: Servitudes. Id. at 1304-18. Other articles on this issue also recommended a comprehensive revision to the law of servitudes.
30. After a Reporter is designated, that person is responsible for “shaping the Restatement’s form and content.” See 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) [hereinafter French, Servitudes Reform]. The ALI requires the submission of drafts to advisors followed by approval by both the ALI Council and general membership. Once approved by the membership, the draft becomes a “Restatement.” Id.
the “servitude.” The 1988 U.C. Davis Law Review article detailed a specific design proposal for a new Restatement of the Law of Property that was later implemented as the ALI’s Restatement (Third) of Property: Servitudes. This “modern integrated body of law” would apply consistent legal doctrine except when “real differences” would reasonably require a different result. Seeing their utility in the contemporary world, Professor French expressed a tolerant attitude towards the creation of servitudes so long as they “do not run afoul of constitutional, statutory, or public policy norms.” Sensitive to the potential for the gradual deterioration in the social utility of land servitudes over time, she planned for a termination feature when they would become “obsolete or unduly burdensome.” In essence, Professor French’s article proposed an overarching reconsideration of American servitude law “to meet the needs of the twenty-first century.” With this scholarly foundation, the ALI was presented with a new project that would express and clarify this important yet confusing area of the common law. In addition, it would suggest new principles for the law to adopt that would not only clarify the law but would advance certain normative goals that were deemed desirable to the drafters.

D. Making the Third Restatement a Reality

Work on the initial draft of the Third Restatement began in 1987 and concluded with the ALI’s publication of the final version in May, 2000. Professor Susan F. French chaired the effort, and she was assisted by advisors and a Members Consultative Group that worked
on the project over this thirteen-year period. There were numerous public discussions of the developing *Restatement* tentative drafts at annual ALI meetings at various points during this period. During these sessions, Professor French responded to questions regarding the developing draft in a fashion similar to a legislative counsel during the mark-up of pending legislation. The final version of the new *Restatement* was contained in two volumes covering nearly 1375 pages of text and structured with principles, explanatory comments, illustrations, statutory notes, and detailed reporter’s notes. These volumes represented a prodigious amount of careful thought and hard work spanning over more than a decade.

**E. What the Third Restatement Did**

The *Restatement* undertook a task that went far beyond merely restating or simplifying existing law. The work introduced new legal concepts that built on existing doctrine, and it stated a clearer normative policy that actually attempted to reform the law. The new *Restatement* was composed of eight chapters, each with numerous definition and explanatory subsections. This new approach to land-based servitudes contained a number of central goals to revamp the existing legal structure. First, it attempted to streamline the law of servitudes by eliminating the independent doctrinal categories for easements, profits, and covenants. Instead, the *Restatement* treated them “as different types of servitudes governed by a single body of law.” This unification was intended to rationalize the demands of


42. *See Restatement (Third) of Prop.: Servitudes (Am. Law Inst. 2000).*

43. The precise purpose of the Restatement process has been subject to differing points of view. A traditional approach contained in the original charter of the ALI viewed the Restatement as a device “to promote the clarification and simplification of the law” in an effort to assist practitioners and jurists. See Kathryn N. Fine, *The Corporate Governance Debate and the ALI Proposals: Reform or Restatement?*, 40 VAND. L. REV. 693, 694 (1987) (quoting Melvin Aron Eisenberg, *An Introduction to the American Law Institute’s Corporate Governance Project*, 52 GEO. WASH. L. REV. 495, 495 (1984)). An alternative outlook considered the Restatement as a process of law reform that would seek to make law function more efficiently and also to achieve different policy goals. See Charles Hansen et al., *The Role of Disinterested Directors in “Conflict” Transactions: The ALI Corporate Governance Project and Existing Law*, 45 BUS. LAW. 2083, 2083-84 (1990). In this light, a Restatement could be offered to the courts as a thoughtful way to change existing law in a more normative way.

doctrine, preserving differences only when they could be justified within the general theoretical framework. Second, the *Restatement* reduced the number of subcategories of servitudes to three: profits, easements, and covenants. This simplification eliminated terminology such as negative easements, equitable servitudes, easements by estoppel, and executed parol licenses in an effort to reduce confusion and unnecessary legal complexity. The law of servitudes had been “encrusted” by many different descriptive terms for servitudes that had increased the confusion of lawyers as well as judges. Third, the *Restatement* advanced a number of definitional and interpretive rules for servitudes drafted by parties employing written documents. These principles emphasized a range of ideas that would support servitudes. These ideas included effectuating a party’s intentions, presuming the validity of servitudes if the purpose was not illegal as in the case of servitudes that were unconstitutional or contrary to public policy, generally running servitudes’ benefits and burdens to bind successors, and enforcing servitudes by any beneficiary through appropriate legal and equitable remedies.

Fourth, the *Restatement* eliminated, or reformulated, a number of traditional doctrinal elements of servitudes that were believed to “no longer serve useful functions or [to] unnecessarily interfere with legitimate servitude uses [it] made possible.” Many of these features had remained in the common law despite the fact that they were poorly understood by property owners and by judges alike. In addition, the policy basis for some of these legal provisions was murky or, at best, outdated. Some of these confusing theoretical elements were legal rules imposing a number of crucial technical requirements. These included requiring vertical and horizontal privity between parties as a predicate for enforcement, common law principles imposing limits on affirmative covenant burdens, the running of benefits

---


47. *Restatement (Third) of Prop.: Servitudes* § 3.1 (Am. Law Inst. 2000). This section emphasized the general freedom of parties to contract land servitudes and placed the burden on challengers to establish that the servitude violates the terms of section 3.1. It also provided an extended explanation of the public policy limitation.

48. French, *Highlights*, supra note 36, at 228-29. The *Restatement* attempts to improve judicial tools for managing servitudes by “giv[ing] courts better tools for maintaining the viability of servitude arrangements over time and for terminating those which have become obsolete or unduly burdensome.” French, *Tradition*, supra note 40, at 129.


51. *Id.* §§ 3.1, 7.12.
in gross,\textsuperscript{52} and the enforcement powers of third party beneficiaries of covenants.\textsuperscript{53} Perhaps the most striking reform was the elimination of the traditional real covenant element that to be enforceable by successors, a promise had to “touch or concern” the land.\textsuperscript{54} This powerful and longstanding doctrinal requirement\textsuperscript{55} had given courts the authority to refuse to enforce a variety of existing covenants, often based on the judicial conclusion that the promise in question failed to “touch or concern” the land. These legal conclusions negated land-based agreements often without acknowledging the significant considerations leading to that result.\textsuperscript{56} Not surprisingly, this provision has challenged traditional judicial power and has garnered a mixed review from some academic commentators.\textsuperscript{57}

\section*{II. The Reception of the \textit{Third Restatement} in the Courts}

The principal question raised by this Article is how has the \textit{Third Restatement} actually affected the law of servitudes in the United States? In the fifteen years following the publication of this updated view of private land arrangements, American courts and litigants have had the opportunity to consider the \textit{Third Restatement} as a new way of addressing the creation, interpretation, and enforcement of easements, real covenants, and equitable servitudes. During this period, advocates could have employed the \textit{Third Restatement} to frame or bolster their legal arguments. Judges, on the other hand, could have relied on this work in the texts of their opinions to support aspects of their case decisions. While it is also possible that the \textit{Third Restatement} could have affected the law in less direct ways, it is the judicial reception and case-by-case application of its provisions that are the central foci of this research. This Article examines how the \textit{Third Restatement} has influenced the development of the American law of servitudes in state and federal court decisions since its final adoption by the ALI in 2000. With the recent announcement of a comprehensive Fourth Property Restatement project in 2015, the re-
results of this research could help to inform the drafters of this new work about the judicial receptiveness of the servitude concepts contained in the Third Restatement.58

Section II.A. of this Article outlines the research methodology employed for the collection and analysis of the reported case decisions for the period under review. The study period spans fifteen years, from 2000 through the end of 2014. This part also describes the classification scheme used in this study to analyze and categorize the way each case discussed and utilized the Third Restatement in reaching its decision. Section II.B. describes the patterns in judicial decisions mentioning the Third Restatement since 2000. This part has both quantitative and qualitative aspects. It contains three components: 1) Identifying the frequency and distribution of judicial citation and discussion of Restatement provisions, 2) Categorizing the character of the judicial discussion according to a series of classifications describing the courts’ use of the Restatement, and 3) Analyzing which parts of the Restatement have received the most and the least judicial attention. Finally, Section III of the Article addresses a number of related issues. Has the Restatement actually accomplished the goals that its drafters sought to achieve? Has the Restatement been an effective agent of law reform affecting this area of the common law? Is there something exceptional about the common law of property that makes it resistant to overarching reform through Restatements? Has the Restatement been effective in other less measurable ways in changing the thinking of practitioners, scholars, and students in their approach to the common law of servitudes?

A. Research Design and Methodology

1. Building the Third Restatement Case Decision Database

The main purpose of this research project has been to determine the extent to which courts have used the Restatement (Third) of Property: Servitudes in their case decisionmaking. To achieve this goal, the project attempted to identify all reported case decisions published in both state and federal courts mentioning the Third Re-

58. With Professor Henry E. Smith of the Harvard Law School as the Reporter, the ALI announced this new Restatement project early in 2015. The purpose of the new undertaking was described in the following way: “This Restatement seeks to bring comprehensiveness and coherence to American property law. Subjects to be covered include the classification of entitlements, possession, accession, and acquisition; ownership powers; protection of and limits on ownership; divided and shared ownership; title and transfer; easements, servitudes, and land use; and public rights and takings.” Am. L. Inst., Restatement of the Law Fourth, Property, https://www.ali.org/projects/show/property/ [https://perma.cc/FH5Q-A3JF]. The breadth of this project is quite broad, and its coverage includes “easements and servitudes.” See id.
statement since its final adoption in 2000. The Westlaw electronic case law database was utilized to identify these case decisions using the words “Restatement,” “Third,” “Property,” and “Servitudes.” Once a relevant case was identified and its text was collected using the Westlaw search method, it was added to the project’s chronologically organized database. Each of the decisions in the database was then analyzed for references to the Restatement within the factual context of the case. This information about the Restatement was then entered into an Excel spreadsheet. If a court discussed more than one Restatement section in a single case, separate entries were entered for each section, resulting in some cases having multiple entries on the spreadsheet. This method allowed for a greater understanding of how courts treated different Restatement sections in one opinion.

To ensure the accuracy and completeness of this survey and to have a high confidence that all reported cases were included in the study’s database, cross-checking methods were employed. In order to ensure the accuracy and completeness of the case collection method described above, alternative search queries and search methods were employed in order to locate additional cases referencing the Restatement (Third) of Property: Servitudes. Also, other annotated sources were consulted to assure that no relevant case decisions were missed. In addition, the categorization of the judicial use of the Third Restatement was also cross-checked after initial processing in an effort to ensure consistency in the case classifications. The goal of this

59. The research also collected a limited number of case decisions (fifty-three) prior to 2000, which cited early drafts of the Restatement in judicial opinions. These decisions represented approximately 5% of the total number of opinions located and represented four decisions per year. The peak year of pre-2000 federal decisions mentioning the Restatement was 1998 when thirty-three decisions, or 60% of the total, were rendered.

