Missouri Law Review

Volume 89 | Issue 1 Article 5

Winter 2024

Repealing Single-Family Zoning Is Not Enough: A Proposal For Removing Existing Parallel Private Covenants For Violating Public Policy

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ABSTRACT

The United States is currently suffering a pervasive and unsettling shortage of housing and increased housing unaffordability. Rents are at an all-time high, which has a disproportionate impact on people of color and people earning lower incomes as these individuals are more likely to rent rather than own their homes. Moreover, people solidly in the middle class are finding it increasingly difficult to purchase residences within their budgets.

Critics have identified "single-family zoning"—allowing only one single-family home per lot—as a major cause of the housing supply and affordability problems. In response, a handful of states and cities have recently passed legislation that voids or limits this zoning by allowing small-scale multifamily units. Proponents claim that the increased density will help address shortages, lack of affordability, and racial and social exclusion.

Properties under single-family zoning may also be subject to private covenants that limit density of land use with substantive restrictions like those imposed by zoning. Thus, unless existing private anti-density restrictions are also removed or limited, they will still bar multi-family development even though zoning has been relaxed.

After analyzing takings arguments against invalidating existing single-family covenants, this article suggests and explores a different approach. Existing single-family covenants can be voided under a longstanding doctrine that bars enforcement of covenants violating public policy. The article explores how and why the doctrine remains viable and provides the public policy basis for application to single-

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family covenants. It also argues that an invalidated single-family covenant is not "property" requiring Fifth Amendment compensation. These covenants can thus be removed by government, most likely by legislation, without draining the public purse.

TABLE OF CONTENTS

I. INTRODUCTION

The United States is currently suffering a pervasive and unsettling shortage of housing and increased housing unaffordability. Rents are at an all-time high, which has a disproportionate impact on people of color and people earning lower incomes, as these individuals are more likely to rent rather than own their homes.[1] Rents in professionally managed apartment buildings rose by 23.9% from 2020 to 2023.[2] Moreover, people solidly in the middle class are finding it increasingly difficult to purchase residences within their budgets.[3] From 2020 to 2023, asking prices for homes rose 37.5%.[4] Newest entrants face a particular struggle to buy the traditional "starter home." "Millions of households are now priced out of homeownership, grappling with housing cost burdens, or lacking shelter altogether. . . ."[5]

There are many factors, some going back a few years, behind this supply and affordability crisis. They include, among others, decreased construction of single-family homes[6] (perhaps as a legacy of the 2008 financial crisis that put many homebuilders out of business),[7] inadequate

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[1] Christina Stacy et al., *Land-Use Reforms and Housing Costs: Does Allowing for Increased Density Lead to Greater Affordability*, 60 URB. STUD. 2919, 2920 (2023).

[2] JOINT CENTER FOR HOUSING STUDIES, HARVARD UNIVERSITY, THE STATE OF THE NATION'S HOUSING 2 (2023), https://www.jchs.harvard.edu/sites/default/files/reports/files/Harvard_JCHS_The_State_of_the_Nations_Housing_2023.pdf [https://perma.cc/W6XA-RKDT].

[3] *See* Adam Barnes, *Housing Affordability Hits Another Low: Report*, THE HILL (July 3, 2023, 10:54 AM), https://thehill.com/business/4078975-housing-affordability-hits-another-low-report/ [https://perma.cc/Q8LY-J5NF] (major homeownership expenses now "require about 33% of a family's monthly income").

[4] JOINT CENTER FOR HOUSING STUDIES, *supra* note 2.

[5] *Id.* at 1.

[6] Jeffery Hayward, *U.S. Housing Shortage: Everything, Everywhere, All at Once*, FANNIE MAE (Oct. 31, 2022), https://www.fanniemae.com/research-and-insights/perspectives/us-housing-shortage [https://perma.cc/J3RJ-WAY3]; JOINT CENTER FOR HOUSING STUDIES, *supra* note 2, at 4.

[7] Chris Arnold, *There's Never Been Such a Severe Shortage of Homes in the U.S. Here's Why*, NPR (Mar. 29, 2022, 7:00 AM), https://www.npr.org/2022/03/29/1089174630/housing-shortage-new-home-construction-supply-chain [https://perma.cc/87PP-2KQV].

land availability,[8] increased household formation,[9] higher interest rates,[10] great costs of construction materials and labor,[11] and entry of investment groups into the single-family home market causing higher rents.[12]

Various commentators have identified "single-family zoning"—zoning that permits only one single-family home per lot and use by only one single family—as a major cause of housing supply and affordability problems.[13] In response, a handful of cities and states have recently passed legislation that voids or limits single-family zoning and other related anti-density laws. This legislation permits a landowner to construct small-scale multifamily buildings in single-family zones if the landowner so chooses and may reject other limits, such as those on accessory units or the splitting of large lots to allow more loci for homebuilding.[14] Proponents claim that

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[8] Adewale A. Maye & Kyle K. Moore, *The Growing Housing Supply Shortage has Created a Housing Affordability Crisis*, ECON. POL'Y INST. (July 14, 2022, 9:31 AM), https://www.epi.org/blog/the-growing-housing-supply-shortage-has-created-a-housing-affordability-crisis/#:~:text=Some%20of%20the%20leading%20factors,in%20certain%20neighborhoods%E2%80%94maintaining%20segregation [https://perma.cc/P33P-XKUD].

[9] Anna Bahney, *The U.S. Housing Market is Short 6.5 Million Homes*, CNN (Mar. 8, 2023, 8:57 AM), https://www.cnn.com/2023/03/08/homes/housing-shortage/index.html [https://perma.cc/9NAL-QDCV].

[10] Diane Olick, *The Shortage of Houses is Hitting Some People and Areas Harder Than Others*, CNBC (June 8, 2023, 1:39 PM), https://www.cnbc.com/2023/06/08/shortage-of-affordable-houses-real-estate-market-hits-some-hardest.html [https://perma.cc/H6FU-RJFF].

[11] Kriston Capps, *Developers Forecast Major Affordable Housing Drought in 2025*, CITYLAB (July 19, 2023, 7:00 AM), https://www.bloomberg.com/news/articles/2023-07-19/affordable-housing-shortage-looms-amid-inflation-high-construction-costs [https://perma.cc/CF8C-JMUQ].

[12] Tim Henderson, *Pew Charitable Trusts, Investors Bought a Quarter of Homes Sold Last Year, Driving up Rents*, STATELINE (July 22, 2022), https://stateline.org/2022/07/22/investors-bought-a-quarter-of-homes-sold-last-year-driving-up-rents/ [https://perma.cc/WRU6-UUWL].

[13] *See* Robert C. Ellickson, *The Zoning Straitjacket: The Freezing of American Neighborhoods of Single-Family Houses*, 96 IND. L.J. 395, 397–98 (2021) [hereinafter Ellickson, *The Zoning Straitjacket*]; John Infranca, *Singling Out Single-Family Zoning*, 111 GEO. L.J. 659, 662–63 (2023); Sara C. Bronin, *Zoning by a Thousand Cuts*, 50 PEPP. L. REV. 719, 722–23 (2023); Sarah J. Adams-Schoen & Edward J. Sullivan, *Middle Housing By Right: Lesson from an Early Adopter*, 37 J. LAND USE & ENV'T L. 189, 191–92 (2022); *see also infra* Section II.B.1., citing critics. Aspects of a zoning code besides single-family zoning that limit density include large minimum lot size, lengthy setback lines per each home, and prohibitions on accessory dwelling units such as a "grandparents' apartment." *See id.* These are referred to collectively in this article "anti-density" zoning or regulations.

[14] The exact number of units varies under the different legislation. *See infra* Section II.B.3. The landowner is still permitted to build single-family structures if the landowner so chooses.

the resulting increases in density will help address housing shortages, lack of affordability, and racial and social discrimination.[15]

One issue that has received limited attention in the drive to pass statutes reforming public zoning, however, is the fact that the properties under single-family zoning may also be subject to *private* covenants that limit density of land use with substantive restrictions similar to those employed in zoning ordinances.[16] Indeed, private land use restrictions—enforced as covenants running with the land—pre-date zoning by hundreds of years. Thus, unless existing *private* anti-density restrictions are also removed or limited, they will still bar multi-family developments even though zoning has been relaxed.

Therefore, limiting single-family zoning is not enough if the same restrictions are imposed through private covenants. A legislature might, as California has done to some extent, expressly invalidate some varieties of private covenants that impose certain anti-density controls.[17] Adjusting zoning is relatively easy under statutory and constitutional constraints.[18] Cutting back on covenants is more difficult given constitutional protections to the holders of these private property interests. Putting that

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[15] *See* Alex Baca et al., *"Gentle" Density Can Save Our Neighborhoods*, BROOKINGS (Dec 4, 2019), https://www.brookings.edu/articles/gentle-density-can-save-our-neighborhoods/ [https://perma.cc/2WZQ-RHYW]; *see also* Jonathan Rothwell & Douglas S. Massey, *The Effect of Density Zoning on Racial Segregation in U.S. Urban Areas*, 44 URB. AFF. REV. 779, 782 (2009).

[16] There has been some discussion in the literature about the conflict of zoning and covenants. *See* Ken Stahl, *The Power of State Legislatures to Invalidate Private Deed Restriction: Is It an Unconstitutional Taking?*, 50 PEPP. L. REV. 579 (2023) (applying *Penn Central* to legislative overrides of HOA covenants banning ADUs and rentals; and to overrides of racial covenants; and to overrides of covenants that limit residential development provided that the owner develops the property for 100% affordable housing); Karl E. Geier, *Statutory Overrides of "Restrictive Covenants" and Other Private Land Use Controls: The Accelerating Trend Towards Legislative Overwriting of Contractual Controls on the Use and Development of Real Property*, 32 MILLER & STARR REAL EST. NEWSALERT 240, 248 (2022) (asserting that the *Penn Central* test "would generally sustain the regulations limiting enforcement of a covenant."); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 797 (2020) ("the exclusionary effect of suburban HOS development is often much greater than municipal zoning"); Ganesh Sitaraman et al., *Regulation and the Geography of Inequality*, 70 DUKE L.J. 1763, 1821–25 (2021) (suburban HOAs would add to the usual exclusionary effects); *see also* Dwight Merriam, *Affordable Housing: Three Roadblocks to Regulatory Reform*, 51 COMPAR. URB. L. & POL'Y 219, 240–43 (2022) (covenants limiting diverse and affordable housing).

[17] *See, e.g.*, CAL. CIV. CODE § 714.3(a) (voiding covenants barring ADUs); *id.* § 714.6 (covenants conflicting with affordable housing development are void and unenforceable).

[18] James E. Krier & Stewart E. Sterk, *An Empirical Study of Implicit Takings*, 58 WM. & MARY L. REV. 35 (2016) (finding low percentages of successful takings challenges).

genie back into the bottle may involve significant takings claims. This is a story of achieving law reform. At its heart is the need for a reckoning between overlapping public and private systems of land regulation.

Section II of this article will briefly examine the social costs of single-family zoning. These costs similarly apply to the parallel universe of covenants that provide comparable restrictions. The section indicates the importance of voiding (also referred to herein as "invalidating") single-family covenants along with zoning changes. Section III unearths and examines the potential takings issue inherent in legislative voiding of limited single-family covenants. A major question is the characterization of the voiding of an existing single-family covenant—will the invalidation be viewed as a per se taking or a regulatory taking subject to the *Penn Central* balancing test? This question is complicated because a covenant is an intangible negative restriction on land that cannot be physically taken. The section concludes that while it is quite likely that courts following recent Supreme Court precedent might find the voiding of an existing covenant to be most akin to a physical taking, this is not clear. Moreover, the complexity of the question makes a direct legislative attack on these covenants suboptimal and unpredictable. As a result, section IV of the article argues for a method of invalidating single-family covenants that would likely avoid the constitutional issue. Instead, it frames and applies the longstanding doctrine holding that covenants violating public policy are void and unenforceable. If the covenant is invalid, it is not a property right for which compensation must be paid under takings law. It argues that in this new era of housing shortages and affordability challenges, covenants limiting housing to single-family units violate public policy and should be struck. This section also provides a roadmap of public policy sources that would apparently compel the limitation of single-family covenants. Courts and legislatures would be better able to accomplish their goal of limiting single-family covenants by applying the doctrine that voids covenants violating public policy.

II. SINGLE-FAMILY COVENANTS VS. SINGLE-FAMILY ZONING

Courts commonly state that covenants and zoning ordinances are separate systems of regulating land.[19] "The use that may be made of land under a zoning ordinance and the use of the same land under an easement or restrictive covenant are, as a general rule, separate and distinct matters, the ordinance being a legislative enactment and the easement or covenant a matter of private agreement."[20] According to the courts, zoning does not

[19] GERALD KORNGOLD, PRIVATE LAND USE ARRANGEMENTS: EASEMENTS, REAL COVENANTS, AND EQUITABLE SERVITUDES § 10.3 (3d ed. 2016) [hereinafter Korngold Treatise].

[20] Friends of Shawangunks, Inc. v. Knowlton, 476 N.E.2d 988, 990 (N.Y. 1985).

impair or abrogate covenants, and, correlatively, covenants do not control zoning.[21]

This blackletter law, however, should not obscure the fact that covenants and zoning often interact. It is a mistake to remedy policy infirmities of one without considering the interplay of the other. This paper illustrates the connection of public regulation and private arrangements. Removing impediments and encouraging increased housing supply and affordability by amending zoning may not bring about anticipated benefits if existing covenants block the operationalizing of the new zoning. This section examines covenant communities and single-family restrictions. It then explores the costs and benefits of single-family zoning and discusses recent attempts to reform it.

A. Covenants and Single-Family Restrictions

The enforcement of covenants running with the land—i.e., binding and benefiting successors of the original parties—pre-dates zoning by a couple of hundred years, depending on one's calculations.[22] Early developers used covenants to impose the single-family housing model, as well as other restrictions supporting residential life.[23] Covenants were, and continue to be, important private law tools to increase efficient use of land, allow free choice to owners, and help homeowners create neighborhoods that meet their aspirations.[24] At the same time, covenants can have pernicious, exclusionary effects. From early days, covenants

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[21] KORNGOLD TREATISE, *supra* note 19, at § 10.3. *See, e.g.*, Highland Springs S. Homeowners Ass'n v. Reinstatler, 907 N.E.2d 1067 (Ind. Ct. App. 2009) (setback variance granted under zoning regulation did not prevent association from enforcing similar private covenant); Mills v. HTL Enters., 244 S.E.2d 469 (N.C. Ct. App. 1978) (though zoning permitted commercial use, covenant against nonresidential use was still enforceable); McDonald v. Emporia-Lyon Cnty. Jt. Bd. of Zoning Appeals, 697 P.2d 69, 71 (Kan. Ct. App. 1985).

[22] Covenants have long been recognized. Spencer's Case, 77 Eng. Rep. 72 (QB 1583). Spencer's Case enforced covenants in leases. *Id.* Tulk v. Moxhay authorized the enforcement of covenants by injunction. 41 Eng. Rep. 1143 (Ch 1848). Early American cases upheld covenants. *See, e.g.*, Whitney v. Union Ry. Co., 77 Mass. (11 Gray) 359 (1858); Coudert v. Sayre, 19 A. 190 (N.J. Ch. 1890); Ulrich v. Hull, 17 Wis. 424 (Wis. 1863). In contrast, comprehensive zoning was only approved by the Supreme Court in 1926 in Village of Euclid v. Ambler Realty Co., 272 U.S. 365 (1926).

[23] *See* Allen v. Barrett, 99 N.E. 575 (Mass. 1912); Dollard v. Whowell, 160 N.Y.S. 544 (N.Y. App. Div. 1916); Shoyer v. Mermelstein, 114 A. 788 (N.J. Ch. 1921).

[24] KORNGOLD TREATISE, *supra* note 19, at ch. 8; Gerald Korngold, *Resolving the Flaws of Residential Servitudes: For Reformation Not Termination*, 1990 WIS. L. REV. 513 (1990).

barred certain racial and religious groups,[25] and they can limit personal autonomy of residents by effectively controlling choices within the home.[26] Covenants also can outlive their utility in light of changing times.[27]

Private land use restrictions and obligations, in the form of covenants binding and benefiting current and future landowners, are playing an increasing role in the regulation of buildings and land use. They continue to be an attractive, non-governmental method for creation and continuation of neighborhood design, uses, maintenance, and governance.

1. Incidence of Single-Family Housing Subject to Covenant Regimes

There is no precise tally of the number of American homes subject to single-family covenants. There are, however, various data points that provide a sense of the widespread magnitude of covenants. The 2019 American Housing Survey prepared from data of the U.S. Census estimates that single-family homes comprise 69.1% of the total U.S. housing units.[28] These data, however, do not identify the number of those units restricted by covenants nor distinguish between owned and rental properties.[29] Similarly, while reports stating that 70.8% of the total single-family homes and multifamily units completed in 2020 were single-family homes show the dominance of single-family housing, these reports do not demonstrate the presence of covenants.[30]

Other sources point to the significant number of American residences subject to private covenants and single-family restrictions. The Foundation for Community Association Research provides valuable data

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[25] KORNGOLD TREATISE, *supra* note 19, at § 10.02; Gerald Korngold, *The Emergence of Private Land Use Controls in Large-Scale Subdivisions: The Companion Story to* Village of Euclid v. Ambler Realty Co., 51 CASE. W. RES. L. REV. 617, 618 (2001) [hereinafter Korngold, 51 CASE W. RES. L. REV.].

[26] KORNGOLD TREATISE, *supra* note 19, at § 10.06; Gerald Korngold, *Single Family Use Covenants: For Achieving a Balance Between Traditional Family Life and Individual Autonomy*, 22 U.C. DAVIS L. REV. 951 (1989).

[27] Robert C. Ellickson, *Stale Real Estate Covenants*, 63 WM. & MARY L. REV. 1831 (2022) [hereinafter Ellickson, *Stale Real Estate Covenants*].