60. The Westlaw research query was “Advanced: (Restatement /s Third /s Property /s Servitude).”

61. The collected data from each case included: 1) The case name and full citation, 2) The case factual summary, 3) The state in which the case arose, 4) The level of the court deciding the case, 5) The section of the Restatement the court discussed, 6) Whether the court’s treatment of the Restatement was positive, negative, or neutral, 7) Whether the Restatement affected the outcome, and 8) Whether other cases were referenced by the court that used the Restatement.

62. In order to ensure the accuracy and completeness of the principal case collection method, alternative search queries and search methods were employed in order to locate cases referencing the Restatement (Third) of Property: Servitudes that had been missed. These methods included: 1) Using the search query “Restatement /s Property,” and searching for any case using the “Third Restatement of Property (Servitudes),” and 2) Browsing the sections of the Third Restatement on Westlaw, and comparing the citations with cases on the existing database. These methods identified a small number of cases that had been omitted by the original search inquiry. These additional cases were added to the existing Excel spreadsheet and analyzed using the same method described in footnote 61.

63. To ensure consistency in the case classifications, multiple reviewers classified the database of case decisions. This cross-check occasionally revealed inconsistencies in some of
collection and analytical process was to compile an accurate list of case decisions throughout the state and federal courts in the United States during the research period.

2. Classification of the Judicial Reaction to the Third Restatement

Once the case decisions mentioning the Third Restatement were assembled into a chronological database, each case was analyzed and an assessment was made as to how the Third Restatement had been considered by the reviewing court. All cases were classified on the basis of the court’s use and reliance upon the Third Restatement in reaching its decision. This was described as the ‘degree of impact’ that the Third Restatement had on the case decision. The classifiers were spread over six levels in a spectrum spanning from negative treatment, to neutral/no effect, to positive treatment. These assigned classifications attempted to describe the degree of impact that the Third Restatement had on the reasoning and the outcome of the case. These six classifications are as follows:

Six identifiers were attached to describe this range of effects in the following pattern:

Negative Classifications:

1. The Court Expressly Declined to Adopt the Third Restatement (Declined to adopt)
2. The Court Distinguished the Third Restatement from Prevailing Law (Distinguished)

Neutral Classifications:

3. The Third Restatement Had No Positive or Negative Effect on the Decision (No effect)

Positive Classifications:

4. The Third Restatement Had a Small Effect on the Decision (Small effect)
5. The Third Restatement Had an Influential Effect on the Decision (Influential effect)
6. The Court Relied Heavily on the Text of the Third Restatement in Its Decision (Heavy reliance / Great effect)

the case classification results. In these situations, the researchers conducted more checks to determine the most appropriate case classification. When the cross-checker and the original researcher agreed and came to the same designation, the designation was left as it was. However, if the cross-checking researcher disagreed, a third researcher, who had not previously reviewed the case decision, then acted as a tie-breaker. In most cases, the differences in classification only involved adjacent scores on a five-point scale.
In the section below, these six case classifications will be defined with examples provided from a representative sample of case decisions to illustrate each of the identifying labels.

3. Explaining the Typology of ‘Degree of Impact on Outcome’ Classifications

Categorizing the effect of the Restatement on the identified cases required that each decision be evaluated with an eye to gauging the significance of the Restatement on the holding in the case. An individual assessment of the amount of effect was made in each case to determine the influence of the Restatement on the outcome. A serious effort was made to achieve substantial consistency across the large number of case decisions under review.

Negative Classifications

1. Declined to adopt: This is the most negative designation applied to a case decision. When this identifier is used, the court actually employs the terms “we decline to adopt” or “we decline to follow,” or something similar, with reference to the Third Restatement. This category requires an express and otherwise clear rejection of the Restatement or a Restatement section in the text of the case decision. Courts may state that the Third Restatement “does not conform” with the law of the jurisdiction.\(^{64}\) The depth or complexity of treatment does not matter so long as the court ultimately rejects the Restatement in its holding.\(^{65}\)

2. Distinguished: This classification applies when a judicial opinion chose not to apply a Restatement section to decide the case. This label applies when a court decided that the Restatement approach was not applicable to the matter before it but did not expressly reject it as a matter of law.\(^{66}\)


Neutral Classification

3. **No effect:** The portion of the opinion citing the *Restatement* section has neither a positive nor a negative effect on the outcome of the case.\(^{67}\) For instance, this can happen if a court relies on another legal authority in deciding a case. Alternatively, this classification applies when a court has cited the *Restatement* section in either a portion of the dissenting or concurring opinion but not the main opinion in the case.\(^{68}\) For example, an appellate court might mention the *Restatement* section, but note that the parties did not make an argument relevant to that *Restatement* section.\(^{69}\) It also applies when a court finds the *Restatement* provision to be irrelevant to the controversy at hand.\(^{70}\)

Positive Classifications

4. **Small effect:** The court mentions the *Restatement* section only in passing. This label applies when a court directly cites the *Restatement*, but the influence of the section is so minor that it does not have a substantial effect on the case. This might occur when a court briefly mentions the *Restatement* while explaining a general theory of property law, quotes from the text, or discusses it in the context of existing case law. If a source materially affects the outcome of the case, it cannot be given the small effect designation.\(^{71}\)

5. **Influential effect:** The court opinion uses the *Restatement* section to reach a conclusion, but the judicial opinion lacks an extended doctrinal discussion concerning the application of the *Restatement*. This is the most difficult category of cases to define, but the general rule is that it provides a middle ground between the ‘small effect’ and ‘heavy reliance’ positive classifications. The designation applies when the *Restatement* influences the overall outcome of the case. However, for a case to be classified as ‘influential’ (as opposed to a ‘heavy reliance’ case), the court will not have solely analyzed the case through the *Restatement*, and may have otherwise failed to discuss the doctrine behind the *Restatement* section with

---

\(^{67}\) First Unitarian Church of Salt Lake City v. Salt Lake City Corp., 308 F.3d 1114, 1133-34 (10th Cir. 2002).


depth. Cases receiving the influential designation may involve multiple citations to the same section, or long, extensive quotes.  

6. Heavy reliance / Great effect: The cited section of the Restatement heavily influences the holding of the case, with the court engaging in an extended doctrinal discussion interpreting or rejecting existing law in favor of the Restatement position. The ‘heavy reliance’ identifier occurs when a court clearly relies on the Restatement to make its decision. This can happen when the court expressly adopts the section or discusses the Restatement in depth. However, a court need not expressly adopt the Restatement in order for the case to receive the heavy reliance label. Cases may include lengthy quotes, examples, or long discussions of the Restatement.

It should be noted that the actual difference between ‘small,’ ‘influential,’ and ‘great effect’ was often a matter of degree turning on small differences in the weighting of these definitions.

B. Assessing the Patterns in Judicial Opinions Discussing the Third Restatement

1. Identifying the Frequency and Distribution of Judicial Citation and the Discussion of the Third Restatement

The database of case decisions making reference to the Third Restatement focused on the period from 2000 to 2014, since the Restatement was issued in final form in the year 2000. During this period of time, there were a total of 1013 specific references to sections of the Third Restatement in 608 case decisions in both state and federal courts.

---


The higher number of references or mentions in cases reflects the fact that a single case might cite different sections of the Third Restatement and be counted multiple times. Judicial opinions written prior to 2000 referring to prior tentative drafts were not considered in the analysis because these drafts contained some different textual provisions from the final draft.\(^ {75}\) Analyzing the comprehensive number of 1013 mentions, it is not surprising that state court decisions dominate the database, comprising nearly 90% of the references to the Third Restatement. Most property law litigation is conducted in general jurisdiction state courts, and the development of property law rules occurs there with the federal courts playing a distinctly secondary role in applying state law to the cases before them. As a result, the federal courts play a much smaller role in deciding common law property disputes. As a reflection of this, during this fifteen-year review period, there was a total of only 121 references to the Third Restatement\(^ {76}\) in 72 federal court decisions at all levels of the

\(^{75}\) During the eight-year period from 1992-1999 when tentative drafts of the Restatement were published and circulated to the bench and bar, there were fifty-three court references to the draft or tentative Restatement appearing in an additional thirty-three court opinions that were most frequently found in state court cases. Adding these pre-2000 references to the post-2000 mentions raises the number of case mentions of the Third Restatement to a total of 1066 references over the entire twenty-three-year period.

\(^{76}\) The federal court opinions were found in a variety of federal courts including the U.S. District Courts, the U.S. Courts of Appeals, the U.S. Claims Courts, the U.S. Bankruptcy Courts, and the U.S. Supreme Court. All of the U.S. Courts of Appeals were represented on this list except for the Second Circuit. Ninety-seven of the references came from decisions within the continental United States. The remaining twenty-four references were found in opinions of federal courts in two U.S. territories—the Virgin Islands and the Northern Mariana Islands. This large number of Restatement references in the U.S. Virgin Islands and the Northern Mariana Islands is largely attributable to local statutes making...
federal system—representing slightly less than 12% of the total number of case decisions and references in the database.\textsuperscript{77}

While analyzing the period commencing in 2000, when the \textit{Third Restatement} was issued in its final form, the overall frequency of the 1013 case mentions represents an annual average 67.5 case references in 40.5 case decisions per year. However, when this time period is divided into three five-year segments the number of annual references gradually increased from 47.6 to 79.4. Applying this three-part approach to the measurement of case decisions, the annual average rose from 25.4 to 51.4 over the fifteen-year period, indicating an increasing frequency of \textit{Third Restatement} references by courts over time.\textsuperscript{78} Considering the large and consistent volume of state and federal court decisions involving all aspects of easements, real covenants, and equitable servitudes, identifying approximately sixty-seven annual case references to the \textit{Third Restatement} does not appear to reflect a high degree of judicial attention. Put into closer perspective, this annual average represents approximately 1.2 case decisions in all state and federal courts at all levels of the judicial system. Although the frequency in case mentions of the \textit{Third Restatement} has recently seen a slight uptick in the number of case references each year, it is fair to say that the overall impact of the \textit{Restatement} has been modest, at best.\textsuperscript{79} While this new approach to servitudes

\textsuperscript{77} The federal cases were both diversity and non-diversity jurisdiction cases. For diversity of citizenship jurisdiction cases see, for example, Winn-Dixie Stores, Inc. v. Dolgencorp, LLC, 746 F.3d 1008, 1031-33 (11th Cir. 2014); Samuel C. Johnson 1988 Tr. v. Bayfield Cty., 649 F.3d 799, 803 (7th Cir. 2011); Dunellen, LLC v. Getty Props. Corp., 567 F.3d 35, 38-39 (1st Cir. 2009); Eastling v. BP Prods. N. Am., Inc., 578 F.3d 831, 837-38 n.4 (8th Cir. 2009); \textit{Weyerhaeuser Co.}, 510 F.3d at 1264-65.