[28] U.S. CENSUS BUREAU, AMERICAN HOUSING SURVEY (2019), https://www.census.gov/programs-surveys/ahs/data/interactive/ahstablecreator.html?s_areas=00000&s_year=2019&s_tablename=TABLE1&s_bygroup1=1&s_bygroup2=1&s_filtergroup1=1&s_filtergroup2=1 [https://perma.cc/7T5A-LH7Q]. The survey estimates a total of 85,817,000 single-family units of a total of 124,135,000 units. *Id.*

[29] *See id.*

[30] U.S. CENSUS BUREAU, HIGHLIGHTS OF 2022 CHARACTERISTICS OF NEW HOUSING, https://www.census.gov/construction/chars/highlights.html [https://perma.cc/P6AL-H6UJ] (reporting 1,022,000 single-family homes and 368,000 multifamily homes completed in 2022).

on" community associations," defined as condominiums, cooperatives, and homeowners associations.[31] The hallmarks of a community association arrangement are the presence of common elements/interests serving the residents (anything from utilities to amenities to services) and a governing association to administer both the common property and the scheme of restrictive and affirmative covenants binding the homes.[32] As of 2020, an estimated 28% of the American population, or 74.1 million people, live in over 27 million housing units in associations.[33] These numbers are growing as a percentage of new housing, with 60% of recently built single-family homes being governed by homeowners associations.[34]

These data, however, both overstate and understate the properties subject to single-family covenants. As far as overstating, homeowners associations (estimated at 58%-63% of "community associations") are typically comprised of individual lots; building and use restrictions, often including single-family building requirements, are usually imposed on these properties, but not always.[35] Moreover, the 27 million units include residences that, by their multifamily nature, do not include a single-family covenant.[36] Thus, between 35% to 40% of community associations are organized as condominiums;[37] because condominiums can be created for different structures, such as high-rise buildings, townhouses, or detached private houses, a single-family *building* restriction may or may not be attached to the individual ownership interests.[38]

But the 27 million data point also understates the total amount of units subject to covenants and to single-family covenants, specifically. Those 27 million units do not include properties in "standard subdivisions" that

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[31] FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH, COMMUNITY ASSOCIATION FACT BOOK 2020 13 (2021), https://foundation.caionline.org/wp-content/uploads/2021/07/FB_Narrative_2020.pdf [https://perma.cc/V98F-PMSL] [hereinafter 2020 FACT BOOK].

[32] *Id.* at 14.

[33] *Id.* at 11; FOUNDATION FOR COMMUNITY ASSOCIATION RESEARCH, 2020-2021 U.S. NATIONAL AND STATE STATISTICAL REVIEW, https://foundation.caionline.org/wp-content/uploads/2021/07/2021StatsReview_Web.pdf [https://perma.cc/339Z-UEFE] [hereinafter 2020-2021 U.S. STATISTICAL REVIEW].

[34] Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. URB. ECON. 1, 7 (2019).

[35] 2020 FACT BOOK, *supra* note 31, at 13–15.

[36] *See* 2020-2021 U.S. STATISTICAL REVIEW, *supra* note 33.

[37] 2020 FACT BOOK, *supra* note 31, at 13.

[38] *See* GARY A. POLIAKOFF, THE LAW OF CONDOMINIUM OPERATIONS, § 1:5, Westlaw (database updated Sept. 2023); ALBERTO ESQUIVEL & JAIME R. ALVAYAY, A GUIDE TO UNDERSTANDING RESIDENTIAL SUBDIVISIONS IN CALIFORNIA, CAL. DEPT. OF REAL EST. 23–24 (2014), https://dre.ca.gov/files/pdf/ResidentialSubdivisionsGuide.pdf [https://perma.cc/2N4Y-3TTT].

are subject to covenants including single-family restrictions but lack common elements.[39] Because of the absence of common elements, these subdivisions are not included in the Foundation for Community Association Research tallies, creating an undercount of covenant-burdened properties.[40]

While these data points do not give a precise number of American homes subject to single-family building covenants, they, along with reported cases involving such restrictions, give a sense of the pervasive presence of private land use arrangements limiting multifamily residences. These covenants operate separately from any zoning restrictions on the property and present an alternative, enforceable set of controls regardless of any loosening of anti-density zoning. A conversation about boosting supply and affordability is incomplete without including the reach of covenants.

2. Subdivision Schemes

During the late nineteenth and early twentieth centuries, American developers began large-scale projects to convert tracts of vacant land into complete residential communities, subject to a scheme of covenants.[41] This was an era of rapid industrialization of American cities, with a rise in the negative externalities of pollution, traffic, urban crowding, among other maladies caused by factories and the surge in population to provide workers. It was a generation or two before the rise of zoning, so there was no wholesale public land use regulation in place and legally authorized to control the fallout created by the industrial boom. Developers marketed their new subdivisions to the wealthy, as oases of expensive and "exclusive" homes in a safe and calm environment, removed from urban turmoil and people of different races, religion, and class. The essential legal tool deployed to create these residential spaces was covenants. Covenants were valuable to bind not only the original purchasers of the lots to the scheme, but also successor buyers, devisees, and heirs.

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[39] *Id.* at 2, 12, 21; 2020 FACT BOOK, *supra* note 31, at 14–15.

[40] 2020 FACT BOOK, *supra* note 31, at 14–15

[41] *See* Gerald Korngold, 51 CASE W. RES. L. REV., *supra* note 25, at 619–23; EVAN MCKENZIE, PRIVATOPIA: HOMEOWNERS ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 36 (1994); MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS 45 (1987). Historically covenants were treated with suspicion by the courts, but during the 20th century they became recognized for role in creating residential neighborhoods and boosting values. See KORNGOLD TREATISE, *supra* note 19, at § 8.3.

The initial phase of large-scale community building, maturing in the 1920s, focused on subdivisions with expensive homes for the wealthy.[42] These developments sought harmony with the environment and homes in sync with each other. The developers believed that high standards were essential to achieve their vision of beauty and would also yield more profits than speculative lot sales.[43]

Covenants in these top end communities typically limited building and use of lots, imposed architectural and design controls, controlled building materials and standards, set lot sizes and landscaping guidelines, and imposed other rules. Single-family covenants provided an extra social exclusiveness, allowing for only high-end houses.[44] In the perception of people able to live within these luxury communities, the covenants regimes were a good thing and worked well. Exclusiveness and exclusion for the subdivision residents were part of the deal: express covenants barred racial and religious minorities and building standards effectively put homes on these properties beyond the reach of all but the well-to-do.[45] After World War II, developers shifted to building for more modest-income buyers.[46] Discriminatory covenants and exclusionary covenants still continued, however. As told by Richard Rothstein, despite the denial of enforcement of racial covenants in 1948 by the Supreme Court in *Shelley v. Kraemer*, the federal government continued to favor racial covenants in subdivisions in order for home buyers to qualify for federal mortgage insurance.[47] Ultimately, the Fair Housing Act of 1968 made it

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[42] MARC A. WEISS, *supra* note 41, at 2. For an early account of the use of covenants in subdivisions, *see* HELEN C. MONCHOW, THE USE OF DEED RESTRICTIONS IN SUBDIVISION DEVELOPMENT (1928).

[43] MARC. A. WEISS, *supra* note 41, at 46.

[44] *See* MARGARET MARSH, SUBURBAN LIVES 169–71 (1990); *see also* M. NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT 4 (2022) (referring to analogous zoning: "[T]his has been used toward the end of rigid economic segregation, which in the American context often means racial segregation.").

[45] *See* RICHARD R.W. BROOKS & CAROL M. ROSE, SAVING THE NEIGHBORHOOD: RACIALLY RESTRICTIVE COVENANTS, LAW, AND SOCIAL NORMS 47–56 (2013).

[46] MARC A. WEISS, *supra* note 41, at 2; 2020 FACT BOOK, *supra* note 31, at 29.

[47] Ellickson, *Stale Real Estate Covenants*, *supra* note 27, at 1849. Early covenant subdivisions often expressly barred persons of color (and religious minorities) from residing in the subdivision. *See* BROOKS & ROSE, *supra* note 45, at 3–4. The growth in single-family zoning came after World War I. RICHARD ROTHSTEIN, THE COLOR OF LAW: A FORGOTTEN HISTORY OF HOW OUR GOVERNMENT SEGREGATED AMERICA 48 (2017). Rothstein attributes this to not just an expression social class elitism but also an attempt to institute de jure racial discrimination after the Supreme Court barred racial zoning. *Id.* Rothstein finds that the "racial intent" behind exclusionary zoning went beyond simply using the requirement of single-family homes to make neighborhoods unaffordable to lower-income people of all races. *Id.*; *see also* KEEANGA-YAMAHTTA TAYLOR, RACE FOR PROFIT: HOW BANKS AND THE REAL ESTATE INDUSTRY UNDERMINED BLACK HOME OWNERSHIP 2 (2019).

unlawful to include new discriminatory covenants in deeds or declarations.[48]

3. The Reach of Covenants

The degree of restriction of properties across the United States by covenants is significant. Covenants vary as to whether they limit properties to single-family homes, permit accessory dwelling unit restrictions, require large lot sizes, contain off-street parking requirements, and offer other provisions that effectively suppress the supply of land and affordability. These agreements, though often substantively similar to zoning, operate in a separate universe and are subject to amendment only by the landowners within this private preserve.[49]

B. Zoning and Single-Family Restrictions

Use of covenants was a viable legal strategy for new subdivisions, but the holdout problem was a major, and usually insurmountable, hurdle to imposing covenants on existing communities.[50] As a result, restrictions mandated by the sovereign, in the form of newly emerging zoning laws, were a better option, applying universally within the municipality.[51] The development of residential covenants, particularly single-family covenants, is explored in the following section. The emergence of parallel systems of land use regulation—private covenants and governmental zoning—underlies the current conflict over single-family zoning.

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[48] The presence of legacy discriminatory covenants in the chain of title remains a serious issue as they may deter a person uninformed on the law from acquiring a property and have a corrosive effect in general on a society attempting to address our legacy of racial discrimination. *See* 42 U.S.C. § 3604. Efforts are under way to provide for expedited removal of discriminatory covenants from public records, beyond current statutes in some states. *See* Justin Wm. Moyer, *Racist Housing Covenants Haunt Property Records Across the Country. New Laws Make Them Easier to Remove*, WASH. POST (Oct. 22, 2020), https://www.washingtonpost.com/local/racist-housing-covenants/2020/10/21/9d262738-0261-11eb-8879-7663b816bfa5_story.html [https://perma.cc/R96M-E62M].

[49] KORNGOLD TREATISE, *supra* note 19, at §§ 11.03, 11.13.

[50] ROBERT H. NELSON, PRIVATE NEIGHBORHOODS AND THE TRANSFORMATION OF LOCAL GOVERNMENT 148 (2005). All owners of a parcel must sign the document creating interests in the land. *See* King v. Oakmore Homes Ass'n, 241 Cal. Rptr. 140 (Cal. Dist. Ct. App. 1987) (all cotenants must sign easement document). Moreover, one "holdout" lot owner could refuse to consent to amendment or termination of the covenant, unless the subdivision documents provide for less than unanimous aments. *see* Rick v. West, 228 N.Y.S.2d 195 (N.Y. 1962); *see also* KORNGOLD TREATISE, *supra* note 19, at § 11.03 at 487–88.

[51] *See* NELSON, *supra* note 50.

Single-family zoning has a large footprint across America. The following percentages of land zoned for residential purposes is further limited to single-family homes: San Francisco, 38%; Los Angeles, 70%; Seattle, over 89%; San Jose, approaching 90%.[52] Professor Robert C. Ellickson's study of 37 suburbs in Silicon Valley, Greater New Haven, and Greater Austin found that 91% of residentially-zoned land was for single-family houses only.[53]

The next section highlights the problems of single-family zoning, many of which are manifestations of broader critiques of zoning and are also reflected in concerns about other forms of anti-density zoning. The benefits, perceived by supporters, of single-family zoning are also examined. Importantly, most of the costs of single-family zoning apply to single-family private *covenants*, with variations reflecting the more limited geographical footprint of private restrictions neighborhoods.

1. Costs of Zoning

a. Inefficiency

Single-family zoning leads to inefficient use of our limited land resources.[54] Single-family housing restrictions mean less land in municipalities for apartments and duplexes, which increases land costs for these housing types and imposes higher prices on people seeking such housing.[55] Because of zoning strictures, developers cannot construct new housing types to meet the demands of the current market.[56] Even for those seeking a single-family home, the lack of alternatives increases competition for existing single-family homes and drives up prices.[57]

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[52] Michael Manville et al., *It's Time to End Single-Family Zoning*, 86 J. AMER. PLANNING ASS'N 106, 107 (2022).

[53] Ellickson, *The Zoning Straitjacket*, *supra* note 13, at 397–98 (2021).

[54] It is asserted that restrictive zoning in general decreases housing supply and increases cost. *See* NOAH KAZIS, POLICY BRIEF: THE CASE AGAINST RESTRICTIVE LAND USE AND ZONING, NYU FURMAN CENTER 2 (Jan. 2022) (rigid land use rules cause increased expense and limited supply of housing); Alex Horowitz & Ryan Canavan, *More Flexible Zoning Helps Contain Rising Rents*, PEW (Apr. 17, 2023), https://www.pewtrusts.org/en/research-and-analysis/articles/2023/04/17/more-flexible-zoning-helps-contain-rising-rents [https://perma.cc/VX67-YN6F].

[55] Manville et al., *supra* note 52, at 107.

[56] Maye & Moore, *supra* note 8; Richard D. Kahlenberg, *Liberal Suburbs Have Their Own Border Wall*, THE ATLANTIC (July 23, 2023), https://www.theatlantic.com/ideas/archive/2023/07/wealthy-liberal-suburbs-economic-segregation-scarsdale/674792/ [https://perma.cc/25V7-DC4M].

[57] *See* Hongwei Dong, *Exploring the Impacts of Zoning and Upzoning on Housing Development: A Quasi-Experimental Analysis at the Parcel Level*, J. PLAN. EDUC. & RSCH. (2021) (upzoning and higher density zoning leads to a higher probability of development and housing supply); GRAY, *supra* note 44, at 3 ("As a

Moreover, studies indicate that single-family zoning is remarkably resistant to change over time.[58]

b. Inequality

People who are unable to pay the heightened cost for single-family homes are excluded from single-family zone neighborhoods.[59] Single-family neighborhoods are claimed to be "explicitly classist," with the desire for "exclusivity" also creating social separation.[60] More than social exclusion results. Single-family neighborhoods are usually high-opportunity areas, so that services and better future outcomes are denied to people who cannot gain entry.[61]

The high cost of housing especially in the country's most innovative and productive cities prevents talented people without independent means from relocating to those centers.[62] These barriers harm our collective goals of economic and social progress. The high costs also, contrary to a cherished American belief, limit the options of people to pursue their best interests and destinies.[63] It is asserted that single-family zoning likely increases wealth inequality, as home values in the protected neighborhood rise due to the zoning.[64]

c. Racial Discrimination

Recent scholarship has underscored the fact that America's past and current pattern of racial segregation in housing is not the result of accident or purely private decision making or market forces, but is directly due to discriminatory policies by the federal, state, and local governments.[65] It has been stated that single-family zoning is "deeply interwoven with

result of the further tightening of zoning restrictions beginning in the late 1970s, median housing prices have dramatically outpaced median incomes in many parts of the country over the past half century, such that millions of Americans now struggle to make rent or pay their mortgage each month."); Amrita Kulka et al., *How to Increase Housing Affordability? Understanding Local Deterrents to Building Multifamily Housing* (Fed. Rsrv. Bank of Bos., Working Paper No. 22-10, 2022).

[58] Ellickson, *The Zoning Straitjacket*, *supra* note 13, at 401

[59] Manville et al., *supra* note 52, at 106–07; Robert C. Ellickson, *Zoning and the Cost of Housing*, 42 CARDOZO L. REV. 1611, 1615–16 (2021) [hereinafter Ellickson, *Zoning and the Cost of Housing*].

[60] Manville et al., *supra* note 52, at 107.

[61] *Id.*; Kahlenberg, *supra* note 56 (reporting on greater educational opportunities for children in single-family zoned towns).

[62] Ellickson, *Stale Real Estate Covenants*, *supra* note 27, at 1614–15.

[63] *See* GRAY, *supra* note 44, at 3.

[64] *See* Jake Wegmann, *Death to Single-Family Zoning . . . and New Life to the Missing Middle*, 86 J. AMER. PLAN. ASS'N, 113, 116 (2020).

[65] *See* ROTHSTEIN, *supra* note 47.

racism."[66] The Supreme Court of the United States struck down zoning based on race in the 1917 case, *Buchanan v. Warley*.[67] Various other tools of zoning, however, were used to impose indirect racial discrimination. For example, single-family zoning (barring apartments), large lot zoning, lack of access in suburbs to public transportation, and other measures serve to impose "rigid economic segregation, which in the American context often means racial segregation."[68] The problem of exclusionary zoning remains, with negative effects on not only housing but also on economic opportunities, health, and wealth accumulation.[69]

d. Environmental

Restricting land to single-family housing and other anti-density measures results in environmental damage. Sprawl, with increased reliance on automobiles and accompanying carbon emissions, heightens air and water pollution.[70] Construction of far-flung highways and utilities also consumes resources. In contrast, multi-family housing near public transportation is an important part of environmental protection and mitigation of climate change.[71]

2. Perceived Benefits of Single-Family Zoning

These costs should be compared to the perceived benefits of single-family zoning. Homeowners believe the benefits include increased home values, reduced traffic and congestion in the neighborhood, prevention of nuisances, and peaceful living.[72] For "middle class" white Americans in the twentieth century, zoning protected them from the public health problems of unregulated urbanization, including lack of access to clean

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[66] Manville et al., *supra* note 52, at 107. *See* Ellickson, *Zoning and the Cost of Housing*, *supra* note 59, at 1617–18.