\textsuperscript{78} Over the period from 2000-2014, the annual average of \textit{Third Restatement} case references was 67.5. However, during the five-year period from 2000-2004, the annual average was 47.6; from 2005-2009 it was 74.8; and from 2010-2014 it rose to 79.4. There was one aberrational year with extremely high \textit{Restatement} references: in 2012 when there was a spike of 123 separate mentions appearing in sixty-seven case decisions.

\textsuperscript{79} Placed into the larger context of the total number of reported and unreported state court decisions, an annual average of 40.5 cases mentioning the \textit{Third Restatement} represents a drop in the bucket, and a minute drop at that. Searching all cases in LexisNexis for all state and the District of Columbia decisions, the annual total of reported and unreported opinions was approximately 206,000 in 2005, 202,000 in 2010, and 185,000 in 2014. These totals did not include any federal opinions. Over this same time period, the annual number of case references to the \textit{Third Restatement} averaged sixty-seven, representing approximately forty reported case decisions each year. These forty opinions and sixty-seven case mentions constitute a tiny fraction of the hundreds of thousands of reported American decisions.
may have been considered by courts in unreported case decisions and in legal arguments, it is also true that American courts have chosen not to refer to the text of the *Third Restatement* to a significant degree in the fifteen years since its final issuance in 2000.

2. **State and Regional Patterns in the Frequency of Case Decisions Citing the Third Restatement**

![Map of the United States](image)

In the fifteen-year period under review, all state court systems, excluding Louisiana, have mentioned the *Third Restatement* in at least one of their published opinions. Over the study period, state court systems, on average, produced 18.5 opinions mentioning the *Third Restatement*. While reference of the *Third Restatement* was widespread, several states had unusually high numbers of case references to the *Restatement*. The top ten list of such states included Connecticut (88), Colorado (84), Arizona (64), Massachusetts (61), New Jersey (54), New Mexico (38), Texas (38), Washington (36), Wisconsin (34), and Alaska (28). This disparate group of ten states produced over half of all the court opinions mentioning the *Third Restatement*.

Focusing solely on national litigation averages may understate the actual effect of the *Third Restatement* on the law of individual states or regional groups of states. Although there was no general regional pattern in the case references observed, there did seem to be a ‘nearby-state’ phenomenon that manifested a relatively high number of
references in four clusters of states. It is possible that litigators in these clustered areas employed the *Third Restatement* in their court briefs and oral arguments. Judges in adjacent jurisdictions may also have been aware of adjoining state case decisions, and they may have incorporated some of the reasoning found in out-of-state cases into their own decisions. Still, all of the remaining forty states tallied twenty-five or fewer court references to the *Third Restatement* over the fifteen-year study period, with thirty-one of these states scoring fifteen or fewer examples. The overall pattern emerging from this data indicates that the bulk of the references to the *Third Restatement* have been concentrated in a limited number of jurisdictions, that most state and federal courts have made fleeting reference to it, and that they have not incorporated it into their decisions.

3. The Distribution of Case Decisions Reaching Different Levels of the Courts

Another important aspect of the analysis has been an examination of the level of the court system issuing written opinions containing references to the *Third Restatement*. Has the judicial consideration of the new *Restatement* risen from the trial courts and reached the highest level of the courts? Or has the *Restatement* been embraced by superior appellate courts, and they have then set the law of the jurisdiction for all inferior courts? An interesting pattern in case references was identified in the data. When focusing on the trial level of state courts, there was rarely any mention of the *Third Restatement* in these written opinions with only 73 mentions or 7.2% of the total in all 606 cases. The intermediate appellate state courts had the largest number of references to the *Restatement*, with 624 or 58.5% of the total. Finally, state supreme courts mentioned the *Restatement* 345 times or 32.5% of all the cases. The presence of more than 90% of the state court references occurring in the appellate and supreme court level case decisions may represent the fact that litigants used the new *Restatement* in their appellate arguments and that these courts were willing to incorporate discussions of it in their opinions. It is worth noting that even if a court were to refer to the *Restatement* in its opinion, the discussion might be fleeting or extremely brief. The analysis below will describe the ways that the courts actually dealt with the *Restatement*.

80. The four clusters were: 1) Connecticut, Massachusetts, and New Jersey; 2) Minnesota and Wisconsin; 3) Washington and Alaska; and 4) Colorado, New Mexico, and Texas.

81. This bottom group includes: Arkansas (6), Delaware (6), Florida (7), Hawai‘i (6), Idaho (7), Indiana (1), Iowa (9), Kansas (1), Mississippi (3), Missouri (7), Nebraska (7), Nevada (4), New Mexico (1), New York (2), North Carolina (3), North Dakota (6), Oklahoma (8), Oregon (6), Rhode Island (5), Virginia (2), and West Virginia (5).
A completely different pattern emerged in the federal courts. In those cases, there were a total of 121 references to the *Restatement* with 75% of the references being found in trial level courts, 24% in the courts of appeal, and 1% in the U.S. Supreme Court. Although the sample of case references was smaller than the state case sample, it did reveal that the federal district courts recorded references to the *Restatement* three times as frequently as did the federal appellate courts and ten times higher than the percentage of state trial court opinions. Explanations for this phenomenon are varied but could be attributable to a higher percentage of federal district court opinions being formally reported or a greater willingness of federal district court judges to accept arguments containing the new *Restatement*.

4. Description of Judicial Acceptance or Rejection of the Third Restatement in Reported Case Decisions

The previous sections described the quantity and distribution of judicial comments relating the *Third Restatement*. It is equally important to examine the quality of the court treatment of the *Restatement* in the judicial opinions. Using the six-category typology mentioned in Section I.B., the overall totals during the 2000-2014 period had the following pattern:

1. Declined to adopt - 27 mentions
2. Distinguished - 29 mentions
3. No effect - 35 mentions
4. Small effect - 628 mentions
5. Influential effect - 225 mentions
6. Heavy reliance / Great effect - 69 mentions

![Number of Case Mentions](image-url)
Employing an incremental weighting system allocating one point for *Restatement* mentions classified as ‘declined to adopt,’ and with each level adding one point and finally awarding six points for those mentions labeled as ‘heavy reliance / great effect,’ the analysis indicates a scaled score. Taken together, the average scaled score of all 1013 mentions in the United States was 4.18, which placed the average qualitative rating of the database close to the ‘small effect’ classification.82 This average score measuring the strength of judicial acceptance of the *Restatement* remained surprisingly constant over the full study period. When segmenting the fifteen-year span into three five-year segments, virtually no variation in scores was observed around the 4.18 mean, indicating that the courts citing the *Third Restatement* had consistently given it ‘small effect.’ Overall, the scaled score data reflects a modestly positive judicial view of the *Restatement* in judicial decisions.

5. Comparisons of State Scaled Score Averages Reflecting Judicial Reception of the Third Restatement in Reported Case Decisions

Although the comprehensive scaled score remained flat over the entire fifteen-year study period, the research database revealed significant variations in the strength of the scaled-score averages for each state. The highest scaled-score average was found in Nevada, with an average of 5.25 in Nevada’s four case decisions. The next two states scoring high averages were Oregon and Mississippi, both registering an average scaled score of 4.67 in 6 and 3 cases, respectively. These three jurisdictions had positive scaled scores clustering around the ‘influential’ classification for the treatment of the *Restatement*. It is noteworthy that these relatively high scores were reflected in an extremely small sample of approximately four cases in each state over a fifteen-year period. On the other end of the spectrum, West Virginia (4 mentions), Washington (36 mentions), and New York (2 mentions) had scaled-score averages of 2.4, 3.5, and 3.5, respectively. Once again, except for Washington, the number of case decisions was extremely small.

Examining the list of the ten states with the greatest number of reported *Restatement* mentions, the scaled score exactly matched the overall, national scaled-score average of 4.18 registered in all jurisdictions over the fifteen-year study period.83 This fact suggests that when courts make frequent mention of the *Restatement*, they do not

---

82. The relatively small sample of 53 comments from the 33 federal cases in the 1992-1999 period yielded a slightly lower average score of 4.06, placing those judicial comments about the *Third Restatement* in the “small effect” category.

83. The top ten list of states with the highest number of *Restatement* mentions included: Connecticut (88), Colorado (84), Arizona (64), Massachusetts (61), New Jersey (54), New Mexico (38), Texas (38), Washington (36), Wisconsin (34), and Alaska (28).
approve or disapprove of the work in any greater frequency than the national average.\footnote{84} Focusing on the ten states with the highest positive scaled-score averages, this mean registered a score of 4.51 indicating a variation of only .33 points higher than the national average scaled score. In comparison, viewing the bottom ten states having the lowest scaled scores, the average registered 3.59.\footnote{85} The fact that this number was .59 lower that the national average scaled score of 4.18 suggests that the jurisdictions having a negative view of the Restatement scored a stronger reading, which deviated farther from the overall mean than did the positive jurisdictions. Put another way, those courts disapproving of the Restatement felt stronger in their disapproval than did those approving of it.

6. Acceptance and Rejection of the Third Restatement at the Extremes

With most of the judicial references to the Restatement registering a mildly positive character, with a scaled score of approximately 4.18, it is difficult to detect a strong overall trend towards judicial approval or disapproval. Some case decisions have taken a clearer position. Which courts have enthusiastically embraced the Restatement and which have clearly rejected it? Using the six-category typology described in Section I.B., the highest scaled (6-point-per-mention) score was recorded for court opinions which demonstrated a ‘heavy reliance / great effect’ of the Restatement, while the lowest scaled (1-point-per-mention) score reflected a position that expressly ‘declined to adopt’ the work. Such court opinions reflected unequivocal positions in a direct and clear fashion.

Reviewing the totals for these top and bottom categories of case comments, judges did not often reach either of these extremes. Over the study period there were only a total of sixty-nine case mentions demonstrating ‘heavy reliance / great effect’ and twenty-seven comments showing a court specifically ‘declined to adopt’ the Restatement, representing 9.4% of the total Restatement comments.\footnote{86} Putting this into perspective, the total number of these strongly affirma-

\footnote{84} However, within this group of ten states, the scaled score did vary somewhat, ranging from 3.53 to 4.47. The scaled scores were: Connecticut (4.14), Colorado (4.10), Arizona (3.67), Massachusetts (4.31), New Jersey (4.24), New Mexico (4.47), Texas (4.42), Washington (3.53), Wisconsin (3.71), and Alaska (4.43).

\footnote{85} These states with the lowest overall scaled-score average include: Virginia (4.0), South Carolina (3.82), Pennsylvania (3.74), Wisconsin (3.71), Arizona (3.67), Kansas (3.67), Washington (3.53), New York (3.50), the District of Columbia (3.44), and West Virginia (2.40).

\footnote{86} This is a total of 96 case mentions out of 1013 over the fifteen-year study period. The federal courts were almost non-existent in this matter, showing a total of one ‘heavy reliance’ and one ‘decline to adopt’ ruling in both the U.S. District Courts and U.S. Courts of Appeals. Overwhelmingly, the federal decisions garnered mentions in the ‘small effect’ category.
tive mentions was slightly in excess of one per state over the fifteen-year period. On the other end of the spectrum, even fewer jurisdictions clearly rejected the *Restatement* in their court opinions, with only twenty-seven 'decline to adopt' opinions over the entire research period or about one-half of an opinion per state. Concentrating only on the opinions of the highest court of a jurisdiction, only twenty-five state supreme court decisions in eighteen states gave 'heavy reliance' comments. By comparison, a total of nine state supreme court decisions in eight states ruled that they 'declined to adopt' the *Restatement*. With these extremely low numbers of state supreme court opinions either expressly approving or disapproving of the *Restatement*, it is difficult to say that the high courts have a strong interest in the *Restatement* as a new source of law. Only a few reacted in a strongly positive or negative fashion. Most states and the federal bench avoided these extreme classifications.

C. Analysis of the Most Commonly Discussed *Restatement* Provisions

The database of case decisions revealed that ninety-two separate sections of the *Restatement* were mentioned at least one time in case decisions within the study period. While a broad range of sections were cited, courts most frequently discussed ten specific *Restatement* sections. In order of frequency, these sections are as follows: 4.1, 1.2, 4.10, 2.17, 4.8, 2.16, 2.15, 4.9, 1.1, and 4.13.

---

87. The leading courts with 'heavy reliance' on their *Restatement* opinions were Massachusetts, New Jersey, New Mexico, and Texas, with all registering five such holdings each.

88. The states of Washington, Wisconsin, and Pennsylvania had the most strongly negative opinions concerning the *Restatement*, averaging five opinions for each jurisdiction.

89. This represented 14% of all state supreme court decisions mentioning the *Restatement*. The judicial approval in each case usually pertained only to a single section of the *Restatement*.

90. This represented 5% of all state supreme court decisions mentioning the *Restatement*. The judicial disapproval in each case usually pertained only to a single section of the *Restatement*.

91. Those state supreme courts using these extreme kinds of comments focused their attention on a limited number of *Restatement* sections. These courts finding 'heavy reliance' attached that classification to sections 1.2, 2.10, 2.12, 2.13, 2.16, 4.0, 4.1, 4.8, 4.9, 4.10, 4.11, 4.13, 6.20, 7.6, 7.7, 8.1, and 8.4. The courts 'declining to adopt' focused on sections 2.10, 2.12, 4.0, 4.8, 7.0, and 7.10.

92. During this period, nearly half of all jurisdictions had no 'heavy reliance' opinions and almost 80% had no 'declined to adopt' opinions at all at the state supreme court level. It appears that when the *Restatement* reached the state courts, it engendered neither a strongly positive nor a negative reaction.
These were the most frequently used sections of the *Restatement*, representing 45% of the total of all case mentions. Three identifiable clusters of section mentions were observed representing over 50% of all the case references in the study period. The first cluster containing fundamental explanatory material—like section 1.2—appears on this list because it gives workable definitions that provide basic conceptual meaning for servitudes useful to a judicial opinion. Next, the segment of the *Restatement* concerned with setting forth the legal theory justifying the creation of servitudes through non-express means received the second largest number of references. These may have been frequently referred to because of the nature of what those sections discuss: easements of necessity and prescription. These easements arise by operation of law and not through conventional conveyancing. As such, the basic legal theory is found in contentious cases where the existence of an easement is being determined and, if found, will be imposed upon a servient estate or tenement. Section 4.8 was a particularly controversial section, because it advanced a minority approach dealing with the relocation of an existing easement. Thus, this view proposed to change much current property law theory. There were a significant number of cases that expressly adopted this section and a number of cases specifically declining to adopt it. In both instances, judges debate the pros and cons of this part of the *Restatement* in the court opinions.

94. *Id.*, § 4.8.
95. *See infra* notes 126-29 and accompanying text.
Section 4.1 sets forth two central ideas contained in the new Restatement: that servitudes should be interpreted so as to effectuate the intention of the parties to the agreement and, presumptively, the provisions should be enforced unless they violate values contained in public policy. This provision was mentioned eighty-four times in case decisions during the study period, making it the most frequently cited section of the Third Restatement. Fifty percent of those case mentions were classified as having a ‘small effect,’ with an additional 25% of the references being considered ‘influential’ and 12%.

96. The text of the Restatement section 4.1 states: “(1) A servitude should be interpreted to give effect to the intention of the parties ascertained from the language used in the instrument, or the circumstances surrounding creation of the servitude, and to carry out the purpose for which it was created. (2) Unless the purpose for which the servitude is created violates public policy, and unless contrary to the intent of the parties, a servitude should be interpreted to avoid violating public policy. Among reasonable interpretations, that which is more consonant with public policy should be preferred.” Restatement (Third) of Property: Servitudes § 4.1 (Am. Law Inst. 2000).

97. This section was referred to in more than 10% of the case references to the Restatement during the study period. There were five additional mentions of section 4.1 in the pre-2000 period as well, also constituting 10% of those references.


reaching the level of ‘heavy reliance.’ In 10% of uses (9 cases), the use of section 4.1 had ‘no effect’ on the outcome. In one case, the court ‘distinguished’ section 4.1, and courts ‘declined to adopt’ section 4.1 twice. Conversely, the section was expressly adopted 11 times (or 12.5% of cases adopted it). However, after examining the fifteen-year period, no clear pattern of increasing or decreasing judicial use emerged. Interestingly, one state, Arizona, was the most likely jurisdiction to use section 4.1, referring to it eleven times out of sixty-three references to the Restatement making section 4.1 more than 17% of the Restatement references in Arizona courts.

100. See, e.g., Powell v. Washburn, 125 P.3d 373, 377-78 (Ariz. 2006) (en banc). The Powell case expressly adopted section 4.1 and ‘heavily relied’ on it. Id. The case very clearly adopts the Restatement section (“We adopt the Restatement approach . . . .”) and then provides three reasons for adopting it. Id. at 377. Similarly, Nature Conservancy of Wis., Inc. v. Altman, adopts section 4.01 and ‘heavily relies’ on it. 756 N.W.2d 641, 644-48 (Wis. Ct. App. 2008). In that case, the court discusses sections 4.1 and 4.5 concurrently, relying heavily on both sections to reach a legal conclusion, and in so doing, explicitly states that they are adopting the Restatement approach. Id. at 646.

101. Section 4.1 has a large number of ‘no effect’ cases (10%, or 9 cases). For example, City of Arkansas City v. Bruton, cites to section 4.1 multiple times in the context of framing the argument by the City. 137 P.3d 508, 514 (Kan. Ct. App. 2006). However, in that case, the court held that the City’s argument was incorrect, and that there was no evidence that the City’s citation to section 4.1 had any impact, positive or negative, on the outcome of the case. Id.

102. In Joiner v. Southwest Central Rural Electric Co-operative Corp., the court ‘declined to adopt’ section 4.1. 786 A.2d 349, 351-52 (Pa. Commw. Ct. 2001). In this case, the court overturned the lower court’s decision, which was based on sections 4.01 and 4.11. The lower court had expressly adopted section 4.11, but the appellate court noted that the Restatement was not expressly adopted in Pennsylvania and declined to adopt it in this case. Id.
2. **Section 1.2: “Easement and Profit Defined”**

Section 1.2 is a definitional provision setting forth basic aspects of easements and profits *â prendre*. These two forms of servitudes were traditionally recognized by the common law. Easements allow use to be made of another’s land, while profits allow some natural resource to be taken from such land. Section 1.2 had the second most frequent citation count with seventy-one uses in court decisions representing 7% of the total. As the chart above indicates, 76% of section 1.2 mentions were ‘small effect’ with only one decision ‘heavily relying’ on it. Often, the section was used to define and support the

---

103. The text of the Restatement section 1.2 states: “(1) An easement creates a nonpossessory right to enter and use land in the possession of another and obligates the possessor not to interfere with the uses authorized by the easement. (2) A profit *â prendre* is an easement that confers the right to enter and remove timber, minerals, oil, gas, game, or other substances from land in the possession of another. It is referred to as a ‘profit’ in this Restatement. (3) The burden of an easement or profit is always appurtenant. The benefit may be either appurtenant or in gross. (4) As used in this Restatement, the term ‘easement’ includes an irrevocable license to enter and use land in the possession of another and excludes a negative easement. A negative easement is included in the term ‘restrictive covenant’ defined in § 1.3.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 1.2 (AM. LAW INST. 2000).

104. Section 1.2 was often used in case opinions to define easements. For example, in *Martin Drive Corp. v. Thorsen*, 786 A.2d 484, 489 (Conn. App. Ct. 2001), the court briefly used section 1.2 to provide a definition. It also referred to section 1.2, comment d, to help explain nonpossessory interests in conjunction with two other case citations. *Id.* Profits *â prendre*, the right of taking natural resources from land, were far less frequently included in section 1.2 cases.

105. STOEBUCK & WHITMAN, supra note 1, at 435, 437.

106. *Marcus Cable Associates, L.P. v Krohn*, 90 S.W.3d 697, 700-03 (Tex. 2002), was the only case classified as heavily relying upon the section. *Marcus Cable* is an important easement case, widely cited in a number of other jurisdictions. In that case, section 1.2 was cited multiple times for multiple purposes. For instance, it was used to provide definitional
text of an opinion.\textsuperscript{107} As such, section 1.2 usually confirmed the meaning of an existing common law property term. No use of section 1.2 was considered ‘negative,’ thus, no case neither expressly declined to adopt the provision nor expressly adopted section 1.2. This is hardly surprising due to the definitional nature of the section and the closeness of its fit with general, common law decisions. Viewing the frequency of case references, the number of uses per year appears to be slowly increasing, although rising from a low base. This section was primarily used by state appellate and supreme courts, though it did appear in five trial court cases and three federal cases. Most significantly, section 1.2 was the section of the \textit{Restatement} that the U.S. Supreme Court cited in \textit{Marvin M. Brandt Revocable Trust v. United States}, the sole high court reference to the \textit{Restatement}.\textsuperscript{108}

\begin{footnotesize}
\begin{enumerate}
\item The section was also used to explain that changes in the use of the dominant parcel must be within the purpose of the original easement. \textit{Id.} at 701. The section was used to help reach the conclusion that “an express easement encompasses only those technological developments that further the particular purpose for which the easement was granted.” \textit{Id.} at 701-02. Finally, section 1.2 was used in conjunction with several other \textit{Restatement} sections, including sections 4.2 and 4.10. \textit{Id.}

\item \textsuperscript{107} ‘Small effect’ was the most common designation for section 1.2. Often, this designation was given because section 1.2 was part of a string of citations sometimes containing parenthetical quotations or explanations from the \textit{Restatement}. \textit{See, e.g.,} Hanna v. Robinson, 167 S.W.3d 166, 170 (Ark. Ct. App. 2004) (providing section 1.2 as part of a string citation without any further information included); Quintain Dev. v. Columbia Nat. Res., 556 S.E.2d 95, 102 (W. Va. 2001) (providing a quote from section 1.2 but only as a “see also” in a string of citations).