[67] Buchanan v. Warley, 245 U.S. 60 (1917).

[68] GRAY, *supra* note 44, at 4. *See* Manville et al., *supra* note 52, at 107 (noting that single-family zoning allowed "back door segregation" by making it harder for lower income people, often non-white, to enter affluent places.).

[69] *See* Cecilia Rouse et al., *Exclusionary Zoning: Its Effect on Racial Discrimination in the Housing Market*, THE WHITE HOUSE (June 17, 2021), https://www.whitehouse.gov/cea/written-materials/2021/06/17/exclusionary-zoning-its-effect-on-racial-discrimination-in-the-housing-market/ [https://perma.cc/MY99-YQ24].

[70] Thomas J. Nechyba & Randall P. Walsh, *Urban Sprawl*, 18 J. OF ECON. PERSP. 177 (2004); *see* Ellickson, *Zoning and the Cost of Housing*, *supra* note 59, at 1615–16.

[71] *See* KAZIS, *supra* note 54, at 2.

[72] Ellickson, *The Zoning Straitjacket*, *supra* note 13, at 398; Edward L. Glaeser et al., *Why is Manhattan so Expensive? Regulation and the Rise in House Prices*, 48 J.L. & ECON. 331 (2005).

water, overcrowding, absence of sewage systems, and limited light and air in tenements, among other things.[73]

Zoning also supported the psychic benefits of achievement and exclusiveness. In giving constitutional approval to zoning, the Supreme Court of the United States in *Village of Euclid v. Ambler Realty Co*. signaled who was in and who was out, stating that "the apartment house is a mere parasite" on the open space and residential character of single-family home neighborhoods.[74] Professor Sonia Hirt has observed that "[t]he twentieth-century version of [the low density] ideal—the middle-class suburban home with the lush green yard—may well be the most commonly held image, the perceived lynchpin and crown jewel of the American Dream."[75]

Surveys generally report a continuing strong consumer preference for single-family homes, although some perceive a shift away from this preference.[76] The National Association of Home Builders Survey completed in 2020 reports what potential buyers would like to purchase: 67% would prefer to buy a single-family home, 15% a townhouse, and 8% a multifamily condominium.[77] The National Association of Realtors stated in 2021 that 82% of homes purchased that year were detached single-family houses; notably, this was an increase over the 1981 figure of 76%.[78] Whether these data are the result of available supply or true preference is unclear.

Commentators have argued that developers favor single-family home construction for various reasons.[79] Developers believe that such homes are more marketable except in dense urban environments.[80] Moreover, a developer can better manage market risks by building single-family homes unit by unit. This enables the developer to adjust to changing market

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[73] Harvey Jacobs, *20th Century Regulation of Private Property in the United States Disaster, Institutional Evolution, and Social Conflict*, PROGRESS IN DISASTER SCI. 3–5 (2020). Zoning and related regulation, however, brought racial and social exclusion to people who were not white, middle-class (or higher) or seen as "others". *See* ROTHSTEIN, *supra* note 47.

[74] 272 U.S. 365, 394 (1926).

[75] SONIA A. HIRT, ZONED IN THE U.S.A.: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 8 (2014).

[76] Wegmann, *supra* note 64 (reporting shift of consumer preferences, frustrated by lack of alternatives).

[77] ROSE QUINT, WHAT HOME BUYERS REALLY WANT 3 (National Ass'n of Home Builders ed., 2021) https://www.nahb.org/-/media/NAHB/news-and-economics/docs/housing-economics-plus/special-studies/2021/special-study-what-home-buyers-really-want-march-2021.pdf [https://perma.cc/7D6Z-44EP].

[78] NAT'L ASS'N OF REALTORS, 2021 PROFILE OF HOME BUYERS AND SELLERS 8, https://cdn.nar.realtor/sites/default/files/documents/2021-highlights-from-the-profile-of-home-buyers-and-sellers-11-11-2021.pdf [https://perma.cc/29YB-3E5B].

[79] ESQUIVEL & ALVAYAY, *supra* note 38, at 19–20.

[80] *Id.* at 18.

demands, while the developer must construct a multifamily building in one occurrence.[81] Federal guarantees of condominium financing may be more difficult than single-family homes.[82] Finally, developer expertise may run to free-standing houses rather than attached residences, and concerns about efficiency and potential construction defect liability may drive builders to favor the single-family market.[83]

There are, however, various compelling responses to the perceived benefits of single-family homes. First, ending single-family zoning would not *prohibit* people from building and living in single-family homes.[84] Rather, zoning reforms to allow new types of housing would simply mean that there will be no governmental *requirement* to build only single-family homes.[85] Factors favoring developer shifts to multifamily homes include savings on high land costs and on installation of infrastructure because the units are in a compact location rather than spread over a large area like single-family homes.[86] Furthermore, societal concerns about promoting housing supply, achieving affordability, fostering social and racial integration, and reducing environmental threats are of supervening importance.

3. Recent Legislative Rejection of Single-Family Zoning

Breaking the hold of single-family zoning has proven to be a hard process. Besides the perceived advantages of single-family zoning to existing homeowners, inertia and uncertainty of what change will bring are strong forces.[87] Removing single-family zoning is a difficult political lift; even traditionally liberal, "blue" areas are committed to maintaining their single-family schemes.[88]

Some states and cities have enacted legislation, however, that rejects traditional single-family zoning. In 2019, Oregon passed House Bill 2001.[89] This legislation compels municipalities to allow a duplex on all lots in medium and large cities that were previously zoned single-family; it also permits triplexes, quadplexes, townhouses, and cottage clusters in certain larger cities.[90]

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[81] *Id.* at 18–20.

[82] *Id.* at 20.

[83] *Id.* at 5.

[84] Wegmann, *supra* note 64, at 114–15.

[85] Manville et al., *supra* note 52, at 106; Wegmann, *supra* note 64, at 114–15.

[86] *Id.*

[87] *See* Ellickson, *The Zoning Straitjacket*, *supra* note 13, at 401; Wegmann, *supra* note 64.

[88] Kahlenberg, *supra* note 56.

[89] Or. H. B. 2001, 80th Leg. Assemb., 2019 Reg. Sess. (Or. 2019).

[90] OR. REV. STAT. § 197.758 (2023); Adams-Schoen & Sullivan, *supra* note 13, at 195–97.

California has also passed several statutes that dismantle key aspects to single-family zoning.[91] Senate Bill 9, effective in 2022, provides for ministerial (nondiscretionary) approval of the construction of a duplex on land zoned single-family.[92] It also allows for ministerial approval of the splitting of a lot into two lots, with each piece permitted to have a duplex.[93] The result is that one single-family residential lot now can be transformed to contain four units.[94] Additionally, the California legislature adopteded various measures related to accessory dwelling units ("ADUs") so that, as of 2020, ADUs are allowed as a matter of right, as long as they are less than 800 square feet and not over 16 feet in height.[95] Maine has also increased use of ADUs.[96]

Washington State enacted legislation in 2023 that significantly disappears single-family zoning.[97] The new statute requires that residential zoning must allow two units, or four units in larger cities.[98] These numbers can be boosted by one or two additional units if a set number of the lots are designated for affordable housing. There is an apparent concern with retroactive application of the increase in density under zoning if a private covenant limiting density was in place before the new statute was enacted.[99] Thus, the statute affects only condominiums, homeowners associations, and community interest communities whose declarations were filed after the enactment of the law.[100]

In other locations, cities themselves amended their residential zoning schemes to inject flexibility into existing single-family house zones. Minneapolis was apparently the first to do so, and it permits three dwelling units on land formerly zoned for single-family housing.[101]

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[91] CAL. GOVT. CODE §§ 65852.21, 66411.7.

[92] *Id.*

[93] *Id.*

[94] Ryan Michael Leaderman & Kevin J. Ashe, *California Gov. Signs Landmark Duplex and Lot Split Legislation Into Law*, HOLLAND & KNIGHT (Sept. 17, 2021), https://www.hklaw.com/en/insights/publications/2021/09/ca-gov-signs-landmark-duplex-and-lot-split-legislation-into-law [https://perma.cc/D2PZ-Z3EN].

[95] CAL. GOVT. CODE §65852.2(a)(3)(A) (2023); *id.* § 65852.2(c)(2)(C) (2023).

[96] *See, e.g.*, ME. STAT. tit. 30-A § 4364-B(3)(A) (2023) (allowing accessory dwelling units).

[97] WASH. REV. CODE § 36.70A.635(a) (2023).

[98] WASH. REV. CODE §§ 36.70A.681, 36.70A.635 (2023).

[99] David Gutman & Daniel Beekman, *WA's New Ban on Single-Family Zoning Exempts Some of Seattle's Wealthiest Communities*, SEATTLE TIMES (Apr. 23, 2023, 6:00 AM), https://www.seattletimes.com/seattle-news/politics/was-new-ban-on-single-family-zoning-exempts-some-of-seattles-wealthiest-neighborhoods/ [https://perma.cc/PM8B-ZQ5C]. Retroactivity is discussed later in this article.

[100] WASH. REV. CODE. §§ 64.32.320, 64.34.120, 64.38.160 (2023).

[101] CITY OF MINNEAPOLIS, DEP'T. OF CMTY. PLAN. & ECON. DEV., MINNEAPOLIS 2040—THE CITY'S COMPREHENSIVE PLAN 105–06 (2019), https://minneapolis2040.com/media/1488/pdf_minneapolis2040.pdf

It is early days for assessing the effectiveness of these recent reforms, but there are some promising developments.[102] For example, before the 2016 reforms in California, there were 1,000 permits issued statewide for ADUs; in 2021, that number had grown to 20,000.[103] There has not been similar growth in permitting for duplexes, attributed to local implementation holdups.[104] A study of the Boston area showed that loosened anti-density zoning was associated with a statistically significant increase in housing supply of 0.8% within three to nine years after reform passage, but the increase happened predominantly at the higher end of rentals.[105] More data and time will hopefully provide deeper information about effectiveness of reforms.

With these gains to decrease the hegemony of single-family covenants, there have also been setbacks. Gainesville, Florida, commissioners restored single-family zoning in 2023 that they previously had removed in 2022 due to push back from homeowners in the formerly single-family neighborhoods.[106] While the California state legislature mandated changes in municipal zoning to allow ADUs and limited-unit multifamily buildings in formerly single-family areas, the process of enacting necessary changes in local zoning codes has been contentious and slow.[107] The Minneapolis plan is currently being challenged for failure to

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[https://perma.cc/6DZS-HL59]. The Othering and Belonging Institute of UC Berkeley publishes online a zoning reform tracker reporting status of reforms across the U.S. Joshua Cantong et al., *Zoning Reform Tracker*, THE OTHERING AND BELONGING INST. OF UC BERKELY (updated July 6, 2023), https://belonging.berkeley.edu/zoning-reform-tracker [https://perma.cc/V25F-GL78].

[102] *See* Jenny Schuetz, *Are New Housing Policy Reforms Working? We Need Better Research to Find Out*, BROOKINGS (Nov. 21, 2022), https://www.brookings.edu/articles/are-new-housing-policy-reforms-working-we-need-better-research-to-find-out/ [https://perma.cc/859G-XWQJ].

[103] BILL FULTON ET AL., NEW PATHWAYS TO ENCOURAGE HOUSING PRODUCTION: A REVIEW OF CALIFORNIA'S RECENT HOUSING LEGISLATION 7 (Terner Center of UC Berkeley, 2023), https://ternercenter.berkeley.edu/wp-content/uploads/2023/04/New-Pathways-to-Encourage-Housing-Production-Evaluating-Californias-Recent-Housing-Legislation-April-2023-Final-1.pdf [https://perma.cc/YXU5-JBCS]. *See* NICHOLAS J. MARANTZ ET AL., EVALUATING CALIFORNIA'S ACCESSORY DWELLING UNIT REFORMS: PRELIMINARY EVIDENCE AND LESSONS FOR STATE GOVERNMENT 10 (Furman Center of NYU, 2023), https://furmancenter.org/files/Evaluating_California's_Accessory_Dwelling_Unit_Reforms_508.pdf [https://perma.cc/WW22-JC74] (ADUs now represent 13% of permitting in Bay area and 19% pm Southern California).

[104] FULTON ET AL., *supra* note 103, at 7.

[105] Stacy et al., *supra* note 1, at 2919.

[106] Mike Loizzo, *Gainesville Commissioners Bring Back Single-Family Zoning*, WUFT-FM (June 2, 2023), https://www.wuft.org/news/2023/06/02/gainesville-commissioners-bring-back-single-family-zoning/ [https://perma.cc/6JRB-5JMS].

[107] Julia Gill & Jenny Schuetz, *In California, Statewide Housing Reforms Brush Against Local Resistance*, BROOKINGS (June 28, 2023),

follow required procedures, especially relating to environmental vetting.[108]

Injecting flexibility in single-family zoning is an important step toward meeting concerns regarding supply and affordability of housing. But changing public land use regulation does not address the large network of private covenants that contain similar restrictions of housing. Only if these covenants are relaxed can builders and their customers see new housing supply and varieties. The next section will address the complex and challenging constitutional questions that would almost surely arise with voiding of single-family home covenants.

III. THE CONSTITUTIONAL CHALLENGE

The invalidation of private single-family covenants by legislation or judicial decision will likely trigger a claim of a taking without compensation, brought by a party who was previously entitled to enforce the covenant. Courts have considered in various contexts whether a covenant is a property interest protected by the Fifth Amendment or safeguarded under an analogous state constitutional provision.[109] The most common scenario in which this emerges is in an eminent domain proceeding to take property burdened by a covenant, raising the question of whether the covenant holder should share the award along with the fee owner.[110] Takings claim may also arise when the government acquires (consensually or by eminent domain) the fee interest in a property without compensating the holder of an appurtenant covenant; the government then

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https://www.brookings.edu/articles/in-california-statewide-housing-reforms-brush-against-local-resistance/ [https://perma.cc/3BFF-CYP7].

[108] Pauleen Le, *Minneapolis' 2040 Plan Heads Back to Court As City Says Progress Continues*, WCCO NEWS (June 7, 2023, 6:23 AM), https://www.cbsnews.com/minnesota/news/minneapolis-2040-plan-back-to-court/ [https://perma.cc/M9K7-Y29T].

[109] A covenant owner is entitled to compensation for a taking but, provided there is a public use, the government cannot be enjoined from acquiring the property. First Eng. Evangelical Lutheran Church v. County of Los Angeles, 482 U.S. 304, 3121 (1987); Dible v. City of Lafayette, 713 N.E.2d 269, 273 (Ind. 1999); *see* Monarch Chem. Works, Inc. v. City of Omaha, 277 N.W.2d 423, 428 (Neb. 1979) (injunction against taking land was proper as public purpose was lacking); S. Cal. Edison Co. v. Bougerie, 507 P.2d 964, 968 (Cal. 1973).

[110] *See, e.g.*, City of Steamboat Springs v. Johnson, 252 P.3d 1142, 1148 (Colo. App. 2010); Morley v. Jackson Redevelopment Auth., 632 So.2d 1284, 1296 (Miss. 1994) (covenant limiting use to offices and other commercial purposes); Dep't. of Transp. v. Fernwood Hill Town Homeowners' Ass'n, 649 S.E.2d 433, 439 (N.C. Ct. App. 2007); Burns v. Scot. Dev. Co., 787 A.2d 786, 795 (Md. Ct. Spec. App. 2001); Sch. Dist. No. 3 of Charleston Cnty. v. Country Club of Charleston, 127 S.E.2d 625, 627 (S.C. 1962) (following the pattern but concluding that covenant not compensable right in eminent domain).

violates the covenant claiming it is not bound, and the covenant holder seeks compensation often by claiming inverse condemnation.[111]

Covenant holders could assert that denial of their enforcement right is a taking of property under the Fifth Amendment or analogous state constitutional provision.[112] The majority of jurisdictions recognize that the voiding or violation of a covenant by a governmental unit is a taking requiring "just compensation," although there is a contrary, minority rule.[113] The courts, however, usually do not examine and discuss the

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[111] *See, e.g.*, Forest View Co. v. Town of Monument, 464 P.3d 774, 781 (Colo. 2020) (government purchased a lot in consensual transaction and then brought action to declare subdivision owners could not enforce covenant against it); Meredith v. Washoe Cnty. Sch. Dist, 435 P.2d 750, 753 (Nev. 1968) (property taken by eminent domain to build school in subdivision governed by residential only covenant; inverse condemnation action because state did not use formal eminent domain proceeding to take the covenant); Creegan v. State, 391 P.3d 36, 47 (Kan. 2017) (Department of Transportation purchased lots restricted to residential uses and proceeded to build a bridge); Leigh v. Village of Los Lunas, 108 P.3d 525, 528 (N.M. Ct. App. 2004) (subdivision owners brought action claiming inverse condemnation when government began building a storm drainage pond on lot restricted to residential only); Poole v. Combined Util. Sys., 237 S.E.2d 82, 83 (S.C. 1977) (city utility system acquired fee by consensual transaction and then built substation in violation of covenant). For an excellent discussion of the distinction between the courts' use of eminent domain and inverse condemnation, and related issues, *see* John D. Echeverria, *What is a Physical Taking?*, 54 U.C. DAVIS L. REV. 731, 738–49; *see also* Knick v. Township of Scott, 139 S. Ct. 2162, 2168 (2019).

[112] The covenant owner is entitled to compensation for this taking but, provided there is a public use, the government cannot be enjoined from acquiring the property. *First Eng. Evangelical Lutheran Church*, 482 U.S. at 314–25; *Dible*, 713 N.E.2d at 273; *see Monarch Chem. Works, Inc.*, 277 N.W. at 428 (injunction against taking land was proper as public purpose was lacking); *S. Cal. Edison Co.*, 507 P.2d at 968.