\item \textsuperscript{108} 134 S. Ct. 1257, 1265 (2014) (the Court’s consideration was classified as an ‘influential’ usage of section 1.2). In \textit{Brandt}, the Supreme Court used the section to define an easement before using one of the \textit{Restatement} comments to explain that abandonment can unilaterally terminate an easement. \textit{Id.} at 1265-66. The \textit{Restatement} section was discussed alongside a number of cases, although the common principles expressed in the section, and cited by the Court, clearly influenced the Court’s decision.
\end{enumerate}
\end{footnotesize}
3. **Section 4.10: “Use Rights Conferred by a Servitude”**

Section 4.10 specifies the rights held by the owner of the easement or profit over the land burdened by the servitude. Consistent with prior sections, this provision allows the parties to freely negotiate the exact terms of use in the creation of the easement or profit. However, in the absence of such a specific description of rights, section 4.10 presumptively allows for a level of use that “is reasonably necessary for the convenient enjoyment of the servitude.” While this language does not provide great clarity, it does suggest that easement or profit rights should be presumptively interpreted to serve their underlying purpose. Furthermore, section 4.10 sets forth a general principle allowing for the modification of a servitude, permitting the dominant parcel to be used for the easement or profit in such a way as to be benefitted by future technological changes and to promote its “normal development.” This expansionist emphasis was limited by a con-

---

109. The text of the *Restatement* section 4.10 states: “Except as limited by the terms of the servitude determined under § 4.1, the holder of an easement or profit as defined in § 1.2 is entitled to use the servient estate in a manner that is reasonably necessary for the convenient enjoyment of the servitude. The manner, frequency, and intensity of the use may change over time to take advantage of developments in technology and to accommodate normal development of the dominant estate or enterprise benefited by the servitude. Unless authorized by the terms of the servitude, the holder is not entitled to cause unreasonable damage to the servient estate or interfere unreasonably with its enjoyment.” *Restatement (Third) of Prop.: Servitudes* § 4.10 (Am. Law Inst. 2000).

110. *Id.*

111. Concepts of intent effectuation and the encouragement of efficient land use have been part of American land use law for centuries. The “normal development” doctrine has been recognized in servitude case law and was incorporated into the earlier *Restatement* in section 484. *See* *Restatement (First) of Prop.* § 484 (Am. Law Inst. 1944). Other case decisions have accorded the easement owner a right to unlimited “reasonable” use of the
cept of “unreasonable” damage and interference with the servient land.\footnote{112} Determining the point at which such damage occurs would be left to courts considering excessive use claims by servient owners.

Section 4.10 was mentioned by courts fifty-six times representing 5.5% of the total number of court mentions in the sample. In general, the judicial discussion of section 4.10 was positive and supportive with 43% of the references classified as having ‘small effect,’\footnote{113} 34% classified as ‘influential,’\footnote{114} and 16% classified as ‘heavy reliance.’\footnote{115} This ‘heavy reliance’ comprised of 93% of all the judicial treatment and constituted a particularly positive acceptance by the courts. As is typical, the overwhelming majority (91%) of these cases were decided by appellate or state supreme courts. Connecticut was the state having the most frequent use of section 4.10, using it ten times in its case decisions. This high degree of use of section 4.10 is also consistent with Connecticut’s first place position as the state with the highest number of Restatement references.

\footnote{112}{The Restatement’s comments indicate that what might be considered “normal development” could change over time and “what may be abnormal development at one time may become normal at a later time.” \textit{RESTATEMENT (THIRD) OF PROP.: SERVITUDES} § 4.10 cmt. f, illus. 14-16 (AM. LAW INST. 2000).}

\footnote{113}{See Weeks v. Wolf Creek Indus., 941 So. 2d 263, 270-73 (Ala. 2006) (referencing section 4.10 multiple times, but each use was part of a string cite); see also Holmstrom v. Lee, 26 S.W.3d 526, 532 (Tex. Ct. App. 2000) (mentioning section 4.10 in conjunction with another source, which used a parenthetical example taken from section 4.10).}


\footnote{115}{In \textit{Mattson v. Montana Power Co.}, 215 P.3d 675, 689-92 (Mont. 2009), the court both expressly adopted section 4.10 and ‘heavily relied’ on it in its opinion. In that case, there was an easement allowing a dam operation to flood the servient property, and a question arose as to whether the easement owners were “required not to cause unreasonable damage to, or interfere unreasonably with the enjoyment of, the Landowners’ properties?” \textit{Id.} at 680. The case found that section 4.10 would suggest that the owners were not allowed to cause unreasonable damage, unless the easement states otherwise. \textit{Id.} at 689. In \textit{Mattson}, the court provided a lengthy discussion on section 4.10, clearly adopting it, and applying it directly to the facts. \textit{Id.} at 690; see also Schugg v. Gila River Indian Cmty. (In re Schugg), No. CV-05-02045-PHX-JAT, 2014 U.S. Dist. LEXIS 67841, at *17-18 (D. Ariz. May 15, 2014) (noting that “[i]n absence of contrary precedent, Arizona follows the Restatement (Third) of Property: Servitudes . . . .”).}
4. Section 2.17: “Servitudes Created by Prescription”

Section 2.17 reflects the legal concept that easements and profits may be created by operation of law through principles of adverse use or prescription. These methods have long existed for the acquisition of fee simple title, but an equally long tradition exists for the earning of an easement through similar prescriptive use. Although a few courts have questioned the wisdom of prescriptive legal theory in the modern context, prescriptive easements continue to be recognized throughout the nation.

Over the period of review, section 2.17 was mentioned by courts fifty-seven times with 55% of those uses being considered ‘small effect,’ 32% considered ‘influential,’ and only 5% finding ‘heavy re-

---

116. The text of Restatement section 2.17 states: “A servitude is created by a prescriptive use of land, as that term is defined in § 2.16, if the prescriptive use is: (1) open or notorious, and (2) continued without effective interruption for the prescriptive period. Periods of prescriptive use may be tacked together to make up the prescriptive period if there is a transfer between the prescriptive users of either the inchoate servitude or the estate benefited by the inchoate servitude.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.17 (AM. LAW INST. 2000).


118. JON W. BRUCE & JAMES W. ELY, JR., THE LAW OF EASEMENTS AND LICENSES IN LAND § 5:1, at 5-7 (2014) (“[T]he doctrine of prescription remains a major force in contemporary real property law.”).

119. The majority of references to section 2.17 have been classified as having ‘small effect.’ A good example of ‘small effect’ reliance can be found in Stone v. Perkins, 795 N.E.2d 583, 586 (Mass. App. Ct. 2003), which briefly mentions section 2.17 comment h, alongside Massachusetts case law, to support the idea that right of way easements by prescription must follow the same confined route as the prescriptive use. Although it was referred to by the court, the Restatement’s usage only had a ‘small effect.’ See also Sandmaier v. Tahoe Dev. Grp., Inc., 887 A.2d 517, 519 (Me. 2005) (referencing section 2.17, comment e for further support in addition to state law precedent).
liance.121 In a single case, section 2.17 had ‘no effect’ (2%) and in another it was ‘distinguished.’ Two cases ‘declined to adopt’ section 2.17 (4%).122 Following the general pattern observed in all the cases, the overwhelming majority of these decisions were found at the level of state appellate (75%) and state supreme courts (16%). There was no clear trend in the number of uses each year, and no states had an abnormally large number of references to section 2.17.

120. O’Dell, 703 S.E.2d at 576, 578, provides an example of an influential use of the Restatement section 2.17. In O’Dell, a landlocked property owner argued for a prescriptive easement for the use of a gravel lane. Id. at 574. The court provided an extensive discussion of prescriptive easements, along with state precedent and other secondary sources. The court selected long quotes from section 2.17, comment c to explain the purpose of prescriptive easements and section 2.17, comment g to emphasize the current lack of consistency and clarity in the doctrine of prescriptive easements. Id. at 576, 578; see also Hamad Assam Corp. v. Novotny, 737 N.W.2d 922, 926 (S.D. 2007).

121. See, e.g., Weyerhaeuser Co. v. Brantley, 510 F.3d 1256, 1265 (10th Cir. 2007) (addressing the adverse use of land by a party who was grazing his animals on another’s land). In Algermissen v. Sutin, 61 P.3d 176, 180 (N.M. 2002), the court expressly adopted section 2.17 along with the related section 2.16. In this case, the court chose to fully adopt the approach that the Restatement had taken with regard to prescriptive easements. Id. Another case that expressly adopted section 2.17 is Burciaga Segura v. Van Dien, 344 P.3d 1009, 1011-12 (N.M. Ct. App. 2014), which, like the Algermissen case, also adopted section 2.16. In Burciaga, the state appellate court described the Algermissen opinion as binding precedent. Burciaga, 344 P.3d at 1011.

122. Trask v. Nozisko, 134 P.3d 544, 553 (Colo. App. 2006) (noting that the adoption of one section of the Restatement (section 2.16) does not result in the adoption of the entire Restatement and holding that the court was refusing to adopt section 2.17 as precedent); see also Walker v. Hollinger, 968 P.2d 661, 665 (Idaho 1998) (declining to adopt section 2.17 and relying instead on existing state law precedent).
Section 4.8 was a significant part of the Restatement, which attempted to clarify a complex part of easement law relating to the initial location and later relocation of an existing easement. While allowing for the instrument creating the easement to control the location of the use, in the absence of such a provision, section 4.8 empowers the servient estate owner to physically select a “reasonable” place where the easement’s owner may lawfully use the servient land. This position is consistent with the underlying property law in many jurisdictions. It is a practically important principle because many documents creating servitudes merely describe a permitted use without specifically noting a precise location where the owner’s use rights may be exercised.

Furthermore, section 4.8 authorizes the servient owner to relocate the easement “to permit normal use or development” of the servient

123. The text of Restatement section 4.8 provides: “Except where the location and dimensions are determined by the instrument or circumstances surrounding creation of a servitude, they are determined as follows: (1) The owner of the servient estate has the right within a reasonable time to specify a location that is reasonably suited to carry out the purpose of the servitude. (2) The dimensions are those reasonably necessary for enjoyment of the servitude. (3) Unless expressly denied by the terms of an easement, as defined in § 1.2, the owner of the servient estate is entitled to make reasonable changes in the location or dimensions of an easement, at the servient owner’s expense, to permit normal use or development of the servient estate, but only if the changes do not (a) significantly lessen the utility of the easement, (b) increase the burdens on the owner of the easement in its use and enjoyment, or (c) frustrate the purpose for which the easement was created.” Restatement (Third) of Prop.: Servitudes § 4.8 (Am. Law Inst. 2000).

124. Bruce & Ely, Jr., supra note 118, § 7.5, at 7-8 n.5.
land.\textsuperscript{125} This provision would recognize an enhanced authority in the servient landowner to shift a servitude’s location after it had been initially established. Section 4.8 does grant the easement owner some protection of its expectations and existing use, but, in general, this Restatement section appears to be inconsistent with a general rule barring unilateral relocation of an easement by either party. Not surprisingly, this proposed change has engendered a mixture of judicial and scholarly responses, some of them highly negative.\textsuperscript{126}

Even though it announced a practically important and controversial provision, section 4.8 was mentioned by the courts only forty-seven times making it the fifth most discussed section of the Restatement. Unlike most sections, the uses of section 4.8 were not classified as having a predominately ‘small effect.’ A bi-modal distribution of references was observed. On the positive side, 26% of the case mentions were categorized as ‘influential’\textsuperscript{127} and 17% were found to have had ‘heavy reliance’ on this section of the Restatement.\textsuperscript{128} On the other hand, 26% of the case references were ‘small effect’\textsuperscript{129} while 23% of cases ‘declined to adopt’ section 4.8.\textsuperscript{130} As such, the section triggered a strong response in both directions of approval and disapproval.

Following the observed pattern, the vast majority of section 4.8 cases were decided by the appellate courts (62%) or state supreme courts (30%). However, it should be noted that several of the cases (though not all of them) that were marked as expressly adopting section 4.8 were from the same state—Massachusetts. Massachusetts cases also mentioned section 4.8 more frequently than any other

\begin{itemize}
  \item \textsuperscript{125} Restatement (Third) of Prop.: Servitudes § 4.8 (Am. Law Inst. 2000).
  \item \textsuperscript{129} Wells v. Sanor, 151 S.W.3d 819, 823-24 (Ky. Ct. App. 2004).
\end{itemize}
state, referring to the section a total of nine times, representing roughly 20% of its section Restatement references.  

6. Section 2.16: “Servitudes Created by Prescription: Prescriptive Use”  

This section of the Restatement should be read in conjunction with the sections immediately surrounding it, which were also frequently discussed in court opinions. These provisions describe the legal theory recognizing the creation of servitudes that do not originate in express, written agreements.

Section 2.16 was mentioned by courts thirty-seven times in an evenly distributed pattern over the study period. The majority of those uses were considered ‘small effect’ (57%), with 13% consi-


132. The text of Restatement section 2.16 states: “A prescriptive use of land that meets the requirements set forth in § 2.17 creates a servitude. A prescriptive use is either (1) a use that is adverse to the owner of the land or the interest in land against which the servitude is claimed, or (2) a use that is made pursuant to the terms of an intended but imperfectly created servitude, or the enjoyment of the benefit of an intended but imperfectly created servitude.” Restatement (Third) of Prop.: Servitudes § 2.16 (Am. Law Inst. 2000).

133. Sections 2.10 through 2.18, dealing with the creation of non-express servitudes through the legal theories of estoppel, implication, prior use, map or boundary reference, general plan, and necessity or prescription was the most frequently discussed Restatement section cluster registering 229 mentions or nearly 23% of all case references.

134. ‘Small effect’ uses of section 2.16 include Thompson v. E.I.G. Palace Mall, LLC, where the court used section 2.16 to provide a very basic description of prescriptive easements. 657 N.W.2d 300, 303 (S.D. 2003). Ultimately, the court relied on its own case law to determine whether a prescriptive easement actually exists. Id. at 304.
erred ‘influential,’ and 14% considered ‘heavy reliance.’ Conversely, section 2.16 had ‘no effect’ in two cases and one case declined to adopt it. Three cases (8%) distinguished section 2.16. Colorado was the jurisdiction with the greatest number of section 2.16 references with eight or 22% of the total mentions. Consistent with the other sections, the majority of the case references (65%) were made by an appellate court, while 24% were issued by a state supreme court.

135. See Brown v. Faatz, 197 P.3d 245, 250-51 (Colo. App. 2008), where the appellate court mentioned section 2.16 in two multiple-source citations. The Brown court used a long quote from comment g of section 2.16 to explain overcoming the presumption of adverse use. Id. at 250. The repeated references to comment g of section 2.16, along with the discussion relevant to unenclosed land, indicate that section 2.16 was ‘influential’ to this decision. Another example of an ‘influential’ usage of section 2.16 is found in Kadlec v. Dorsey, No. 2 CA-CV 2013-0020, 2013 WL 5460136, at *3 (Ariz. Ct. App. Sept. 30, 2013), where the appeals court noted that section 2.16 had been relied upon by the trial court. Id. The appellate court considered section 2.16 and concluded that the trial court’s interpretation of the comments was incorrect regarding whether necessity bars adverse use for prescriptive easements. Id. It then considered another section of the Restatement, and, taken in combination, these references clearly influenced the court’s overall decision. Id. See also Gamboa v. Clark, 321 P.3d 1236, 1245-47 (Wash. Ct. App. 2014).

136. Two cases expressly adopted section 2.16. See Algermissen v. Sutin, 61 P.3d 176, 180 (N.M. 2002) (updating the law and adopting section 2.16 in conjunction with section 2.17 and section 2.18); Burciaga Segura v. Van Dien, 344 P.3d 1009, 1011-12 (N.M. Ct. App. 2014) (expressly following the Restatement and the prior state supreme court Algermissen decision). In Algermissen, the court found a prescriptive easement because the parties attempted, but technically failed, to create an express easement, and they had acted as though an easement existed for an extended period of time. Algermissen, 61 P.3d at 183.

137. In Allen v. Woelfel Family Revocable Trust, No. 2013AP2420, 2014 WL 2050823, at *5 (Wis. Ct. App. May 20, 2014) (also available without pagination at 848 N.W.2d 905), the court declined to adopt section 2.16. In that case, one party was arguing that a prescriptive easement existed, despite evidence of permissive use, using section 2.16 (which allows prescriptive easements when the parties previously tried to establish, and intended to establish, an easement but technically failed). The appeals court declined to apply section 2.16, due to the fact that the Restatement’s position that a permissive use (even if it was a failed attempt to create a servitude) could satisfy prescription was inconsistent with state law. Id.
7. Section 2.15: “Servitudes Created by Necessity”

This section concerns a form of non-express easement that arises by virtue of either economic necessity or unexpressed intention. The common law legal theory establishing this form of easement is longstanding and often is confused or commingled with other non-express easement theories. Section 2.15 sets forth a presumptive principle for finding these property rights unless “the language or circumstances . . . clearly indicate” an opposite intention. This provision was the third most frequently discussed section having thirty-four mentions, of which 71% were classified as having ‘small effect,’ yet 26% were labeled as being ‘influential.’ No court ‘heavily relied’

138. The text of Restatement section 2.15 states: “A conveyance that would otherwise deprive the land conveyed to the grantee, or land retained by the grantor, of rights necessary to reasonable enjoyment of the land implies the creation of a servitude granting or reserving such rights, unless the language or circumstances of the conveyance clearly indicate that the parties intended to deprive the property of those rights.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 2.15 (AM. LAW INST. 2000).

139. See STOEBUCK & WHITMAN, supra note 1, §§ 8.4-8.5, at 444-47.


141. The most numerous uses of section 2.15 are of ‘small effect.’ For example, Barge v. Sadler, 70 S.W.3d 683, 686-87 (Tenn. 2002), states that “[t]hese statutes recognized necessity as justification for an easement even where the common law requirements were not met.” This clearly had a very minimal impact on the outcome of the case. In Thompson v. E.I.G. Palace Mall, LLC, 657 N.W.2d 300, 305 (S.D. 2003), this section was mentioned briefly in a discussion of the state’s different versions of implied easements (necessity and prior use, comparing Restatement section 2.15 to section 2.12). Finally, the court in Reece v. Smith, 594 S.E.2d 654, 658 (Ga. Ct. App. 2004), mentioned section 2.15 in a detailed string cite containing many other sources of authority.

142. Kitras v. Town of Aquinnah, 833 N.E.2d 157, 163-64, 166 (Mass. App. Ct. 2005), provides an example of an ‘influential’ use of section 2.15 since the court mentions this section three times in its opinion. Id. Although section 2.15 was discussed in conjunction with significant state case law, it clearly influenced the court’s decision in this case. See
on section 2.15, and one case decision expressly declined to adopt section 2.15. There is no clear trend in the use of section 2.15 over time, other than an initial increase in usage. This might reflect the limited number of times section 2.15 is actually used, despite being one of the top seven most used Restatement sections. The majority of the cases (50%) come out of the state appellate courts, with 38% coming from a state supreme court. A small number of cases came from a lower court (9% from a trial court and 3% from a claims court).

8. Section 4.9: “Servient Owner’s Right to Use Estate Burdened by a Servitude”

This Restatement section reflects the property law principle allowing the servient landowner to use the servient land for any purpose that does not interfere with the enjoyment of the dominant parcel. It creates a presumptive interpretive position that applies unless the parties have expressed a different intent discernable from the language of their agreement or from the circumstances of the transac-

-- BERGE v. STATE, 915 A.2d 189, 194-95 (Vt. 2006) (using an extensive quote of section 2.15, comment d to argue that the common law needs to reflect modern needs and technology); MYERS v. LACASSE, 838 A.2d 50, 56 (Vt. 2003) (using section 2.15 to help explain the modern law of easements of necessity).

143. WOOD v. NEUMAN, 979 A.2d 64, 71-72 (D.C. 2009), is the only reference of section 2.15 that declined to adopt it. In WOOD, the trial court held that no easement of necessity existed under current law. Id. On appeal, it was argued that under section 2.15 the claimant had an easement of necessity to repair a wall. Id. The appellate court expressly declined to use section 2.15 to overturn the trial court’s judgment and provided no indication as to whether it would entertain the section under different circumstances. Id. at 72.

144. Restatement section 4.9 provides: “Except as limited by the terms of the servitude determined under § 4.1, the holder of the servient estate is entitled to make any use of the servient estate that does not unreasonably interfere with enjoyment of the servitude.” RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 4.9 (AM. LAW INST. 2000).
tion. This is consistent with the overwhelming majority of court opinions dealing with the issue of servient owner rights. The provision allows the servient landowner to make “any use” of the burdened land so long as such use does not “unreasonably interfere” with the rights of the servitude owner. The “unreasonable interference” standard can be found in the law of many jurisdictions, although determining what constitutes “unreasonable interference” is often a factual matter determined in a case-specific manner. Expressed as it is, Restatement section 4.9 appears to encourage servient parcel use. Set out in this way, this section attempts to define a default position in the law that allows both parties to achieve a balance in their respective land uses that will result in maximizing its aggregate utility. Judicial review determines when the servient owner has gone too far, one way or the other.