[113] The Restatement of Property—Third (Servitudes) takes the position that compensation is required for a condemnation or regulatory taking of both easements and covenants, while recognizing that the First Restatement indicated that the jurisdictions are mixed on compensation for takings of covenants. RESTATEMENT (THIRD) OF PROP. (SERVITUDES), § 7.8, cmt. a (AM. L. INST. 1998); *see* KORNGOLD TREATISE, *SUPRA* note 19, at § 11.11 (discussion of doctrine and cases); R.E. Barber, Annotation, *Eminent Domain: Restrictive Covenant or Right to Enforcement Thereof as Compensable Property Right*, 4 A.L.R.3d 1137 (1965) (cases). The minority courts justify their decisions on various reasons: (1) a view, now clearly rejected by the Third Restatement, that covenants are not a property interest sufficient to garner compensation. *See Morley*, 632 So.2d at 1296 (describing minority rule); *Burns*, 787 A.2d at 798 (covenant running with the land is a compensable property interest in condemnation even though such covenants are "contractual in nature" and interpreted like other contracts); *see also* 135 Wells Ave., LLC v. Hous. Appeals Comm., 84 N.E.3d 1257 (Mass. 2017) (negative easements are to be treated equally to affirmative easements); (2) a concern that recognizing covenants would make costs prohibitive for government to remove a subdivision covenant; *see Forest View Co.*, 464 P.3d at 780; (3) an assertion that the effect on a covenant is part of the harms that the general

particular takings theory that they deploy. In eminent domain cases, for example, courts usually first determine if a covenant is a compensable property interest; once they so find, they straightaway apply the condemnation statute and find that compensation is due without discussion of constitutional theory.[114] More constitutional analysis of the nature of the property right of covenants in the condemnation line of cases would be helpful in fleshing out the analysis that might be used in evaluating a broad-based, legislative termination of single-family covenants.

Takings concerns are also triggered if the legislature enacts a statute curtailing enforceability of a species of covenants. This would be the most comprehensive and direct means to remove all of the targeted restrictions in the jurisdiction.[115] Such legislation would likely be the preferred route of opponents of single-family and other anti-density covenants, eliminating them in one stroke rather than by individual court challenges.[116] If single-family covenants are to be voided, developers may prefer this to be by legislation rather than by judicial decision; that way, developers will know up front whether they can build multifamily housing rather than investing resources and subsequently learning that the project is barred.

As will be developed below, termination of covenants by legislation can be framed under Supreme Court holdings either as a per se physical taking or as a matter for the balancing test of *Penn Central*; the *Penn Central* approach could lead to the government's action being upheld.[117]

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public suffers from eminent domain. *See* Horst v. Hous. Auth., 166 N.W.2d 119, 121 (Neb. 1969).

[114] *See, e.g.*, *Leigh*, 108 P.3d at 532; *S. Cal. Edison Co.*, 507 P.2d at 966–67 (rejecting semantics-based arguments that a covenant is not property and finding policy considerations not compelling, then finding that condemnation awards should be given to covenant holder); *see Meredith*, 435 P.2d 750 (finding residential only covenant was property interest, so eminent domain statute applied when board built school); Mercantile-Safe Deposit & Trust Co. v. Mayor & City Council of Baltimore, 521 A.2d 734, 740 (Md. 1987).

[115] Analogous legislation in some states provides that "residential only" or "single-family" covenants do not apply to prevent group homes for people with developmental disabilities from being located in a property bound by a covenant. *See infra* Section III.E.1. In these situations, government does not acquire the fee interest in the burdened land, and it remains in the same (presumably private) hands as before. *See infra* Section III.E.1. Only the benefit of the covenant is arguably "taken" by the legislation, voiding the effect of the covenant on the titles of the benefited and burdened parcels. *See infra* Section III.E.1.

[116] Some of the limits on the legislative approach are discussed in *infra* Section III.C. (retroactivity).

[117] Some cases approach the termination of a covenant as a potential violation of the Contracts Clause. *See, e.g.*, Clem v. Christole, Inc. 582 N.E.2d 780 (Ind. 1991). Full development of this issue is outside the scope of this article, but some brief observations are in order. First, most courts view a covenant as a real property right. *See, e.g.*, Eldorado Cmty. Improvement Ass'n v. Billings, 374 P.3d 737, 743 (N.M.

The following section will explore these two different tests and their applicability to covenants. If no taking is found under the relevant test, then the government could deploy legislation terminating single-family covenants without paying compensation to affected covenant holders. This would make a direct attack on covenants viable, as the burden of a compensation obligation would likely price statutes invalidating covenants beyond the financial ability of governments.

A. Types of Takings

The courts and commentators usually divide takings into two basic types: a physical taking or a regulatory taking.[118] Typically, analysis of a takings claim will involve placing the case's scenario within one of these two categories. Determining the right genre of taking is important because, as discussed below, there are different analytical rules depending on the type of taking. The following section outlines the possible types of takings and how a legislative voiding of covenants might be categorized. The section illustrates the difficulties in framing the taking of a covenant because of its unique nature—a negative interest in property, without a

Ct. App. 2016); Conlin v. Upton, 881 N.W.2d 511, 520 (Mich. Ct. App. 2015); Medearis v. Trs. of Park Baptist Church, 558 S.E.2d, 199, 205 (N.C. App. 2001); Lake at Twelve Oaks Home Ass'n v. Hausman, 488 S.W.3d 190, 195 (Mo. Ct. App. 2016); *see* Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261, 1271 n.46 (1982) ("The majority view, however, is that covenants create interests in [real] property. . . ."). Some courts, though, follow a minority position that "restrictive covenants are contractual in nature." SPUR at Williams Brice Owners Ass'n v. Lalla, 781 S.E.2d 115, 121 (S.C. Ct. App. 2015) (quoting Perry Creek Assocs., LLC v. Fenwick Tarragon Apartments, LLC 651 S.E.2d 617, 620 (S.C. Ct. App. 2007)), *accord* Warriner Invs., LLC v. Dynasty Homeowners Ass'n, 189 N.E.2d 1119 (Ind. Ct. App. 2022); Gilbert v. Canterbury Farms, LLC, 815 S.E.2d 303, 308 (Ga. Ct. App. 2018). Under the majority view of covenants as property rights, one would expect to see takings as the major constitutional challenge. It would appear that the Supreme Court would so see it given its recent focus on property rights. *See generally* Knick v. Township of Scott, 139 S. Ct. 2162 (2019); PennEast Pipeline Co., LLC v. New Jersey, 141 S. Ct. 2244 (2021); Cedar Point Nursery v. Hassid, 141 S. Ct. 2063 (2021). Second, the courts are split as to whether there is a Contracts Clause violation, on similar facts involving group homes and day care. Some refuse to find a Contracts Clause problem, finding an important public purpose and that the measure taken was reasonable and appropriate to accomplish this. *See, e.g.*, Crane Neck Ass'n, Inc. v. New York City/Long Island County Servs. Grp., 460 N.E.2d 1336, 1342 (N.Y. 1984); Overlook Farms Home Ass'n, Inc. v. Alternate Living Servs., 422 N.W.2d 131, 136 (Wis. Ct. App. 1988) (retroactive application is permissible); Hall v. Butte Home Health, Inc., 60 Cal. App. 4th 308, 323 (Cal. Ct. App. 1997) (no Contracts Clause violation under state and federal constitutions with retroactive application); *contra Clem*, 582 N.E.2d at 784 (retroactive application violates contracts clause).

[118] *See, e.g.*, *Cedar Point Nursery*, 141 S. Ct. at 2072 (physical taking); Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 528–29 (2005) (regulatory taking).

physical dimension. Thus, it is hard to predict how a court would react to a takings claim of a covenant, making legislation voiding covenants a risky venture.

1. Physical Takings

Physical takings involve governmental incursion into private property, creating a "clear and categorical obligation" to pay the owner just compensation.[119] A physical taking occurs when government formally uses its eminent domain power to acquire a property.[120] Onecan also occur if government simply obtains physical possession of, or occupies, a property without using legal process.[121] Physical takings were found when government caused land to flood as a result of the building of a dam[122] and when government seized mines during a strike.[123] The Court has made clear that physical takings cross a bright line:

> These sorts of physical appropriations constitute the "clearest sort of taking," and we assess them using a simple, per se rule: The government must pay for what it takes.[124]

2. Regulatory Takings

Courts have typically identified three types of regulatory takings.[125] First, in rare cases, a regulation goes beyond controlling uses of land and instead awards physical possession (at least to some extent) to a government or its third-person designee.[126] Regulations in this first group thus create per se or "categorical" takings, and it includes cases where the regulation subjects a property to a partial "permanent physical

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[119] *Cedar Point Nursery*, 141 S. Ct. at 2071; *accord Lingle*, 544 U.S. at 538.

[120] *See* Richard Epstein, *Physical and Regulatory Takings: One Distinction Too Many*, 64 STAN. L. REV. ONLINE 99 (2012).

[121] *Cedar Point Nursery*, 141 S. Ct. at 2071.

[122] Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 38 (2012) (applying to ongoing, temporary incursions).

[123] United States v. Pewee Coal Co., 341 U.S. 114, 115 (1951).

[124] *Cedar Point Nursery*, 141 S. Ct. at 2071.

[125] *Lingle*, 544 U.S. at 538; Nekrilov v. City of Jersey City, 45 F.4th 662, 669 (3d Cir. 2022); Andrews v. City of Mentor, 11 F.4th 462, 468 (6th Cir. 2021); Willowbrook Apartment Assocs. v. Mayor, 563 F. Supp. 3d 428, 439 (D. Md. 2021) (dealing with rent caps imposed during the Covid-19 pandemic).

[126] *Nekrilov*, 45 F.4th at 670; *Willowbrook*, 563 F. Supp. 3d at 439.

occupation."[127] As discussed below, the Supreme Court in *Cedar Point* emphasized that a physical invasion by government or its designee created by regulation should be considered a per se physical taking and not subjected to the *Penn Central* regulatory takings balancing test.[128]

The second category of regulatory takings also entails a per se taking and includes regulations that "completely deprive an owner of all beneficial use of his property."[129] For example, in *Lucas*, the regulation barring building on coastal land deprived "all economically beneficial use of the property."[130]

The third group of regulatory takings involves any regulation not fitting into the per se groups: "Any regulation that falls outside of [the first grouping] . . . is subject to the balancing test set forth in *Penn Central* to determine whether the regulation 'goes too far' such that it effects a taking for which compensation is required."[131] This large, catch-all category logically would allow for the balancing approach in a broad spectrum of regulations.

Penn Central-type regulatory takings do not typically involve physical appropriation of the property, but rather limitations on the owner's *use*.[132] The opinion elaborated on Justice Holmes' statement that a taking occurs when a governmental regulation "goes too far" in exercising the police power, with the effect that the owner suffers an undue burden on property rights.[133] *Penn Central* further evolved the Court's definition of regulatory takings, setting out various key factors to be weighed, including the economic impact of the regulation (in light of the extent of the diminution of property rights), interference with investment-backed expectations, and the character of the governmental action.[134] The Court has recognized the complexity and ambiguity inherent in its

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[127] Loretto v. Teleprompter Manhattan CATV Corp., 458 U.S. 419, 426 (1982) (authorizing cable companies to install wires on residential buildings for reasonable fee).

[128] *Cedar Point Nursery*, 141 S. Ct. at 2072. The Cedar Point Court also indicated that a physical invasion limited temporally or geographically is also a per se taking, provided that it is more than an occasional trespass. *Id.* at 2073–74.

[129] *Lingle*, 544 U.S. at 538.

[130] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1019 (1992) (regulation prohibiting any structures on the property).

[131] *Willowbrook*, 563 F. Supp. 3d at 439; *accord Lingle*, 544 U.S. at 538; *Nekrilov*, 45 F.4th at 672.

[132] *Cedar Point Nursery*, 141 S. Ct. at 2071–72.

[133] Pa. Coal Co. v. Mahon, 260 U.S. 393, 415 (1922).

[134] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978). *See* Echeverria, *supra* note 111, at 741–45.

"flexible" regulatory takings test.[135] The regulatory taking tests of *Pennsylvania Coal* ("goes too far") and *Penn Central* have been applied to block the award of compensation in challenges to zoning legislation.[136]

3. Cedar Point

The Supreme Court in *Cedar Point Nursery v. Hassid* further articulated the physical taking versus regulatory taking dichotomy and provided insight on which category might cover the voiding of a covenant.[137] Moreover, the Court emphatically declared the centrality of the Constitution's protection of private property against physical intrusions and appropriations.[138]

The case involved a California regulation that gave labor organizers a "right to take access" to agricultural employers' property to solicit workers to support unionization.[139] Organizers were permitted to enter the property for one hour during each of three daily intervals (i.e., before and after work and during lunch).[140] Employers filed suit against the regulation, claiming that the "access regulation effected an unconstitutional per se physical taking" of their properties.[141]

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[135] *Cedar Point Nursery*, 141 S. Ct. at 2072. Justice O'Connor has noted that that *Mahon* provides a "storied but cryptic formula" that does not clarify "how far is 'too far.'" *Lingle*, 544 U.S. at 537. Justice Ginsburg has explained:

> We have recognized, however, that no magic formula enables a court to judge, in every case, whether a given government interference with property is a taking. In view of the nearly infinite variety of ways in which government actions or regulations can affect property interests, the Court has recognized few invariable rules in this area.

Ark. Game & Fish Comm'n v. United States, 568 U.S. 23, 31 (2012).

[136] *See* Diversified Holdings LLP v. City of Suwanee, 807 S.E.2d 876, 888 (Ga. 2017); City of Annapolis v Waterman, 745 A.2d 1000, 1020–1022 (Md. App. Ct. 2000) (subdivision approval); Gove v. Zoning Bd. of Appeals, 831 N.E.2d 865, 874–75 (Mass. 2005).

[137] 141 S. Ct. 2063 (2021).

[138] *Id.*

[139] *Id.* at 2069. For insights on Cedar Point, *see generally* Lee Anne Fennell, *Escape Room: Implicit Takings After* Cedar Point Nursery, 17 DUKE J. CONST. L. & POL'Y 1 (2022); Cynthia Estlund, *Showdown at Cedar Point: "Sole and Despotic Dominion" Gains Ground*, 2021 SUP. CT. REV. 125 (2021); Bethany R. Berger, *Property and the Right to Enter*, 80 WASH. & LEE L. REV. 71 (2023); Aziz Z. Huq, *Property Against Legality: Taking After* Cedar Point, 109 VA. L. REV. 223 (2023).

[140] *Cedar Point Nursery*, 141 S. Ct. at 2069.

[141] *Id.* at 2070.

The Court divided takings into two types.[142] It distinguished between physical invasion which is a per se taking and "use" restrictions on land which should be evaluated under the *Penn Central* test.[143]

In elaborating on the physical invasion group of takings, the Court declared that the union access regulation in *Cedar Point* worked a physical taking of the property.[144] It emphasized that it should be analyzed as such:

> This access regulation appropriates a right to invade the growers' property and therefore constitutes a *per se* physical taking. The regulation grants union organizers a right to physically enter and occupy the growers' land for three hours per day, 120 days per year. Rather than restraining the growers' use of their own property, the regulation appropriates for the enjoyment of third parties the owners' right to exclude.[145]

The Court found the physical aspect to be determinative of the type of taking. It questioned the analysis of the Ninth Circuit, explaining that "[g]overnment action that physically appropriates property is no less a physical taking because it arises from a regulation."[146] It is irrelevant that the physical taking "comes garbed as a regulation (or statute, or ordinance, or miscellaneous decree). It is whether the government has physically taken property for itself or someone else—by whatever means—or has instead restricted a property owner's ability to use his own property."[147] Thus, two categories of takings appear to emerge from *Cedar Point*: physical invasions (including those created by regulation) and "use" regulations.[148] The meaning and extent of "use" restrictions was not explored as the case itself dealt with a physical taking.

B. Takings of Covenants

The *Cedar Point* opinion provided an updated architecture for the takings analysis. The case's reasoning leads to the threshold question of whether a governmental voiding of a covenant should be evaluated for takings purposes as a per se physical taking or a regulation of "use" of the property.[149] Classification as a physical taking makes a difference as that

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[142] *Id.* at 2071.
[143] *Id.* at 2071–72.
[144] *Id.* at 2072.
[145] *Id.*
[146] *Id.*
[147] *Id.*
[148] *Id.*
[149] *Id.* at 2071.

constitutes a per se taking requiring compensation.[150] Otherwise, courts will evaluate the government's action under the *Penn Central* balancing test.[151] Thus, the question is: What standard should courts use to evaluate the taking of covenants?[152]

Most cases hold that the voiding of a covenant by the government is a compensable taking under the Fifth Amendment or parallel state constitutional provisions.[153] A minority of states reject this principle, but most often this view appears in older opinions.[154] It is noteworthy, though, that few decisions explain their reasoning. Moreover, the courts following the majority rule usually conclude that a taking has occurred without indicating whether the government's action should be evaluated as a per se physical taking or under the *Penn Central* balancing test. Proponents of legislation invalidating covenants would prefer the balancing test as it would allow for some diminution of the covenant's inherent property rights. In contrast, proponents would resist the application of the physical taking per se rule as it would be likely to yield a finding of an uncompensated taking.

The challenge in the next section is to understand which type of taking test is involved with the voiding of a covenant. The analysis focuses on the typical "building and use" covenant—one that limits structures and activities on the lot. A single-family restriction is a subset of the building and use covenant.

1. Voiding of a Covenant as a Per Se Taking

When government invalidates a building and use covenant (such as a single-family restriction), what is the nature of the property interest that has been encroached upon? Once this threshold inquiry is answered, then we can approach the question of whether the per se physical invasion test or the *Penn Central* rubric applies.

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[150] *Id.*

[151] *Id.* at 2072.