The judicial treatment of section 4.9 generally received positive mentions in case references, with 28% being categorized as ‘influential’ and 62% classified as having a ‘small effect.’ The remaining 10% of the references were evenly spread between the strongly positive and negative classifications. While the 29 case references represent a small number and a relatively small share of the total 1013 case mentions, they do indicate a positive judicial reception.

145. BRUCE & ELY, JR., supra note 118, § 8:20, at 8-65 to -67 n.5 (listing a voluminous citation of supporting case decisions).

146. In Kanifolsky v. United States, 368 F. Supp. 2d 1118, 1120-21 (E.D. Wash. 2005), while referring to Washington law and Restatement section 4.9, the U.S. District Court found that the servient owner’s construction of a “large, expensive house” on the burdened land constituted “unreasonable interference” due to the permanence of the encroachment and the difficulty and expense of removing it.

147. Some state courts have reached similar positions in their own property law decisions and section 4.9 has merely confirmed these precedents. See, e.g., Lazy Dog Ranch v. Telluray Ranch Corp., 965 P.2d 1229, 1238 (Colo. 1998) (“[T]he interests of both parties must be balanced in order to achieve due and reasonable enjoyment of both the easement and the servient estate.”); Ephrata Area Sch. Dist. v. Cty. of Lancaster, 886 A.2d 1169, 1176-77 (Pa. Commw. Ct. 2005) (allowing the servient owner to create additional servitudes on the burdened land as long as they did not unreasonably interfere with the prior servitude holders).


This *Restatement* section provides basic definitions governing the meaning of servitudes as used in the document. It also sets out the comprehensive scope for the *Restatement* bringing easements, profits, and real covenants into one unified real property category—servitudes. As such, this section provides the fundamental elements for all durable, land-based promises finding specific, enumerated exclusions from the broad, general definition.\(^{150}\) It was not surprising that sections 1.1, 1.2, 1.3, and 1.5 were all mentioned in court decisions in relatively high numbers due to their usefulness as clear statements of these property law interests. With a total of twenty-seven case references, 74% were categorized as having a ‘small ef-

---

150. Restatement section 1.1 provides: “(1) A servitude is a legal device that creates a right or an obligation that runs with land or an interest in land. (a) Running with land means that the right or obligation passes automatically to successive owners or occupiers of the land or the interest in land with which the right or obligation runs. (b) A right that runs with land is called a ‘benefit’ and the interest in land with which it runs may be called the ‘benefited’ or ‘dominant’ estate. (c) An obligation that runs with land is called a ‘burden’ and the interest in land with which it runs may be called the ‘burdened’ or ‘servient’ estate. (2) The servitudes covered by this Restatement are easements, profits, and covenants. To the extent that special rules and considerations apply to the following servitudes, they are not within the scope of this Restatement: (a) covenants in leases; (b) covenants in mortgages and other property security devices; (c) profits for the removal of timber, oil, gas, and minerals. (3) Zoning and other public land-use regulations, the public-navigation servitude, the public-trust doctrine, and rights determined by riparian, littoral, prior-appropriation, or ground-water doctrines are not servitudes within the meaning of the term as used in this Restatement.” *Restatement (Third) of Prop.: Servitudes* § 1.1 (AM. LAW INST. 2000).

151. Restatement section 1.1, subsections 2-3 identify a number of potential servitudes for exclusion from its provisions. These include lease and mortgage covenants for timber, oil, gas, and minerals; land use controls; navigation servitudes; riparian rights; as well as surface and ground water rights. Perhaps the *Restatement’s* intention was not to disturb these specific and idiosyncratic parts of state law, often having significant economic impact.
fect'\textsuperscript{152} and nearly 19\% as being 'influential.'\textsuperscript{153} Once again, this section received a moderately positive judicial reception. Not surprisingly, very few mentions were extreme in their degree of acceptance or rejection.

10. **Section 4.13: “Duties of Repair and Maintenance”\textsuperscript{154}

This *Restatement* section sets forth the background principles for assigning the duties of repair and maintenance of the servient land

\begin{itemize}
    
    
    \item \textsuperscript{154} *Restatement* section 4.13 provides: “Unless the terms of a servitude determined under § 4.1 provide otherwise, duties to repair and maintain the servient estate and the improvements used in the enjoyment of a servitude are as follows: (1) The beneficiary of an easement or profit has a duty to the holder of the servient estate to repair and maintain the portions of the servient estate and the improvements used in the enjoyment of the servitude that are under the beneficiary’s control, to the extent necessary to (a) prevent unreasonable interference with the enjoyment of the servient estate, or (b) avoid liability of the servient-estate owner to third parties. (2) Except as required by § 4.9, the holder of the servient estate has no duty to the beneficiary of an easement or profit to repair or maintain the servient estate or the improvements used in the enjoyment of the easement or profit. (3) Joint use by the servient owner and the servitude beneficiary of improvements used in enjoyment of an easement or profit, or of the servient estate for the purpose authorized by the easement or profit, gives rise to an obligation to contribute jointly to the costs reasonably incurred for repair and maintenance of the portion of the servient estate or improvements used in common. (4) The holders of separate easements or profits who use the same improvements or portion of the servient estate in the enjoyment of their servitudes have a duty to each other to contribute to the reasonable costs of repair and maintenance of the improvements or portion of the servient estate.” *RESTATEMENT (THIRD) OF PROP.: SERVITUDES* § 4.13 (AM. LAW INST. 2000).
\end{itemize}
and improvements used in the enjoyment of a land-based servitude. This subject is of great practical necessity to assure the continuing usefulness of the servitude over time. The standard set by section 4.13 is consistent with the general property law rule prevalent in most states. The responsibilities of repair and maintenance are presumptively allocated to the “beneficiary of an easement or profit” which would be the owner of the dominant parcel. These duties are established at a level needed to prevent “unreasonable interference” with the servient owner or to avoid creating third-party liability in the servient owner. This provision would appear to limit the servient owner’s responsibility although this matter could be adjusted in the design of the servitude’s original drafting. Finally, joint use of servitudes could give rise to a shared obligation in the co-users to repair and maintain the servient estate or the improvements. In a situation where both the dominant and servient owners used the servitude, both parties could be obligated to share the expense of repair and maintenance.

Section 4.13 had a total of twenty-six mentions over the study period making it the tenth most frequently cited provision. Of this total 53.8% were classified as having a ‘small effect’ on the decision with another 30.7% having been noted as being ‘influential’ to the outcome. With 11.5% having the most strongly positive ‘heavy reliance’ characterization, section 4.13 had a more positive weighted score than the average Restatement provision mentioned in opinions.

D. Conclusions to Be Drawn from the Case Analysis.

The review of the database of cases discussing the Third Restatement generates a number of conclusions about the set of reported court decisions. First, the absolute number of reported case decisions citing and discussing the Restatement was surprisingly small. It re-


157. Id. Many case decisions have found that there may be tort liability for personal injuries, should they be incurred on the land burdened by an easement. Numerous case decisions make the easement owner liable for such losses should negligent maintenance be established. See, e.g., Sutera v. Go Jokir, Inc., 86 F.3d 298, 303-07 (2d Cir. 1996); Morrow v. Boldt, 512 N.W.2d 83, 86 (Mich. Ct. App. 1994); Green v. Duke Power Co., 290 S.E.2d 593, 598 (N.C. 1982).


flected an annual average of sixty-seven case references in forty reported decisions per year over the fifteen-year study period. This volume of decisions is less than one reported case at any level in all states and in the entire federal judicial system. Even focusing solely on the last ten years, the average number of annual case references rose slightly from sixty-seven to seventy-seven, and the average number of reported cases grew from forty to forty-eight. This growth represents an extremely modest, and relatively stable, series of annual totals reflecting no rapid acceleration in the numbers of either references or case decisions. These annual numbers undeniably constitute a very small number of cases when they are understood in the context of all reported decisions of the state and federal courts. They are especially small when compared to the judicial receptiveness of other Restatements in common law areas. Second, the cases containing mentions of the Restatement were overwhelmingly decided by state courts on a nearly 90% basis. Within the state courts, the courts of appeal rather than state supreme courts were represented on an approximate 70% to 30% basis. Trial court decisions barely factored into the state court pattern. However, a completely different picture was evident in the federal decisions where trial court decisions were the most common on a 66% to 34% basis.

161. Separating and analyzing the entire fifteen-year study period as three five-year sections, the annual average number of reported cases did increase from 25.4 to 44.8 and then to 51.4 representing a doubling of the number of cases mentioning the Restatement from the first segment to the last one. Curiously, the number of references to the Restatement in each case has trended downward from 1.87 references per case in the first segment to 1.54 references per segment in the last one. These patterns suggest that more courts are using the Restatement in their decisions but that they now make a more limited use of it.

162. See supra text accompanying note 76.

163. One appraisal of the general impact of Restatements on the common law sets forth an impressive, although dated, assessment. “[T]he success of the Institute has been immense. In some states, where there is no conflicting statute or earlier case law precedent, the Restatements are the law. As Wisconsin Supreme Court Justice Shirley Abrahamson pointed out in her Fairchild Lecture, as of March 1994 there had been 125,000 published court citations to Restatements, and the U.S. Supreme Court had cited the Restatements in no fewer than nine cases during the 1993-1994 term. Judges in every one of the fifty states have utilized the Restatements; while some of these are simply string citations, as Justice Abrahamson has observed, Restatement work has had ‘a substantial impact in the “real world.”’ This impact has, if anything, intensified since; total published citations to Restatements by 1998 were up to 141,087.” John P. Frank, The American Law Institute, 1923-1998, 26 HOFSTRA L. REV. 615, 638-39 (1998); see also David A. Thomas, Restatements Relating to Property: Why Lawyers Don’t Really Care, 38 REAL PROP. PROB. & TR. J. 655, 656 n.1 (2004) (claiming that the First and Second Restatement of Property had only been mentioned in 1500 cases since 1936 while the Restatements of Torts and Contracts had 16,500 case references).

164. In 2011, the balance between state appeals and state supreme court decisions mentioning the Restatement shifted to a 50 / 50 ratio with the supreme courts becoming relatively more active.

165. At the federal level, 65% of all cases mentioning the Restatement were from the trial level U.S. District Courts, Court of Claims, and Bankruptcy Courts. See supra note 77.
Third, regardless of the number of judicial references to the Restatement, certain state decisions were much more positive than the national average with Nevada leading followed closely by Mississippi and Oregon. On the other hand, other states were much more negative in their references to the Restatement than the national average with West Virginia leading followed by the District of Columbia, New York, and Washington. Fourth, there was very little intensity of acceptance or rejection of the Restatement in most of the opinions mentioning it. There were, surprisingly, few state or federal decisions either strongly adopting or strongly rejecting a Restatement section. Generally, the judicial reactions were mildly positive in degree and did not gravitate towards the extremes. Fifth, the distribution of state and federal courts referring to the Restatement in their reported opinions varied widely throughout the nation. Over the study period, Arizona had the largest number of case decisions with forty-one, while Connecticut had the greatest number of specific references to the Restatement with eighty-eight. Colorado and Massachusetts were not far behind these states with their totals. Putting this performance into a clearer national perspective, nearly half of the states had ten or fewer references to the Restatement over the fifteen-year study period. Some states had largely ignored the

---

166. The average scaled score of judicial treatment of the Restatement was 4.18 on the 6-point scale. The scaled score average for Nevada was 5.25 followed by Mississippi and Oregon tied at 4.67. On the other end of the spectrum, West Virginia had a scaled score of 2.40 while the District of Columbia was at 3.44 and New York scored 3.50.