[152] Similarly, the court in *Knight v. Metro. Gov't* faced a threshold issue of which test to apply when the legislature authorized a physical imposition on an owner's rights. 67 F.4th 816, 818 (6th Cir. 2023). The local legislature passed an ordinance, adding to the zoning code, that required owners seeing to develop their properties to build a sidewalk for public use as a condition to getting a building permit. *Id.* The court held that this legislative (rather than administrative) exaction should be evaluated under the unconstitutional condition doctrine of *Nollan v. Cal. Coastal Comm'n*, 483 U.S. 825 (1987) and not under the *Penn Central* balancing test even though it was a legislative, land use-related determination. *Knight*, 67 F.4th at 829.

[153] *See supra* note 115.

[154] *Id.*

Covenants,[155] along with easements,[156] are nonpossessory property rights in the land of another. These interests are typically created between two parcel owners. Provided that a covenant meets certain requirements, it will burden and benefit future owners of the respective parcels.[157] Covenants usually give the benefited parcel a veto power over the burdened parcel and activities that take place there.[158] Covenants thus generally create restrictions or negative controls on the land of another.[159] A typical scenario involves establishing a residential subdivision or association community where the developer imposes reciprocal covenants on all the lots or units, allowing enforcement by all against their neighbors. These restrictions are designed to enhance the residential character and value of the subdivision. They may include, for example, minimum lot requirements,[160] prohibitions on accessory structures,[161] and height limitations.[162]

While a covenant is viewed as a property interest, it is a negative interest.[163] The holder of the covenant is given control over activities on a neighboring lot. But, importantly, the covenant does not grant the holder a physical right in the burdened lot; there is no right to access, possess, or use the burdened property. Because there is no corporeal, physical aspect

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[155] *See, e.g.*, Budget Inn of Daphne, Inc. v. City of Daphne, 789 So.2d 154, 159 (Ala. 2000); Eric R. Claeys, *Property Concepts, and Functions*, 60 B.C. L. REV. 1, 15 (2019); *see* JOSEPH WILLIAM SINGER, PROPERTY § 6.1, at 228–32 (5th ed. 2017).

[156] KORNGOLD TREATISE, *supra* note 19, § 2.01.

[157] For a detailed discussion of the background, development, and potential future directions of the law of covenants, *see id.* at ch. 8 and cited references.

[158] Gerald Korngold, *Privately Held Conservation Servitudes: A Policy Analysis in the Context of In Gross Real Covenants and Easements*, 63 TEX. L. REV. 433, 478 (1984) [hereinafter Korngold, *Privately Held Conservation Servitudes*].

[159] There are exceptions. Importantly, for example, affirmative covenants requiring payment of homeowners association dues or other payments for common facilities. KORNGOLD TREATISE, *supra* note 19, § 9.12.

[160] *See, e.g.*, Cobb v. Gammon, 389 P.3d 1058, 1063 (N.M. App. 2016); Albright v. Fish, 394 A.2d 1117, 1119 (Vt. 1978).

[161] *See, e.g.*, Buck Hill Falls Co. v. Clifford Press, 791 A.2d 392, 395 (Pa. Super. Ct. 2002); Gunnels v. N. Woodland Hill Cmty. Ass'n, 563 S.W.2d 334, 336 (Tex. Civ. App. 1978); Sutherland v. Bock, 688 P.2d 157, 157–58 (Wyo. 1984).

[162] *See, e.g.*, Sandomire v. Brown, 439 P.3d 266, 269 (Haw. Ct. App. 2019); Jones v. Brown, 748 P.2d 747, 748 (Alaska 1988); Leighton v. Leonard, 589 P.2d 279, 280 (Wash. App. 1979).

[163] An estate in land, including the fee simple estates, life estate, and leasehold estates, gives the holder an exclusive right of possession over the property. "[A] possessory interest entitles the owner to exclusive occupation of the space possessed." RESTATEMENT (FIRST) OF PROPERTY, Div. V, pt. I, Introductory Note (AM. L. INST. 1944) ("[A] possessory interest entitles the owner to exclusive occupation of the space possessed."). Rest. of the Law of Property (1944) ("easements . . . restrictive covenants and agreements affecting the use of land . . . are not possessory interests and not interests which may become possessory.").

as part of the covenant benefit, it is hard to see or even imagine how the covenant holder has a "right to exclude" over the burdened property. Importantly, how does a covenant align with the *Cedar Point* opinion that explained its finding of a per se physical taking as an interference with the property owner's "right to exclude"?[164] The Court noted that the right to exclude is "universally held to be a fundamental element of the property right," and is "one of the most essential sticks in the bundle of rights that are commonly characterized as property."[165] The owner of a fee simple absolute (or other possessory estate) has the right to possession, and thus excluding others is essential.[166] But this is not the case with the nonpossessory covenant interest.[167]

Although *Cedar Point* spoke of *physical* takings, it is possible that a future court could discover within the opinion support for finding a per se taking with the voiding of a covenant.[168] In *Cedar Point*, the Court noted that the access granted to the recruiters might not fit the technical definition of an easement in gross under California law, given the limited days and hours of access.[169] But this did not make the intrusions any less of a "constitutionally protected property interest" for takings purposes because the regulation clearly imposed on the owners' "right to exclude."[170] The Court explained that it used an "intuitive approach" in defining the property rights protected by the Takings Clause, finding appropriation of some interests that were not necessarily a fee simple or leasehold.[171] The Court noted that "[t]he Board [imposing the regulation]

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[164] Cedar Grove Nursery v. Hassid, 141 S. Ct. 2063, 2072 (2021).

[165] *Id.*

[166] Joyce Palomar, *Fee Simple and Fee Tail Estate*, 1 PATTON AND PALOMAR ON LAND TITLES § 203 (3d ed.).

[167] KORNGOLD TREATISE, *supra* note 19, § 4.06. An affirmative easement, such as a right of way, also is a nonpossessory interest. But the right of way gives the holder the right to use the burdened property, creating a right to access and to being present on that property. One can see if government as the owner of the burdened property interfered with the physical rights of the easement holder, such as blocking the right of way, there would be interference similar to the lost right of exclusion of an owner of a possessory estate. Indeed, the holder of an easement can bring an action for interference with the easement or excessive use of the underlying fee. *Id.*

[168] The language that the Court used to describe this intrusion, which constituted a per se taking, included "physical taking," "physically acquires," "physically takes possession." *Cedar Point Nursery*, 141 S. Ct. at 2071; *but see* Katzin v. United States, 908 F.3d 1350, 1357 (Fed. Cir. 2018), where the U.S. government told potential buyers of the plaintiffs' property that the government had title to the land, not the plaintiffs, thus causing the deal to fall through due to title questions. The court rejected a claim by the plaintiffs that the government's action effected a compensable "non-possessory physical taking." *Id.*

[169] *Cedar Point Nursery*, 141 S. Ct. at 2075.

[170] *Id.*

[171] *Id.* at 2076.

cannot absolve itself of takings liability by appropriating the growers' right to exclude in a form that is a slight mismatch from state easement law."[172] Thus, in a challenge to legislation voiding covenants, a court might focus on the basic question of whether a property right was seized even though it was not physically invaded. The Court's use of the term "appropriation" might accommodate the "disappearing" of a covenant by governmental action.[173]

Thus, the nature of a building and use covenant (including a single-family covenant) makes it an inexact fit into the per se physical taking doctrine. Perhaps courts will tweak the statement of the doctrine in future cases to include covenants. Indeed, one recent state court case, *Creegan v. State*, provides hints as to how that might be accomplished.[174] With the *Creegan* insights about covenants strapped to the *Cedar Point* architecture and attitude, it seems that the invalidation of a single-family covenant might be made part of the physical invasion takings genre.

2. Creegan v. State

Creegan v. State, a 2017 Kansas Supreme Court decision, is a notable example of how courts seem to sidestep the per se physical invasion issue.[175] The C*reegan* court did not engage with the "physical" aspect of the physical invasion theory, but it still found a taking when a governmental unit "vaporized" the covenant by permanently violating it.[176] The case involved a subdivision with recorded covenants limiting the lots' use to single-family residential purposes. The Kansas Department of Transportation ("KDOT") purchased some twenty lots in the subdivision.[177] It used the lots for construction activities and eventually built permanent bridges and pavement on several of them.[178] Plaintiffs, who were other owners in the subdivision, brought suit claiming inverse condemnation and a compensable taking by KDOT of the plaintiffs' residential only covenant.[179]

The intermediate appellate court refused to find a taking, on the grounds that "violation of the restrictive covenants is not a *physical taking*.

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[172] *Id.*

[173] *Id.* at 2071–72. The Court defines "appropriation" in *Cedar Point Nursery. Id*. at 2077. *Lingle* arguably distinguishes between appropriation and physical removal: "the classic taking in which government directly appropriates private property or ousts the owner from his domain." Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 539 (2005).

[174] 391 P.3d 36 (Kan. 2017).

[175] *Id.*

[176] *Id.* at 43.

[177] *Id.* at 39.

[178] *Id.*

[179] *Id.*

Some physical taking or substantial inevitable damage" was required by the lower court.[180] The Kansas Supreme Court, however, declared:

> [W]e are far less concerned with whether there was physical damage to the parcels owned by plaintiffs than with whether their right to a certain amount of legal control over use of the parcels owned by KDOT was *vaporized*. This right, possessed by plaintiffs as a function of the restrictive covenant governing all subdivision parcels, was one of the "sticks" in the valuable "bundles of sticks" they paid for when they acquired their land.[181]

The Supreme Court of Kansas further emphasized that "a physical taking is not inevitably required."[182]

Notably, once the court found that the benefit of the covenant was destroyed, it ordered compensation.[183] The court did not apply a balancing test of any sort, neither *Penn Central* nor any other variety.[184] Rather, the permanent violation of the covenant was all the court needed to support its finding.[185] Moreover, the Kansas high court, as indicated by the quoted language, was loath to look at the totality of the property right remaining in the lot owners' hands; the loss of a "stick" from the bundle required compensation.[186]

3. Taking of a Covenant as a Regulatory Taking

If, in contrast, a court applied the *Penn Central* test to the voiding of single-family covenants, will that action be found to be a taking requiring compensation under the Fifth Amendment? *Penn Central* indicates several factors to be considered with a regulatory taking: the economic impact of the of the regulation (considering the extent of the diminution of property rights), interference with investment-backed expectations, and the character of the governmental action.[187]

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[180] *Id.* (emphasis added).
[181] *Id.* at 43 (emphasis added).
[182] *Id.* at 47.
[183] *Id.* at 48.
[184] *Id.* at 47–48.
[185] *Id.*
[186] *Id.* at 43.
[187] Penn Cent. Transp. Co. v. City of New York, 438 U.S. 104, 124 (1978).

a. Economic Impact

Courts have not given a precise number for the percentage of diminution of property value that will transform a regulation into a compensable taking.[188] The economic loss that an owner would suffer with the elimination of the right to enforce single-family covenants against neighbors (thus keeping density low) would likely be reflected in the loss of value of the owner's lot that had benefited from the covenant.[189] Higher density arguably would make for more crowded neighborhoods, overuse of school and recreational resources, increased noise and pollution, decreased street parking, and a loss of "exclusivity," among other losses to the owners.

Penn Central recognized that a property can lose value due to a regulation.[190] The Court, however, rejected the view that "diminution in property value, standing alone" creates a taking.[191] Moreover, a taking will not necessarily be found even if there is "an unduly harsh impact upon the owner's use of the property," noting that the 75% diminution in *Euclid* did not yield a taking.[192] Thus, in applying the *Penn Central* balancing test, proponents of legislation voiding single-family covenants might focus on the *total* property value of an affected owner to assess the level of diminution. Moreover, because the covenant is appurtenant to the lot owned by the enforcing party, the total initial value held by that owner would be the value of the fee simple of that lot as enhanced by any benefit accruing from the potential enforcement of the restriction.[193] Proponents of legislation invalidating single-family covenants could argue, depending on the facts, that the diminution to that total property right is not sufficient to get over the *Penn Central* bar.

It is unclear, however, that the loss of the single-family covenant will negatively affect the property value of the enforcing property. Covenants are now generally thought of as beneficial because they allow parties to transfer limited rights in property, help to achieve an efficient allocation of limited land resources, and permit parties to exercise personal choice

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[188] *See* Daniel L. Siegel, *Evaluating Economic Impact in Regulatory Takings Cases*, 19 HASTINGS W. NW. J. ENVT'L L. & POL'y 373 (2013). The Court has stated: "[M]ere diminution in the value of property, however serious, is insufficient to demonstrate a taking." Concrete Pipe & Prod. Of Cal., Inc. v. Contr. Laborers Pension Tr. For S. Cal., 508 U.S. 602, 645 (1993).

[189] On economic impact in general, *see Penn Central*, 438 U.S. at 124; *see also* Echeverria, *supra* note 111, at 741–45.

[190] *Penn Cent. Transp. Co.*, 438 U.S. at 131.

[191] *Id.*

[192] *Id.* at 127, 131.

[193] This assumes that the covenant increases the value of the benefited parcel. Theoretical and empirical work supports that general conclusion. *See infra* note 194.

over their land.[194] That said, some data appear to indicate that greater density resulting from removing single-family covenants might well increase the value of nearby homes, as discussed in the following section. If true, this would be an important factor in evaluating the economic impact of the regulation under *Penn Central*.

b. Offsetting Loss of Value

There actually may be an offsetting increase in value to the complaining owner resulting from the voiding of the single-family covenant. This rise in value may serve to reduce the loss of the right to enforce the covenant against neighbors and mitigate the "economic loss" due to the regulation.

A major factor in the Supreme Court's finding that the Landmark Law in *Penn Central* did not cause an excessive negative economic impact on the owner was the transferable development rights ("TDRs") provided by the ordinance.[195] Briefly, although zoning laws would permit the erection of additional square footage on a landmarked property, owners were prohibited by the Landmark Law from tapping into this increased building envelope because it would alter the existing exterior features of the landmarked structure. The owners, however, were permitted to sell and transfer their unused right to build under zoning restrictions to neighboring lots. The TDRs thus decreased the economic loss due to the regulation.[196]

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[194] Covenants were once "disfavored" by the law, KORNGOLD TREATISE, *supra* note 19, at ch. 8, but are now generally accepted as bringing benefits. *See* Consigny & Zile, *Use of Restrictive Covenants in a Rapidly Urbanizing Area*, 1958 WIS. L. REV. 612, 614 (1958) (emphasizing the benefit of certainty of covenants over zoning which can be changed); Richard Epstein, *Notice and Freedom in the Law of Servitudes*, 55 S. CAL. L. REV. 1353, 1359 (1982) (respecting the personal choice to impose a covenant though we may not understand it); Gerald Korngold, *Privately Held Conservation Servitudes*, *supra* note 158, at 453–59 (addressing efficiency, personal choice, and moral obligation); Uriel Reichman, *Toward a Unified Concept of Servitudes*, 55 S. CAL. L. REV. 1177, 1231–32 (1982) (efficiency); Uriel Reichman, *Residential Private Governments: An Introductory Survey*, 43 U. CHI. L. REV. 253, 303–04 ("freedom to transact," "freedom of contract"). Empirical studies support the value of covenants generally. *See* Clarke & Freedman, *supra* note 34, at 11 (newly constructed single-family home in a homeowner association community (HOA) sells for 8.3% higher than equivalent non-HOA home); Rachel Meltzer & Ron Cheung, *How Are Homeowners Associations Capitalized into Property Values?*, 46 REG'L SCI. & URB. ECON. 93 (2014) (HOA homes in Florida sell for 5% premium over non-HOA homes).

[195] *Penn Cent. Transp. Co.*, 438 U.S. at 124.

[196] *Id.* at 137. "While these rights may well not have constituted 'just compensation' if a 'taking' had occurred, the rights nevertheless undoubtedly mitigate whatever financial burdens the law has imposed on appellants and, for that reason, are to be taken into account in considering the impact of regulation." *Id.*

There is a potential mitigation of any loss of value that might arise with the voiding of single-family covenants in subdivisions that is analogous to the effect of the TDRs in *Penn Central*. Consider a subdivision with reciprocal single-family covenants—i.e., permitting enforcement of the restriction by all owners against all others. Assume the legislature enacts an ordinance voiding the covenant for all lots. While a given owner might claim a loss of value if a neighbor then increases density by building a multi-story building, that complaining owner can itself enhance the value of its own property, and its rental income, by also boosting density. All owners can therefore tap into the same benefit and theoretically increase their property values.[197]

Whether values will increase with the removal of bans on multi-unit housing, and by how much, is subject to some debate. Local homeowners typically oppose proposals to increase density;[198] it has been asserted, however, that there is little empirical evidence supporting their fears that density will lower values.[199] Moreover, various studies find an increase in house values when density rises, depending on circumstances.[200] On the other hand, there are, as might be expected, studies finding decreases in the value of single-family homes in areas increasing density.[201]

There is no uniform conclusion about the effect of increased density on values of nearby single-family homes. The result appears to depend on variables such as the location of the properties, demand and supply for housing in the surrounding areas, the particulars of the regulation, and

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[197] There would not be this value increase across the board unless the loosening of density rules applies to all lots; a one-off violation of such a restriction on one lot a lot would seemingly harm the other lot owners without giving them freedom to increase their values. Perhaps the one-off violations of the covenant by governmental entities might be handled as a routine violation of the covenant, with damages and injunction as the remedy rather than as a constitutional matter. For remedies for breach of covenant, *see* KORNGOLD TREATISE, *supra* note 19, at §10.11.

[198] *See* Arthur Acolin et al., *How Do Single-Family Homeowners Value Residential and Commercial Density?*, 113 LAND USE POL'Y 1 (2022).

[199] *Id.*; Kulka et al., *supra* note 57 (observing that there are benefits to renters and first-time home buyers but "often accompanied by a reduction in single-family home prices").