167. The following state supreme courts issued decisions giving ‘heavy reliance’ to the Restatement: Massachusetts (5), New Jersey (5), New Mexico (5), Texas (5), Colorado (4), and Connecticut (4). On the negative side, the following states decisions ‘declined to adopt’ the Restatement: Washington (6), Wisconsin (5), and Vermont (2). In the federal courts, there were 5 ‘heavy reliance’ decisions but only 3 ‘decline to adopt’ rulings.

168. Over the study period, with 41 case decisions referring to the Restatement, Arizona led the nation, followed by Connecticut (34), Colorado (31), Massachusetts (30), and New Jersey (18). This statistic reveals that even in the most active jurisdictions, very few case decisions cited to the Restatement.


170. Connecticut (88), Colorado (84), Arizona (64), Massachusetts (61), and New Jersey (54) were the top 5 states in terms of the number of case references to the Restatement.

171. The following state courts produced <10 references to the Restatement from 2000-2014: Arkansas (3), Delaware (6), Florida (7), Hawaii (6), Idaho (7), Indiana (1), Iowa (9), Minnesota (1), Mississippi (9), Missouri (7), Nebraska (7), Nevada (4), New York (2), North
Restatement altogether in their case decisions. During the same time period, the number of state and federal case decisions mentioning the term “easement,” “real covenant,” and “servitude” yielded approximately 28,000 results. Considered in this light, Arizona’s eighty-eight Restatement mentions represented a very small number of references. Sixth, although the entire Restatement contains ninety-seven separately-numbered sections, only a few received the regular attention of the courts, and a majority of the remaining ones were largely ignored. Ten of the ninety-seven sections received nearly 50% of all the case references during the study period. The top five most frequently referred to sections were 4.1, 1.2, 4.10, 2.17, and 4.8. The most commonly mentioned Restatement chapters were chapters 1, 2, and 4 with the least frequently referred to chapters being 3, 5, 6, 7, and 8. This pattern indicates that the Restatement topic areas of definitions, servitude creation theory, and the interpretation of servitudes garnered the greatest judicial attention while the rest of the document largely escaped frequent and thorough discussion.

Carolina (3), North Dakota (6), Oklahoma (8), Oregon (6), Rhode Island (5), South Dakota (10), Tennessee (10), Virginia (2), and West Virginia (5).

Several states had virtually no cases referring to the Restatement. For example, Indiana (1), Minnesota (1), New York (2), Virginia (2), and Arkansas (3) had the fewest number of case mentions.

A search in all of LexisNexis’s state court decision databases limited to [easement OR “real covenant” OR “equitable servitude” OR servitude] for 2000-2014 returned 20,560 results. Along with the 50 states, the Lexis search included D.C., Northern Mariana Islands, Puerto Rico, and Virgin Islands courts. A search in all of Lexis’s federal court decision databases with a search limited to [easement OR “real covenant” OR “equitable servitude” OR servitude] for 2000-2014 returned 7,965 results. In addition to District Courts, Circuit Courts, and the U.S. Supreme Court, the Lexis search included the Court of Federal Claims, Military Courts, and Tax Courts. Combining the state with the federal court decisions, there was a total of 28,525 case references to these search terms over the fifteen-year study period.

Examining all 1013 case references over the study period, eleven sections were never mentioned in any state or federal case decision while 64 of 97 (or 65%) Restatement sections received 10 or fewer case mentions. Of these low citation frequency sections, 55 of the 64 received 5 or fewer case mentions. All in all, 77% of the Restatement’s sections received scant judicial treatment over the fifteen-year study period. Chapters 3, 5, 6, 7, and 8 were the principal components in these low frequency categories, and they largely had very limited discussion in state or federal court opinions.

This lists the most frequently mentioned Restatement sections along with the percentages of the total number of references: 1) section 4.1 (89 mentions / 8.8%), section 1.2 (71 mentions / 7%), section 4.10 (59 mentions / 5.8%), section 2.17 (57 mentions / 5.6%), section 4.8 (49 mentions / 4.8%), section 2.16 (38 mentions / 3.8%), section 2.15 (34 mentions / 3.4%), section 4.9 (29 mentions / 2.9%), section 1.1 (27 mentions / 2.7%), and section 4.13 (26 mentions / 2.6%). The actual number of case decisions containing these references was far less than the number of mentions.

The most frequently mentioned Restatement sections were: chapter 1 (Definitions), chapter 2 (Creation of Servitudes), and chapter 4 (Interpretation of Servitudes). The least frequently mentioned Restatement sections were: chapter 3 (Validity of Servitudes Arrangements), chapter 5 (Succession to Benefits and Burdens of Servitudes), chapter 7 (Modification and Termination of Servitudes), and chapter 8 (Enforcement of Servitudes).
III. DID THE THIRD RESTATEMENT ACHIEVE ITS PURPOSE?

This Article has concentrated on identifying and analyzing the judicial receptiveness that the Third Restatement has received during the fifteen-year period following its final release in 2000. Published in final form at the conclusion of a lengthy development process and with great enthusiasm in some quarters, the Third Restatement was heralded to be within the ALI’s fundamental mandate to promote “the ‘clarification and simplification of the law and its better adaptation to social needs.’” However, the Restatement went beyond a merely descriptive role, capturing a “snapshot” of the state of the law. It adopted many new principles that attempted to clarify the murky meaning of earlier, common law terminology and unify the servitude concept by making it a “modern integrated body of law.”

Springing from a nineteenth-century codification tradition, this recent Restatement of Property has transcended mere doctrinal simplification and clarification to the “setting forth [of] fundamental principles of the common law in a logically ordered form.” The drafters clearly had the intention to make the common law of servitudes function more smoothly and predictably. Significantly, the new Restatement also advanced normative concepts thought necessary for “mak[ing] it easier to use servitudes for the important roles they play in modern land development.” The Third Restatement advanced ideas that would emphasize notions of economic efficiency, free contractual power, and doctrinal unification. Other features of the Restatement would allocate one party to the servitude agreement a greater set of rights than currently would exist under prevailing common law rules in many jurisdictions. The drafters clearly believed these principles to be desirable modifications of existing legal doctrine.

These major suggestions also raise questions about the continuing utility and desirability of the common law process, where judges utilize the case-by-case decisional method to implement and refine legal rules. This traditional Anglo-American method fits legal doctrine together with specific contextual information to reach ‘fair’ and gener-

177. See Buck, supra note 169, at 160-64.
178. Liebman, supra note 26, Forward, at X; see also French, Highlights, supra note 36, at 226.
179. French, Design Proposal, supra note 5, at 1231.
182. Predictability had been emphasized as a desirable value since the formation of the ALI in the 1920s. See Am. L. Inst., Proceedings, 1 A.L.I. PROC. 104-09 (1923); see also White, supra note 14, at 29.
183. French, Highlights, supra note 36, at 226.
ally consistent results. How should a new Restatement be considered by the courts in their day-to-day decisions in the myriad of property law conflicts involving servitudes? Should the Restatement be formally adopted and made ‘hard law’ in a jurisdiction like a statute or codified rule? Should it be considered to be persuasive authority and viewed as a ‘soft law’ suggestion available to the common law courts? Or, should it be merely considered a well-meaning ‘academic effort’ carefully analyzing and reordering the existing common law but detached from the actual realities of courts employing the common law method? The ultimate decision of the appropriate role or purpose of the Restatement rests not with its drafters, but rather, with courts and legislatures that will or will not adjust current law in response.

The analysis of this database of case law provides a partial answer to the central question—can a Restatement reform the American law of servitudes? Theoretically, the Restatement could serve as the model for courts and legislatures to follow. However, the cases decided over the last fifteen years reveal that federal and state reported case decisions only give modest attention to the Restatement. In no single jurisdiction could it be said that the law of servitudes has been significantly reformed or revolutionized by the Restatement. A few state courts have favorably embraced a few of its provisions, but in the overwhelming majority of courts, the most that can be said is that the impact has been mildly positive.

What explains this phenomenon? A host of possible explanations exist. There is nothing to suggest that the thoroughly prepared and completely vetted Restatement was poorly drafted or badly reasoned. There is also no reason to believe that the Restatement was drafted to benefit a particular commercial or other interest group and is working to advance some undisclosed agenda. It might be possible that some of the novel Restatement provisions, which vary in existing state common law principles, may not contain sufficient persuasive force to convince state courts to use the Restatement as the theoreti-

184. At the creation of the ALI, the founders did not wish for the new Restatements to serve as codes or statute. See Am. L. Inst., supra note 182, at 23 (“[W]e do not look forward to the principles of law [in Restatements] . . . being adopted as a code.”).

185. The founders of the ALI did consider the possibility that Restatements would be viewed as “a guide” and aid to the courts and that they would be treated as the equal of a state supreme court opinion having a role “in correcting existing uncertainties and otherwise improving the law . . . .” Id. at 24-25.

186. One academic considered all of the Restatements of Property and reached the following conclusion: “With the benefit of hindsight, the Restatements generally and the Restatements of Property particularly, may be best viewed as academic exercises. As such, they have benefitted from, and given benefit as, profoundly good thought about important issues of law. But in the end the Restatements have had little influence on the actual daily application and administration of the law.” Thomas, supra note 163, at 695 (emphasis added).
cal foundation for a significant change in the structure of the common law. More simply, another reason might be that practitioners may not be familiar with the Restatement, and, as a result, they have not incorporated it into their briefs or court arguments.

Finally, a more compelling explanation for the observed results may rest with the nature of the common law as it relates to real property. It may be that courts take a special view that there is an overarching need for stability in the common law of property. This value of doctrinal stability in property law could differentiate it from tort or contract law doctrine. The courts’ reluctance to fully embrace the Restatement may also be explicable on the desire of preserving court control over the development of the common law of property. This ‘property exceptionalism’ may make courts less willing to receive comprehensive revisions to their basic property law doctrine from external sources. Under this view, judicial control would need to be maintained in order to reinforce stable framework principles and traditional decisionmaking authority, even if it would result in poorly defined legal concepts or a less than optimal doctrine. If this final explanation is correct, then it is not surprising that the Third Restatement has had its observed impact and has not been a major force of law reform. If this final explanation is correct, it should also give pause to the drafters of the Fourth Restatement who have just embarked on their new undertaking to prepare a comprehensive Restatement of Property.