[200] *See, e.g.*, Acolin et al., *supra* note 198 (finding significant, positive relationship between density and house value in the urban core; in outlying areas the correlation is lesser and even negative in situations); Dong Wook Sohn et al., *The Economic Value of Walkable Neighborhoods*, 17 URB. DESIGN INT'L 115 (2012) (data suggest that higher density development may increase the value of nearby properties, including single-family homes).

[201] Kulka et al., *supra* note 57 (observing that there are benefits to renters and first-time home buyers but "often accompanied by a reduction in single-family home prices"); *but see* Ellickson, *Zoning and the Cost of Housing*, *supra* note 59, at 1686 (employing cost-benefit analysis, Professor Ellickson suggests that the benefits to housing consumers and suppliers and beneficiaries of agglomeration outweigh the losers in the proposition).

other factors. It seems that the strongest case for value increase can be found in urban areas with a high demand for housing. Professor Ellickson has suggested that rezoning to permit denser uses could triple the value of certain properties in Palo Alto, California, an area with high demand for housing.[202] The value of the reciprocal right to develop granted to subdivision owners who lose density protections must be accounted for.

c. Application to Covenants

In *Forest View Company v. Town of Monument*, the Colorado Supreme Court followed its tradition of denying compensation for the extinguishment of a covenant through a taking.[203] The case stands as an exemplar of treating the taking of covenants under the regulatory taking test rather than a physical taking.[204] *Forest View* involved a consensual purchase by a town of a lot in a subdivision.[205] The town intended to build a million-gallon water tank on the property.[206] The town's lot, however, like the others in the subdivision, limited the use of the lots to private, site-built, single-family homes.[207] The town brought an action under its eminent domain power to perfect its title to the lot by the removal of the subdivision restriction.[208] Other lot owners in the subdivision claimed that they had a right to compensation as they suffered a taking.[209]

The court applied the takings provision of the Colorado constitution, which is close in language to the Fifth Amendment.[210] The court stated that compensation is required when government physically occupies the land.[211] The court noted that the other owners did not claim a physical occupation and declared:

> [The owners'] claims, rather, might be understood as asserting that the violation of the restrictive covenant on [the Town's] lot is effectively a physical occupation of the restrictive covenants held by the other landowners who are subject to the covenant. *But a restrictive covenant is intangible and cannot be physically occupied.* This highlights the essential difference between a positive

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[202] Ellickson, *Zoning and the Cost of Housing*, *supra* note 59, at 1692.
[203] 464 P.3d 774 (Colo. 2020).
[204] *Id.*
[205] *Id.* at 776.
[206] *Id.*
[207] *Id.*
[208] *Id.*
[209] *Id.*
[210] *Id.*
[211] *Id.* at 778.

> easement—a right to occupy another person's land for some purpose—and a negative easement—a right to prohibit certain conduct on another person's land. . . . [I]n violating the restrictive covenant, the Town is not physically occupying any property other that the [lot it purchased in fee].[212]

The court was unwilling to finesse away the lack of actual physical interference by the town with the covenant right, unlike the *Creegan* court's approach.[213]

After rejecting the physical invasion theory of a taking with its per se standard, the court indicated that the claims of the other owners "are more analogous to a regulatory taking, … when a government entity does not physically occupy the land but government action places an impermissible burden on certain landowners."[214] The court noted, similar to the balancing test under federal constitutional doctrine, that "a regulatory taking can only be established if the regulation imposes a 'very high' level of interference with the property owners' use of land—that is a mere decrease in property value is not enough."[215] The court did not find such diminution of value on the facts.[216]

Although voiding of single-family covenants may decrease the value of properties that lose the right to enforce, this does not necessarily mean that the legislative judgment in imposing the new regulation can, under the Constitution, be overturned by a court. Loss of the covenant right will not necessarily rise to the level of a regulatory taking. Invalidating single-family covenants could achieve the legislature's policy goal of boosting the supply of housing, a judgment that the legislature is empowered to make.[217] Moreover, minor losses in value resulting from regulation do not usually activate the courts under *Penn Central* as they focus on only "unduly harsh" value decreases. Considering the principle of deference by courts to legislative judgments,[218] legislation voiding enforcement of

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[212] *Id.* at 779 (emphasis added).

[213] *Id.*

[214] *Id.*

[215] *Id.*

[216] *Id.*

[217] Employing cost-benefit analysis, Professor Ellickson suggests that the benefits to housing consumers and suppliers and beneficiaries of agglomeration outweigh the losers in the proposition. Ellickson, *Zoning and the Cost of Housing*, *supra* note 59, at 1686.

[218] *See* United States v. Carolene Prods., Co., 304 U.S. 144, 152–53 (1938) (courts should defer to congressional judgments on social and economic legislation unless there is an infringement of fundamental rights); Hodel v. Indiana, 452 U.S. 314, 331–32 (1981); Kelo v. City of New London, 545 U.S. 469, 488–89 (2005) (court defers to the legislative judgment).

single-family covenants may be sustainable despite some possible degradation of the property right.

C. Retroactivity

As suggested above, legislation voiding single-family covenants could provide a comprehensive, single-stroke abrogation of these restrictions. Even if a statute limiting the enforceability of covenants is valid, there is the question of the legislation's retroactive application. Will the statute apply to existing covenants or only prospectively to those created after passage of the new law? The answer depends to a significant extent on whether the court considers this to be, on one hand, a "general" type of statute affecting property rights or, on the other hand, legislation in the category of zoning and related land use regulation. Oregon and Washington were apparently concerned about constitutional challenges to their single-family zoning reform statutes if they were applied retroactively.[219] As a result, these statutes provide for prospective abrogation of covenants, so that only newly-created covenants would be governed by the density expansion of the reform legislation.[220] California, in contrast, passed statutes voiding *existing* covenants that pose barriers to reforms of single-family zoning.[221] With no litigation yet on this issue, it remains to be seen how these statutes will fare on retroactivity issues. We may learn whether the legislatures in Oregon and Washington were overcautious in their concerns about constitutionality or only making a political calculation on whether the electorate would tolerate retroactivity.

1. "General" Statutes

General statutes are assumed to apply only prospectively, unless the statute indicates retroactive implementation.[222] This rule serves the policy goal of allowing people to better plan for themselves and their property.

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[219] *See* Gutman & Beekman, *supra* note 99.

[220] OR. REV. STAT. § 94.776; WASH. REV. CODE §§ 64.38.150, 64.38.160, 64.90.340, 64.90.35.

[221] *See, e.g.*, CAL CIV. CODE § 714.3 (voiding covenants barring ADUs); *id.* § 714.6 (covenants conflicting with affordable housing development are void and unenforceable).

[222] *See, e.g.*, Phillips v. St. Mary Reg'l Med. Ctr., 116 Cal. Rptr. 2d 770, 778 (Cal. Ct. App. 2002); Promontary Enters. v. S. Eng'g & Contracting, Inc., 864 So.2d 479 (Fla. Dist. Ct. App. 2004); *see* Ann Woolhandler, *Public Rights, Private Rights, and Statutory Retroactivity*, 94 GEO. L.J. 1015, 1019 (2006); *see also* Jan Laitos, *Legislative Retroactivity*, 52 WASH. U.J. URB. & CONTEMP. L. 81 (1997). Courts may allow retroactive application of procedural rules rather than substantive provisions of legislation. *See* Cooper v. Holden, 189 S.W.3d 614 (Mo. Ct. App. 2006).

Retroactive application, moreover, raises constitutional concerns, as property rights might be compromised.[223]

2. Zoning

In contrast, changes in zoning and land use regulation usually apply retroactively.[224] The change may well cause a resulting loss of value to the owner. If, for example, building density is reduced by a zoning amendment, the holder of vacant land will only be able to build and market fewer housing units.

Retroactive implementation of zoning is based on the premise the government needs to be able to change its regulatory scheme to achieve policy goals.[225] As one court explained:

> [W]e have pointed out the need for government flexibility to meet the needs and requirements of each emerging generation precludes fulfilling, in all but the most extreme cases, the expectations of value brought about by earlier official moods and actions.[226]

The doctrines of vested rights and estoppel, however, might prevent the retroactive application of zoning changes, such as the passage of a new ordinance or an amendment of prior zoning.[227] Courts refer to the

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[223] *See* Plotkin v. Sajahtera, Inc., 131 Cal. Rptr. 2d 303, 309 n.6 (Cal. Ct. App. 2003) (indicating that denial of a "vested right" that bars retroactive application is a function of "due process" concerns); Nobrega v. Edison Glen Assocs., 772 A.2d 368, 378 (N.J. 2001) (even if intended by legislature, no retroactivity if there would be unconstitutional interference with "vested rights"). Some state constitutions expressly prohibit retrospective legislation. *See, e.g.*, COLO. CONST. art. II, § 11; MO. CONST. art. I, § 13.

[224] *See* Hitz v. Zoning Hearing Bd., 734 A.2d 60 (Pa. Cmmw. 1999); Watergate E. Comm. Against Hotel Conversion to Co-op Apartments v. D.C. Zoning Comm'n, 953 A.2d 1036 (D.C. 2008); City of Floresville v. Starnes Invest. Grp., 502 S.W.3d 859 (Tex. Ct. App. 2016); Pratt Land & Dev. LLC v. City of Chattanooga, 681 F. Supp. 3d 962 (E.D. Tenn. 2022); Friends of Yamhill Cnty. v. Bd. of Comm'rs., 264 P.3d 1265 (Or. 2011).

[225] *See* Furniture LLC v. City of Chicago, 818 N.E.2d 839, 843 (Ill. Ct. App. 2004) ("Generally, there is no vested right in the continuation of a zoning classification."); Ocean Bay Mart, Inc. v. City of Rehoboth Beach, 285 A.3d 125, 137 (Del. 2022) (referring to the "public interest").

[226] Furey v. City of Sacramento, 598 P.2d 844, 850 (Cal. 1979).

[227] *See, e.g.*, BBC Land and Dev., Inc. v. Butts Cnty., 640 S.E.2d 33 (Ga. 2007) (zoning amendment increasing minimum square footage of houses from 1,500 to 2,000); City of New Haven v. Flying J., Inc., 912 N.E.2d 420 (Ind. Ct. App. 2009) (zoning amendment limiting service stations). These doctrines may also be helpful to retain building rights where government has previously signaled some type of approval of the proposed project. *See, e.g.*, Nasierowski Bros. Inv. Co. v. City of

applicable theory either as estoppel or vested rights, but the concept is essentially the same.[228] In these cases, government has made a land use decision in the past that was reasonably relied on by the owner, resulting in the owner's investment in significant funds.[229] Some courts emphasize due process concerns as underlying these doctrines, because zoning interferes with property rights and expectations,[230] while others stress that it would be "highly inequitable" under the circumstances to deny the owner the right to proceed under the prior regulation.[231] A typical statement of the required elements provides:

> Colorado law recognizes a protected property interest in a zoning classification when a specifically permitted use becomes securely vested by the landowner's substantial actions taken in reliance, to his or her detriment, on representations and affirmative actions by the government.[232]

Under existing precedent, if the voiding of single-family covenants is framed as part of zoning and public land use regulations, the infringement on the right to enforce the covenant might be upheld. The case for this might be stronger if the legislation affecting the covenant is enacted as part of comprehensive zoning reform. If, however, the single-family legislative reforms are seen as ordinary legislation, albeit property-

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Sterling Heights, 949 F.2d 890 (6th Cir. 1991) (purchaser checked with city official before buying and received assurances that proposed project was permitted under existing zoning); Eason v. Bd. of Cnty. Commr's, 70 P.3d 600, 605–06 (Colo. App. 2003) (city confirmed by letter that anticipated building fit within zoning); NECEC Transmission LLC v. Bureau of Parks & Lands, 281 A.3d 618, 635 (Me. 2022) (addressing whether owner had acquired vested rights to prevent changes from voters' Initiative); Brown v. Carson, 872 S.E.2d 695 (Ga. 2022) (assurances from municipality's city planning director); Daniel R. Mandelker, LAND USE LAW §§ 6.12–6.23 (5th ed.).

[228] Mandelker, *supra* note 227, at § 6.13. *See* Baiza v. City of Coll. Park, 994 A.2d 495, 503 (Md. Ct. Spec. App. 2011) (Maryland frames the issue as vested rights not estoppel).

[229] Ropiy v. Hernandez, 842 N.E.2d 747 (Ill. Cir. Ct. 2005).

[230] Stewart Enters. v. City of Oakland, 203 Cal. Rptr. 3d 677, 682 (Cal. Ct. App. 2016); Metro Dev. Comm'n v. Pinnacle Media, LLC, 836 N.E.2d 422, 425 (Ind. 2006); City of Waconia v. Dock, 961 N.W.2d 220, 237 (Minn. 2021).

[231] Toigo v. Town of Ross, 82 Cal. Rptr. 2d 649, 656 (Cal. Ct. App. 1998).

[232] *Eason*, 70 P.3d at 605–06; *accord* KOB-TV, LLC v. City of Albuquerque, 111 P.3d 708 (N.M. Ct. App. 2005); *In re* C & B Realty #3 v. Van Loan, 208 A.D.3d 778 (2022); Checketts v. Providence City, 381 P.3d 1142 (Utah Ct. App. 2016). Some jurisdictions provide for vested rights by statute. *See, e.g.*, VA. CODE § 15.2-2307(A) (requiring "affirmative governmental act," good faith reliance, and incurring "extensive obligations or substantial expenses."). For an application of the various elements, *see* Mandelker, *supra* note 227 § 6.12–13.

related, attempts at retroactive application may have constitutional problems.

D. The Taken Property: The Denominator Problem

Courts can find a "taking" under the Fifth Amendment only if "property" has been taken by the government.[233] This requirement has several manifestations when dealing with covenants. First, as discussed above, some courts believe that covenants are not property interests protected under the Fifth Amendment.[234] Second, as will be discussed below, it is possible to argue that covenants that violate public policy, arguably single-family housing covenants, are not valid and enforceable property interests and thus not compensable.[235]

There is an additional issue relevant in some situations, often referred to as the "denominator problem:"[236] Should the taken covenant be evaluated as a freestanding interest (similar to an in gross interest) or as part of the enforcing owner's total property rights (i.e., the parcel held by the owner enforcing the covenant—the benefited land—*plus* the covenant benefit attached to that lot)?[237] If the voiding of the covenant is treated as a per se physical taking, then it does not matter if it is a freestanding interest or not. Under a *Cedar Point* analysis, full compensation for the covenant is required whether it is seen as a stand-alone right or as one stick in the bundle of property rights held by the neighboring owner.[238]

The conceptualization as a freestanding interest or part of the benefited land might matter, however, when the regulatory/*Penn Central* test is applied to a termination of the covenant. If it is stand-alone, a court might characterize the taking under *Lucas* as removing all economically beneficial use of the "land" (i.e., the covenant), so compensation is due.[239]

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[233] Wyatt v. United States, 271 F.3d 1090, 1096 (Fed. Cir. 2001); Andrews v. City of Mentor, 11 F.4th 462 (6th Cir. 2021).

[234] *See supra* note 111 & accompanying text.

[235] *See infra* section IV.

[236] On the denominator problem (also referred to as the "whole parcel rule"), *see* Stewart E. Sterk, *Dueling Denominators and the Demise of Lucas*, 60 ARIZ. L. REV. 67 (2018); David Dana, *Why Do We Have the Parcel-As-A-Whole Rule?*, 39 VT. L. REV. 617 (2015); Frank Michelman, *Property, Utility, and Fairness: Comments on the Ethical Foundations of "Just Compensation" Law*, 80 HARV. L. REV. 1165, 1192 (1967).

[237] For a definition of in gross interests, *see* KORNGOLD TREATISE, *supra* note 19, at §§2.03, 9.15. *Cedar Point* made clear that physical takings and regulatory takings are treated differently—physical takings per se require compensation. Cedar Point Nursery v. Hassid, 141 S. Ct. 2063, 2080 (2021).

[238] Horne v. Dep't. of Agric., 576 U.S. 350, 363 (2015) (with a physical appropriation, court does not consider level of economic deprivation and amount of value remaining to owner).

[239] Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1017 (1992).

If the benefit of the covenant combined with the fee is viewed as a single property interest, then destruction of the covenant will only be a partial percentage of the total property right; compensation may not be required for that level of economic deprivation under *Penn Central*.[240] It would seem that the covenant should be viewed as a part of a combined fee and covenant property interest, as in gross covenants are rare and not favored by the law.[241] Moreover, it would be hard to see any benefit from enforcing a stand-alone covenant; it is unclear which property would benefit from maintaining the restriction.

E. Similar Legislation

Legislators have enacted statutes that are analogous in their structure and constitutional aspects to legislation that would bar enforcement of single-family covenants.[242] These statutes provide insight into how single-family covenant legislation might be effectively drafted.

1. Group Homes

One set of state statutes prevents the enforcement of covenants barring the building and operation of group homes for people with developmental disabilities.[243] Covenant holders seeking to prohibit a group home typically allege that, within the terms of a given covenant, the group home is barred by the language of the covenant because it is

[240] Murr v. Wisconsin, 582 U.S. 383 (2017) (stating a multifactor test to find the denominator); Andrus v. Allard, 444 U.S. 51, 65–66 (1979) involved a claim of regulatory taking, by application of restrictions on the sale of eagle parts but which did not involve the surrender of possession. The Court stated "denial of one traditional property right does not always amount to a taking. At least where an owner possesses a full 'bundle' of property rights, the destruction of one 'strand' of the bundle is not a taking, because the aggregate must be viewed in its entirety." *Id.*

[241] *See* Korngold, *Privately Held Conservation Servitudes*, *supra* note 158.

[242] Consider CAL. CIV. CODE § 714(a) which would appear to create takings problems similar to those of a single-family covenant ban, but the issue is not addressed by the legislation nor have there been reported court challenges. CAL. CIV. CODE § 714(a) provides that a covenant that prohibits or restricts the installation or use of a solar energy system is void and unenforceable. Theoretically, a neighbor holding a covenant benefit to prevent such a system (either mentioning such a system explicitly or through a regulation of additional structures or aesthetics) lost the property right inherent in this covenant when the legislation was passed. *Id.*

[243] Other statutes that are analogous to prohibition of enforcement of single-family covenants include 765 ILL. COMP. STAT. 605/18.4(h) (2018) (no condominium rule shall prohibit reasonable accommodation of religious practice, including attaching of religiously mandated objects to door); MONT. CODE § 70-17-2 (providing that day care facilities are "residential" within covenants); WASH. REV. CODE § 64.38.140 (homeowners association cannot adopt or enforce unreasonable restrictions against use of lot as day care facility).

commercial rather than "residential" or because it will not be occupied by a "single-family."[244]

The statutes prohibiting enforcement against a group home are drafted in different ways. One set of statutes protect group homes from the effect of the covenants by expanding the definitions of terms in the covenant to include group homes. Such statutes provide, for example, that a residential facility for six or fewer persons with developmental disabilities is "a residential use" and a "use by a single family."[245] A second type of statute pronounces that language in a covenant that expressly bars group homes is void.[246] This variety of legislation does not directly address attempts to bar group homes based on allegations that they are commercial rather than residential or not for a single family. A court would have to read in a legislative intent to cover such arguments.

Cases related to the enforcement of legislation seeking to bar covenant application against group homes cover, to some extent, the takings issue that lurks in single-family covenant legislation. These cases, however, do not provide compelling precedent or helpful exegeses of constitutional issues inherent in single-family restriction cases.[247]

2. The Georgia Experience: Twenty Year Expiration

Legislation in Georgia, originally passed in 1938, abrogating covenants offers limited insight into the takings and retroactivity issues.[248] The current Official Georgia Code Annotated provides that "covenants restricting lands to certain uses shall not run for more than twenty years in municipalities which have adopted zoning laws."[249]

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[244] *See, e.g.*, Welsch v. Goswick, 181 Cal. Rptr. 703 (Cal. Ct. App. 1982); Crane Neck Ass'n v. New York City/Long Island Cnty. Servs. Grp., 64 N.Y.2d 154 (N.Y. 1984); Mains Farm Homeowners Ass'n v. Worthington, 854 P.2d 1072, 1076 (Wash 1993).

[245] *See, e.g.*, CAL. HEALTH & SAFETY CODE § 1566.5 (1978); ARIZ. REV. STAT. § 36-581 (2022); VA. CODE 36-96.6(D) (2021); WIS. STAT. § 46.03(22) (2022).

[246] *See, e.g.*, IDAHO CODE § 67-6531 (2010); IND. CODE 31-27-5-3 (2023); N.C. GEN STAT. § 168-23; OKLA. STAT. tit. 60, § 864 (2023); TEX. HUM. RES. CODE § 123.003(b); W.VA. CODE § 27-17-2 (2023).

[247] *See* Adult Grp. Props., Ltd. v. Imler, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987) (mentioning "property" rights but deciding case based on contracts clause); Westwood Homeowners Ass'n v. Tenhoff, 745 P.2d 976, 983 (Ariz. Ct. App. 1987) (upholding the denial of the covenant because it "substantially advance[s]" a "legitimate and strong public interest" quoting Agins v. Tiburon, 447 U.S. 255 (1980)). Lingle v. Chevron U.S.A., Inc., 544 U.S. 528, 540 (2004), however, specifically rejected the *Agins* test, finding that substantially advancing legitimate public interest was not to a part of the *Penn Central* formula for regulatory takings.

[248] GA. CODE § 29-301 (1938).

[249] *Id.* § 44-5-60(b) (2017). A version of this Code was originally passed in 1935 through GA. CODE § 29-301 (1938). *See* Smith v. Pindar Real Est. Co., 200 S.E. 131,

a. The Takings Issue

The overall constitutionality of this statute did not receive the Georgia courts' direct attention until 1979 and, even then, it received only limited treatment.[250] The court in *Payne v. Borkat* apparently viewed the issue as a straightforward police power matter of controlling the *use* of the property and did not broach the takings issue. Moreover, the court relied on *Euclid* alone, rather than any of the then-extant takings cases, such as *Penn Central.* The court disposed of the potential issues with seeming dispatch:

> *Euclid* [citation omitted], the decision in which the Supreme Court of the United States upheld the constitutionality of local zoning ordinances, involved a comprehensive zoning plan containing both building and use restrictions. The statute empowering municipalities of this state to exercise zoning power speaks in terms of both building and use restrictions. [citation to old Code omitted] The defendants' argument is clearly without merit.[251]

b. Retroactivity

Cases under the Georgia statute provide some insight on retroactivity. Both early and more recent Georgia cases state the typical rule that statutes will be enforced prospectively unless a contrary intent is shown, and that rule is applied to the forerunner and current version of § 44-5-60(b).[252] Because there was no legislative intent for retroactive application of the twenty-year limitation, one court noted that "[w]hether the General Assembly could lawfully have made this proviso retroactive is not now before us for determination."[253] Thus, the court avoided the constitutional issue.[254]

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135 (Ga. 1938) (referencing the 1935 legislation enacting the provision); Britt v. Albright, 282 Ga. App. 206 (2006) (providing background on the amending of the statute).

[250] Payne v. Borkat, 261 S.E.2d 393 (Ga. 1979).

[251] *Id.* at 395.

[252] *Smith*, 200 S.E. at 135; Appalachee Enters. v. Walker, 463 S.E.2d 896, 898–99 (Ga. 1995). *See* House v. James, 207 S.E.2d 201, 202 (Ga. 1974) (finding no impermissible retroactive application when covenants were created prior to passage of statute but had run some 37 years after passage of the act).

[253] *Smith*, 200 S.E. at 135.

[254] *See generally Appalachee Enters., Inc.*, 463 S.E.2d 896.

F. Constitutionality Unclear

This section has shown that the constitutional treatment of legislation or judicial decisions that void single-family covenants is unclear. First, because of the peculiar nature of a covenant, it is uncertain whether the termination of such an interest would be assessed under the physical taking per se test or the balancing test of *Penn Central* for use restrictions. Moreover, if *Penn Central* were applied, the availability of offsetting benefits due to the voiding of the covenants may yield a finding that there is inadequate economic loss to qualify as a regulatory taking. Retroactive application of a statute voiding single-family covenants may be difficult, but not impossible if the legislation was viewed as a zoning-related matter.

The ultimate conclusion is that the constitutionality of legislation and judicial decisions that directly terminate or amend existing single-family covenants is not clear. This makes it preferable, therefore, to terminate these covenants by using a theory that does not trigger constitutional issues. The following section suggests that the doctrine barring enforcement of covenants which violate public policy may be a good alternative.

IV. COVENANTS VIOLATING PUBLIC POLICY

Prior sections have demonstrated the potential constitutional issues that could frustrate the enforceability of new legislation voiding single-family home covenants. This section suggests an entirely different approach to removal of single-family covenants, one that could very well avoid a constitutional attack. It will argue that single-family covenants should be viewed as void and unenforceable under the longstanding doctrine that denies enforcement to covenants violating public policy.[255] Moreover, if these covenants are void and unenforceable according to the law of covenants, then they should not be regarded as "property." Thus,

[255] Under longstanding notions of property stated in some of the earliest American judicial opinions on covenants, a covenant violating public policy was not enforceable. *See, e.g.*, Whitney v. Union R.R. Co., 11 Gray 359, 363 (Mass. 1858) (restrictions on group of lots barring certain businesses are enforceable and run with the land; a covenant has to be "exercised reasonably, with due regard to public policy" to be enforceable); Coudert v. Sayre, 19 A. 190 (N.J. Ch. 1890) (owner can imposed covenants on a conveyance but with a "due regard to public policy"); De Gray v. Monmouth Beach Clubhouse Co., 24 A. 388, 389 (N.J. Ch. 1892) (restriction on land will be enforced provided "its enforcement is not against public policy"); Ulrich v. Hull, 17 Wis. 424, 427 (Wis. 1863) (covenant barring maintaining a mill in a particular location does not conflict with public policy and so enforcement is not prevented); Jacobs v. Davis, 24 Md. 204, 212–13 (Md. 1871).

the void covenants cannot be the subject of a taking and government would not have to pay compensation to remove them.[256]

This section will examine the three major aspects of this argument. First, it will explore the meaning of the "void as against public policy" doctrine, including its scope and methods of determining public policy. Second, it will show that such void property does not qualify for compensation under the takings doctrine. Finally, it will argue that the void covenant approach is not a means to circumvent the Fifth Amendment and legislation calling for prospective application.

It is possible that a court could void single-family covenants, perhaps in a litigation contesting enforcement, in an action to quiet title to determine the covenant's validity, or in a case seeking such a declaratory judgment. A binding precedent from the state's high court declaring that such single-family covenants are unenforceable because they violate public policy would stand as stare decisis for this principle. Moreover, it would essentially void even existing covenants without requiring compensation for the holders. Alternatively, the legislature could enact a law declaring single-family covenants void, finding that they are adverse to public policy.[257]

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[256] *See* Darren Park Dist. v. Schmidt, 388 N.E.2d 1343, 1345–46 (Ill. App. Ct. 1979) (agreements to purchase property became null and void so no compensation for taking); People v. Auman, 223 P.2d 260, 261 (Cal. Dist. Ct. App. 1950) (when lease voided, no right to compensation in eminent domain); *see also* Tyler v. Henepin Cnty., 598 U.S. 631, 638 (2023) (to define property for Takings clause, court should draw on existing rules and understanding of property); Members of the Peanut Quota Holders Ass'n v. United States, 421 F.3d 1323, 1330 (claimant just have right to exclude, use, transfer, or dispose of property).

[257] *See* Stop the Beach Renourishment, Inc. v. Fla. Dep't. of Env't. Prot., 560 U.S. 702, 723–24 (2010) (plurality opinion). An unresolved question surrounding judicial retroactive voiding of covenants is whether this could be found to be a "judicial taking" requiring compensation. *See* Barton H. Thompson, Jr., *Judicial Takings*, 76 VA. L. REV. 1449 (1990); Eduardo M. Peñalver & Lior Strahilevitz, *Judicial Takings or Due Process*, 97 CORNELL. L. REV. 305 (2012); Note, *Judicial Takings, Judicial Federalism, and Jurisprudence: An* Erie *Problem*, 134 HARV. L. REV. 808, 812 (2020). This is part of a larger inquiry, much debated, and beyond the scope of this article. However, a couple of observations might be made. First, the judicial takings principle has not yet been adopted by a majority of the Supreme Court. *See* Pavlock v. Holcomb, 35 F.4th 581, 586 (7th Cir. 2022) (Since *Stop the Beach* was decided, "neither this court nor any of our fellow circuits have recognized a judicial-takings claim."). Second, Justice Scalia's plurality opinion in *Stop the Beach* indicates that a judicial taking would occur when a court decision voids an "established right of property." 560 U.S. at 715.

A. The Public Policy Rule

1. Overview

Courts often declare the principle that covenants violating public policy will not be enforced.[258] There are not many decisions, however, that actually apply this doctrine, leaving judicial statements of the rule as dicta or general information about covenant law.[259] There are also cases that declare the doctrine and then apply it without explaining the reasoning for the decision.[260]

The subject matter of the cases about covenants violating public policy deal with a range of issues.[261] A set of cases, decided before enactment of the 1988 federal Fair Housing Act, addressed enforcement of "residential" covenants against group homes for people with disabilities.[262] A recent collection of decisions has addressed a somewhat similar issue of whether child daycare facilities in houses violate a

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[258] KORNGOLD TREATISE, *supra* note 19, at § 10.02, 433 n.1. *See, e.g.*, Coahoma Cnty. v. City of Clarksville, 267 So.3d 236, 260 (Miss. 2019); J.T. Hobby & Sons, Inc. v. Fam. Homes of Wake Cnty., Inc., 274 S.E.2d 174, 179 (N.C. 1981); *see Whitney*, 11 Gray at 363 (restrictions on group of lots barring certain businesses are enforceable and run with the land; a covenant has to be "exercised reasonably, with due regard to public policy" to be enforceable); *Coudert*, 19 A. at 191 (owner can imposed covenants on a conveyance but with a "due regard to public policy"); *De Gray*, 24 A. at 389 (restriction on land will be enforced provided "its enforcement is not against public policy"); *Ulrich*, 17 Wis. at 427 (covenant barring maintaining a mill in a particular location does not conflict with public policy and so enforcement is not prevented); *Jacobs*, 24 Md. at 212–13.

[259] KORNGOLD TREATISE, *supra* note 19, at § 10.02, 434 n.3. *See, e.g.*, SPUR at Williams Brice Owners Ass'n v. Lalla, 781 S.E.2d 115 (S.C. Ct. App. 2015) (covenant barring rental to college students); Wachter Dev., Inc. v. Martin, 931 N.W.2d 698 (N.D. 2019).

[260] KORNGOLD TREATISE, *supra* note 19, at § 10.02, 434 n.4. *See* Bewley v. Stieff, 273 S.W.2d 833 (Ky. 1954) (covenant barring alcohol does not violate public policy).

[261] KORNGOLD TREATISE, *supra* note 19, at § 10.02.

[262] *See, e.g.*, Crane Neck Ass'n, Inc. v. New York City/Long Island Cnty. Servs. Grp., 460 N.E.2d 1336 (N.Y. 1984); Welsch v. Goswick, 181 Cal. Rptr. 703 (Cal. Ct. App. 1982); Craig v. Bossenbery, 351 N.W.2d 596 (Mich. Ct. App. 1984). It has been held that the federal Fair Housing Act amendments of 1988 and similar state acts have barred enforcement against these facilities. *See, e.g.*, Martin v. Constance, 843 F. Supp. 1321 (E.D. Mo. 1994) (group home for people with developmental disabilities are protected und the Fair Housing Act, 42 U.S.C. § 3601 *et seq* barring discrimination against people with a "handicap"); Hill v. Cmty. of Damien of Molokai, 911 P.2d 861 (N.M. 1996) (group home for people with AIDS); Dornbach v. Holley, 854 So.2d 211 (Fla. Dist. Ct. App. 2002) (enforcement of subdivision covenant against group home created incidental discrimination under state fair housing law); *see* RESTATEMENT (THIRD) OF PROP. (SERVITUDES), § 3.1, cmt. c, d (AM. L. INST. 1998).

"residential only" restriction.[263] The following analysis focuses on these cases as they provide the largest segments of cases for comparison.

2. Language and the Facts

Courts often attempt to avoid a journey through public policy by focusing on the specific language of the covenant to determine if it clearly indicates whether the activity in question is barred.[264] Thus, the fact that a covenant not only limited the subdivision to residential uses but also specifically stated that commercial or business uses were prohibited was a key factor for one court's finding that a daycare home violated the covenant.[265] The particular facts are important, and they often serve as the fulcrum to lever enforcement of a covenant into the void or valid category. Thus, when a daycare home hosted a limited number of children, children played inside the home and attached yard, and only minimal traffic was generated at drop-off and pickup-times the court refused to enforce a residential restriction.[266] Still, public policy concerns may bar enforcement of a covenant even if the language of the covenant literally applies to a situation.[267]

3. Sources of Public Policy

After determining whether the language of the covenant actually governs the situation presented in the case, courts then decide whether to

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[263] *See, e.g.*, Terrien v. Zwit, 648 N.W.2d 602 (Mich. 2002); Stewart v. Jackson, 635 N.E. 186 (Ind. Ct. App. 1994); Southwind Homeowners Ass'n v. Burden, 810 N.W.2d 714 (Neb. 2012).

[264] *See Crane Neck Ass'n, Inc.*, 460 N.E.2d at 1338–43 (group home was not a "single-family dwelling" within a covenant because it did not function as a single-family unit; court relied on public policy to void covenant even though definitions did not coincide).

[265] *Terrien*, 648 N.W.2d at 607.

[266] *See, e.g.*, Beverly Island Ass'n v. Zinger, 317 N.W.2d 611, 613–14 (Mich. Ct. App. 1982) (day care home did not violate residential restriction because by law operator could only care for seven children, children only used the home and adjoining yard where operator's own children played, and there was minimal traffic generated only at drop-off and pick-times); *accord Stewart*, 635 N.E.2d at 192; *Welsch*, 181 Cal. Rptr. At 709. *See* Woodvale Condo. Tr. v. Scheff, 540 N.E.2d 206, 209 (Mass. Ct. App. 1989) (operation of day care in condominium unit violated "residential dwelling purposes" in light of the close sharing of physical space in a condominium).

[267] *See Crane Neck Ass'n, Inc.*, 460 N.E.2d at 1339 ("But even if the use of the property violates the restrictive covenant, that covenant cannot be equitably enforced because to do so would contravene a long-standing public policy favoring the establishment of such houses for . . . mentally disabled [persons]."); *Whitney*, 11 Gray 359 (1858) (restrictions on group of lots barring certain businesses are enforceable provided they are "exercised reasonably, with a due regard to public policy" to be enforceable).

apply the "void as against public policy" doctrine. One major issue in this application is the source of the public policy relied upon by the courts. There are clear differences among groups of courts as to what sources should be considered when finding and analyzing public policy.[268]

One set of courts takes a more limited view of appropriate sources of public policy. A court stated that the focus should be on "the policies that, in fact, have been adopted by the public through our various legal processes, and are reflected in our state and federal constitutions, our statutes and the common law."[269]

Other courts, however, rely on additional sources. For example, one case faced the question of whether a group home for adults with developmental disabilities was a "single-family dwelling."[270] The court discussed in great detail and relied upon the thirty year history of state-developed policy and measures favoring small-scale community based homes, the progression of over eight statutes addressed to this effort, state administration of some of these homes and financing of others, and a requirement of "fair distribution" of these residences in all municipalities across the state.[271] Reports from the executive branch and legislature, along with addresses by the governor, were also deeply reviewed by the court.[272] Similarly, some courts recited news articles examining the scope of the problem before the court,[273] or took expert testimony from academics and civic leaders.[274] The degree to which a court is willing to

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[268] In these cases, the courts may distill public policy from federal or state statutes. *See, e.g.*, Martellini v. Little Angels Day Care, Inc., 847 A.2d 838, 844 (R.I. 2004). However, unlike the discussion in *supra* Section IV, the statutes do not literally apply to private covenants, but to public regulation such as zoning. On finding public policy in general, *see* Phillips v. St. Mary Reg'l Med. Ctr., 116 Cal. Rptr. 2d 770, 775–76 (Cal. Ct. App. 2002).

[269] *Terrien*, 648 N.W.2d at 608 (deciding whether "family day care" home violates a covenant limiting use to residential purposes and barring business and commercial uses). *See White v. J.M. Brown Amusement Co.,* 601 S.E.2d 342, 345 (S.C. 2004) ("The general rule, well established in South Carolina, is that courts will not enforce a contract when the subject matter of the contract or an act required for performance violates public policy as expressed in constitutional provisions, statutory law, or judicial decisions.").

[270] *See Crane Neck Ass'n, Inc.*, 460 N.E.2d at 1338.

[271] *Id.*

[272] *Id.* at 1342–43.

[273] Welsch v. Goswick, 181 Cal. Rptr. 703, 709 (Cal. Ct. App. 1983) (citing L.A. Times article on the need for residential care for the elderly, in support of finding that group homes were within "single family residential purposes only").

[274] Davidson Bros., Inc. v. D. Katz & Sons, Inc., 643 A.2d 642 (N.J. Super. Ct. App. Div. 1994) (case involving enforcement of covenant barring use of property as supermarket in a neighborhood that lacked food stores, access to transportation, and had over 3,000 households; testimony from city director of economic development, recognized experts, the former mayor of the city).

extensively examine sources of public policy both supports and signals how the court might conclude.

4. A Legal Culture Clash

But it is more than a disagreement about sources. There are strong competing views expressed by some courts as to what to do with these policy inputs. More specifically, is it the province of the legislature alone to void a genre of covenant based on this policy or should the court strike the covenant when there is no, or incomplete, legislation barring the covenant?[275] Some courts indicate that voiding a type of covenant is for the legislature and the absence of a current statute doing so means that the courts should defer. One court, holding that a "family day care" home covenant was enforceable despite zoning permitting such facilities, thus asserted:

> In defining "public policy," it is clear to us that this term must be more than a different nomenclature for describing the personal preference of individual judges, for the proper exercise of the judicial power is to determine from objective legal sources what public policy *is* and not simply assert what such policy *ought* to be based on the subjective views of individual judges. . . . [M[aking social policy is a job for the Legislature, not the courts.[276]

Other judges take an opposite view, seeing a greater role for the courts. One case, refusing enforcement of a "residential only" covenant to prevent use of the house for home daycare, relied on the state's policy favoring such care and declared:

> We, as judges, are not required to forget what we know from human experience. Our observations have been that neighborhoods bustle from the hustle of parents heeding

[275] This conflict over "judicial legislation" and "judicial activism" is part of an ongoing debate. *See* JOHN HARRISON, LEGISLATIVE POWER AND JUDICIAL POWER, 31 CONSTITUTIONAL COMMENTARY 295 (2016); Jane Schachter, *Putting the Politics of "Judicial Activism" in Historical Perspective*, 2017 SUP. CT. REV. 209 (2017); Hon. Diarmuid O'Scannlain, *Politicians in Robes: The Separation of Powers and Problem of Judicial Legislation*, 101 VA. L. REV. ONLINE 31 (2015); Aziz Huq, *When Was Judicial Self-Restraint*, 100 CAL. L. REV. 579 (2012).

[276] Terrien v. Zwit, 648 N.W.2d 602, 607–08 (Mich. 2002); *accord* Teal Trading & Dev., LP v. Champee Springs Ranches Prop. Owners Ass'n, 593 S.W.3d 324 (Tex. 2020) ("Courts should refrain from nullifying a transaction because it is contrary to public policy, unless the transaction contravenes some positive statute or some well-established rule of law.").

> their children's needs and attending to their extra-curricular schedules. Were our decisions otherwise, it would reflect poorly upon our commitment to one of society's most prized "possessions"—our children.[277]

The cases indicate different attitudes and results as to whether the court should act in the absence of specific legislation barring enforcement of private covenants. This divide exists even if the courts recognize the important policies involved and acknowledge the relaxation of public regulation (zoning) on the issue. The question often comes down to whether the court should wait for the legislature to specifically address the enforceability of the species of covenant in question.[278]

Moreover, the decisions and attitudes of courts on the use of public policy to supersede covenants reflect the general ambivalent attitude of courts over the years toward covenants. The courts have balanced the important right to contract for property rights against the value of free and unrestricted use of land.[279] While decisions have noted the efficiency benefits and freedom of choice that covenants provide, they have expressed concerns about the past controlling the aspirations of current owners and intrusions into personal autonomy.[280] These dueling strains are sometimes reflected in cases about whether public policy considerations should prevail over express covenants. Thus, some courts find that public policy does not supersede rights granted by a covenant, noting that covenant acquisition and enforcement is an inviolable property right.[281] One such opinion declared that "were we at liberty to do so, we might place in balance these great social needs against the interest of property owners in exercising their property rights."[282] In contrast, another court refused to apply a single-family covenant to a group home, stating that "it is in the best interests of society that the free and unrestricted use and enjoyment of land be encouraged to its fullest extent."[283]

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[277] Stewart v. Jackson, 635 N.E. 186, 193–94 (Ind. Ct. App. 1994).

[278] *See* Southwind Homeowners Ass'n v. Burden, 810 N.W.2d 714 (Neb. 2012) (refusing to apply state legislative change prohibiting zoning from interfering with day care homes to similar covenants).

[279] KORNGOLD TREATISE, *supra* note 19, at § 8.01(a).

[280] *Id.* In light of the industrialization of the United States beginning in the late 19th century, the courts have noted the especial value in residential covenants. *See, e.g.*, Oosterhouse v. Brummel, 72 N.W.2d 6, 8 (Mich. 1955); Beverly Island Ass'n v. Zinger, 317 N.W.2d 611, 615 (Mich. Ct. App. 1982) (day care home did not violate restriction).

[281] Walter v. Carignan, 407 S.E.2d 241, 243 (N.C. Ct. App. 1991).

[282] *Id.* (upholds enforcement of residential covenant against day care home).

[283] J.T. Hobby & Sons, Inc. v. Fam. Homes of Wake Cnty., Inc., 274 S.E.2d 174, 179 (N.C. 1981) (family care home did not violate residential only covenant). *See also* SPUR at Williams Brice Owners Ass'n v. Lalla, 781 S.E.2d 115, 121 (S.C. App.

Failure to articulate and apply a robust principle of barring covenants violating public policy ignores an important line of cases and underlying values inherent in covenants law; it also overemphasizes property rights concerns.[284] To be sure, some of the courts invoke both the policy against restrictions and freedom of contract policies.[285] But what matters fundamentally is which side the court comes down on in the end.

B. Possible Critiques of Deploying the Public Policy Approach

Opponents to the use of the "void as against public policy" doctrine have two potential arguments against its application. The first relates to the nature of the property right that is allegedly taken by government action and the other concerns the frustration of legislative intent.

1. The Property Right

Opponents could claim that only sleight of hand converts what was a seemingly valid (single-family) covenant into an interest that lies outside of the Fifth Amendment's compensation doctrine. While it might appear to some that the public policy argument is an unprincipled maneuver to allow the trampling of the rights of covenant holders, the result is consistent with the concept that a compensable taking occurs only if the government infringes on a "legally cognizable property interest."[286] Other courts similarly require a "protectable property interest"[287] or an "undisputed ownership of property"[288] to find a taking. Moreover, "if the claimant fails to demonstrate the existence of a legally cognizable property interest the court['s] task is at an end."[289]

It would seem self-evident that a void "interest" in property is not a legally cognizable interest. Moreover, there are various decisions stating that there can be no taking if the court finds there to be no property

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2015) (citing the policy against land restrictions, but upholding condominium prohibition on renting to college students).

[284] *See* Martellini v. Little Angels Day Care, Inc., 847 A.2d 838, 845 (R.I. 2004) (barring day care home; "the strong competing policy of supporting the right of property owners to create and enforce covenants affecting their property;" court states that this protects the owners investment and increases marketability).

[285] *See Lalla*, 781 S.E.2d at 121; Adult Grp. Props., Ltd. v. Imler, 505 N.E.2d 459, 464 (Ind. Ct. App. 1987); *Fam. Homes of Wake Cnty., Inc.*, 274 S.E.2d at 179–80.

[286] Beres v. United States, 104 Fed. Cl. 408 (2012); *see* City of New Braunfels v. Carowest Land Ltd., 432 S.W.2d 501, 514 (Tex. Ct. App. 2014).

[287] Ridge Line, Inc. v. United States, 346 F.3d 1346, 1355 (Fed. Cir. 2003).

[288] Thompson v. United States, 101 Fed Cl. 416, 431 (2011) (quoting United States v. Dow, 357 U.S. 17, 20–21 (1958)).

[289] Am. Pelagic Fishing Co. v. United States, 342 F.3d 1363, 1372 (Fed. Cir. 2004).

interest.[290] Thus, for example, decisions have held there to be no compensable taking of a tenancy at will,[291] a revocable license,[292] and a lease subject to fulfillment of conditions to become effective.[293]

The denial of compensation for the "taking" of a non-interest in property, i.e., a void and unenforceable covenant, is, therefore, consistent with constitutional principles. The use of the "void under public policy" doctrine is not an end run around the Constitution. Rather, it only underscores the principle that the sovereign is obligated to pay compensation only if an owner suffers a true loss.

2. Harmony with Statutes

Second, application of the "void as against public policy" doctrine to single-family restrictions might be opposed as twisting legislative intent. A few cases have found that when a legislature passed a statute voiding single-family covenants but expressly provided for prospective application only, the outcome did not implicitly validate covenants created before the statute's effective date. Rather, the courts, using the statute indirectly, barred enforcement of covenants created before the legislation. One court explained that a public policy supporting community homes was already in place before the new statute was passed.[294] The legislation simply made it clear that covenants barring certain types of group homes (i.e., those having six or fewer residents) were automatically void; it did not mean that earlier covenants restricting group homes were valid.[295] The court, unironically, stated that the statute's prospective application was not "in reaction to an expressed concern for the constitutional rights of individual landowners. Indeed, such a concern, had it existed, would have been without foundation in the law."[296] It was left unsaid whether the prospective-only statute reflected a political calculation of the legislature due to potential pushback by constituents.[297]

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[290] Determination of whether there is a property right is a question of state law. *See* Arnold v. United States, 137 Fed. Cl. 524 (2018).

[291] Millhouse v. Drainage Dist., 304 S.W.2d 54 (Mo. Ct. App. 1957).

[292] State v. Riley, 293 N.W. 95, 96 (Minn. Ct. App. 1940).

[293] Sangre de Cristo Dev. Co. v. United States, 932 F.2d 891, 894 (10th Cir. 1991) (lease lacked necessary governmental approval); Darien Park Dist. v. Schmidt, 388 N.E.2d 1343, 1346 (Ill. App. Ct. 1979) (failure to meet conditions in agreement to lease or buy); Minn. Sands LLC v. Cnty. of Winona, 940 N.W.2d 183, 203 (Minn. 2020) (preconditions for effective mining lease not met).

[294] Westwood Homeowners Ass'n v. Tenhoff, 745 P.2d 976 (Ariz. Ct. App. 1987).

[295] *Id.*

[296] *Id.* at 982–82 (the court stated that there was no apparent contracts clause violation).

[297] *See* Gutman & Beekman, *supra* note 99.

Another case, *Welsch v. Goswick*, went a step further.[298] The court used the statute, which by its express terms did not apply to the covenant in question as it predated the new statute, as demonstrating a public policy against enforcement of the covenant at hand.[299] The court stated that the legislation "constitutes a strong statement of public policy in favor of a broad interpretation of single-family residential use in this area."[300]

One wonders how legislators reacted to these opinions that might have been viewed as throwing down the gauntlet in a legislature versus judiciary tussle. Moreover, while appearing to be sound uses of public policy, these decisions may be vulnerable to a claim of manipulation by using a statute that does not control to find a broader policy. Interestingly, there is no reported appeal from either of these intermediate appellate court decisions.

C. Public Policy Sources for Voiding Single-Family Covenants

There are various public policy sources that a court could rely upon to void single-family covenants, with the understanding that there may be jurisdictional variations. First, looking to legal sources, courts could rely on legislation in their jurisdiction that abolishes or limits single-family zoning to support the voiding of single-family covenants.[301] The public policy foundation of these statutes, expressed in the legislation itself or accompanying legislative history, could be read into the effort against covenants imposing single-family zoning or other anti-density measures.

Even in jurisdictions that have not enacted a relaxation of single-family zoning, other legal sources might support a public policy for terminating single-family covenants. This public policy might be seen in legislative or executive programs designed to increase affordable housing opportunities; the connection between affordability, supply, and restrictive zoning has been shown.[302] Additional support can be found in the jurisdiction's laws attacking exclusionary zoning. For example, some states strike down exclusionary zoning that imposes excessive lot minimums, requires unwarranted construction standards, mandates in-building parking spaces, prohibits multi-family development, and imposes other regulations that make it not financially possible to build affordable housing.[303] Other jurisdictions go further and require that all

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[298] 181 Cal. Rptr. 703, 708 (Cal. Ct. App. 1982).

[299] *Id.*

[300] *Id.*

[301] *See supra* Section II.B.3 for such legislation.

[302] *See supra* note 13.

[303] *See, e.g.*, S. Burlington Cnty. NAACP v. Township of Mt. Laurel, 336 A.2d 713 (N.J. 1975); Berenson v. Town of New Castle, 341 N.E.2d 236 (N.Y. 1975); Township of Willistown v. Chesterdale Farms, Inc., 341 A.2d 466 (Pa. 1975);

municipalities provide their "fair share" of affordable housing.[304] Additionally, "inclusionary zoning" programs in various states are designed to increase affordable housing. Inclusionary zoning methods might include state authorization of zoning standards that would foster affordable housing[305] (including relaxing procedural requirements);[306] a requirement that developers set aside a certain percentage of units for affordable sale or rent;[307] and incentives to developers, such as higher density allowances, in return for the inclusion of affordable housing.[308] There may also be financial support to assist affordable housing efforts, in the form of funding or tax benefits.[309] There is a substantial body of law supporting the position that frustration of affordable housing violates public policy.[310]

Moreover, for those courts willing to utilize broader resources, there is a rich body of work connecting the elimination or relaxing of single-family covenants to enhanced social welfare.[311] Limiting the reach of these single-family covenants would likely be an effective tool to increase housing supply and affordability—an important goal given the current low supply of housing and ongoing affordability challenges. It would then come down to the philosophical position of the courts, as discussed above: Is the court willing to take this policy to the next level or step back and wait for legislation? Given the serious problem of lack of housing, the courts should not pass on the opportunity to apply longstanding common law doctrine to address a critical, emerging social need.

Allegheny Energy Supply Co., LLC v. Township of Blaine, 829 A.2d 1254 (Pa. Cmmw. Ct. 2003).

[304] *See, e.g.*, *Southern Burlington Cnty. NAACP*, 456 A.2d at 420.

[305] *See*, *e.g.*, CONN. GEN. STAT. § 8-2(b)(4), (5), (6) (2023); N.J. REV. STAT. § 52:27D-311 (2013); 45 R.I. GEN. LAWS § 24.46.2; VA. CODE ANN. § 15.2-2305 (2012).

[306] ORE. REV. STAT. § 197.308 (2023).

[307] *See, e.g.*, CAL. GOV'T. CODE § 65915 (2023).

[308] *See, e.g.*, WASH. REV. CODE § 35.63.280 (2019).

[309] 53 PA. CONS. STAT. § 6012 (2005); ME. STAT. tit. 30-A, § 5250-A (2020); ILL. COMP. STAT. § 3805/7.28.

[310] On exclusionary zoning and inclusionary efforts, *see* Mandelker, *supra* note 227; Peter Salsich, *Toward a Policy of Heterogeneity, Overcoming a Long History of Socio Economic Segregation in Housing*, 42 WAKE FOREST L. REV. 459 (2007); Christopher Serkin & Leslie Wellington, *Putting Exclusionary Zoning in its Place: Affordable Housing and Geographical Scale*, 40 FORD. URB. L.J. 1667 (2013); Tim Inglesias, *Inclusionary Zoning Affirmed:* California Building Industry Association v. City of San Jose, 24 J. AFFORDABLE HOUS. & CMTY. DEV. L. 409 (2016).

[311] *See supra* Section II.B.3.

V. CONCLUSION

This article has suggested an alternate approach for resolving a conflict between private covenants and public zoning that creates a socially undesirable limit on the building of housing. These overlapping regulatory systems clash when covenants still restrict housing to single-family homes, but recent legislative reforms have loosened parallel restrictions in zoning laws. The issue is whether government, by legislation or court decision, can void existing private covenants that are at odds with the new zoning or whether doing so would work a taking of the property rights of covenant holders (who are usually neighbors). The article has suggested that the answers to the constitutional questions are murky. Thus, direct voiding of existing covenants on the grounds that this is a legitimate exercise of the police power and not a taking is a risky and ill-advised strategy. Instead, the article has argued for the use of a longstanding property law doctrine that denies enforcement of covenants violating public policy. In this era of housing shortages and affordability challenges, the common law rule that rejects covenants violating public policy provides a sound basis to invalidate single-family covenants.