The Power of Local Governments to Invalidate Private Deed Restrictions

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ABSTRACT: Many cities and states facing a severe housing crisis have taken steps to reform restrictive land use regulations that block the production of new housing. These efforts have been hindered, however, by the prevalence of homeowners associations ("HOAs") that impose overlapping restraints on housing production through private deed restrictions. In response, many cities and states have considered enacting laws to "override" or invalidate these private deed restrictions. I argued in a previous article that state legislatures have the power to override private deed restrictions, notwithstanding potential arguments under the Constitution's Takings and Contract Clauses. Increasingly, however, local governments have also been taking the initiative to reform their land use regulations. Accordingly, this Article takes on a related question—do local governments have the power to override deed restrictions? This question is more complicated because the doctrine of home rule and other related principles place some limitations on local land use powers that do not apply to state governments. In particular, local governments may be restricted in their ability to affect "private law" obligations, possibly including the enforceability of private deed restrictions. Nevertheless, I argue that local governments do have the power to override deed restrictions, and that, in fact, local governments may be better positioned to do so than state governments are. Local governments possess knowledge of local conditions that enable them to tailor overrides appropriately, and local governments' sensitivity to the concerns of landowners makes it unlikely that they would overreach in regulating private property rights. More broadly, local government scholars today are divided over whether local land use control has the potential to be something more than just a license for "Not in My Backyards" ("NIMBYs") to block needed housing. This Article shows that local power and local knowledge

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need not be synonymous with "no," and there is a way to affirm the capabilities of local democracy without it devolving into unchecked parochialism.

INTRODUCTION

Like many cities today, Madison, Wisconsin, is facing a severe housing shortage that is making housing increasingly unaffordable. To address that crisis, the city proposed to change zoning rules in suburban neighborhoods on the west side of town to reduce required lot sizes. Large lot size minimums can dramatically decrease housing density and raise housing costs, so reducing such minimums is an important step towards increasing affordability.[1] In

1. Minimum lot size requirements have long been identified as one of the single most significant contributors to skyrocketing home costs. *See* Charles M. Haar, *Zoning for Minimum Standards: The Wayne Township Case*, 66 HARV. L. REV. 1051, 1058–61 (1953); *see also* M. NOLAN GRAY, ARBITRARY LINES: HOW ZONING BROKE THE AMERICAN CITY AND HOW TO FIX IT 57–58 (2022) (minimum lot size requirements "serve no purpose other than to drive up housing costs and drive down population densities in most urban and suburban communities.").

response to the proposal, however, homeowners in one suburban neighborhood, called "the Highlands," banded together and agreed to impose private deed restrictions on their properties to maintain the large lot requirements.[2]

Similarly, the City of Orange, California, is required by state law to adopt a housing plan that "realistically" accommodates 3,936 homes over the next eight years, in order to do its part to address the regional and statewide housing crisis.[3] The City passed a housing plan to meet this goal that was approved by the state housing agency, but a housing advocacy group then sued to invalidate the housing plan on the grounds that many of the sites identified by Orange to accommodate its share of homes were not realistic because those sites were covered by private deed restrictions that prevent them from being used for housing.[4]

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2. *See* Allison Garfield, *Madison's Last 'Traditional' Zoned Neighborhood Fights West Area Plan*, CAP TIMES (Apr. 14, 2024), https://captimes.com/news/government/madisons-last-traditional-zoned-neighborhood-fights-west-area-plan/article_5289eea0-f98c-11ee-95b3-1772cbf72a95.html [https://perma.cc/259V-727A]. Economists generally take the view that HOAs are extremely difficult to form retroactively in an established neighborhood because it is nearly impossible to obtain unanimous consent from homeowners in a community to be bound by new deed restrictions, and the value of the restrictions inheres largely in their being uniformly applied throughout the neighborhood. *See, e.g.*, Robert C. Ellickson, *New Institutions for Old Neighborhoods*, 48 DUKE L.J. 75, 79 (1998) ("When relevant owners and residents are heterogeneous and more numerous than a dozen or two, their efforts at voluntary coordination are likely to be beset by significant free rider problems."); Robert H. Nelson, *Privatizing the Neighborhood: A Proposal to Replace Zoning with Private Collective Property Rights to Existing Neighborhoods*, 7 GEO. MASON L. REV. 827, 833 (1999) (noting that the creation of HOAs in established neighborhoods is virtually impossible because "the transaction[] costs of assembling unanimous neighborhood consents voluntarily would be prohibitive"). The Highlands does not appear to have obtained unanimous consent for the new restrictions, and as a result, only some of the properties in the neighborhood are restricted. *See* Garfield, *supra*. Though less than ideal, this was perhaps the only real recourse the homeowners had to fight the upzoning.

3. *See* CITY OF ORANGE, CAL., CITY OF ORANGE 6TH CYCLE HOUSING ELEMENT UPDATE (2021-2029) 1–4 (2023), https://www.cityoforange.org/home/showpublisheddocument/4968 [https://perma.cc/XSZ3-MNUQ]. In California, these plans must be adopted through an update to the "housing element" of the jurisdiction's general plan. *See* CAL. GOV'T CODE § 65583 (West 2025). The general plan is like a constitution for the future development of the city, and consists of numerous components or elements, such as land use, circulation, noise and so forth. *Id.* Normally, jurisdictions have considerable discretion with regard to the content of their general plan elements, but the housing element is the exception in that the state prescribes each jurisdiction's housing need and must sign off on whether the housing element is realistically designed to achieve the goal. *Compare* CAL. GOV'T CODE § 65302 (broadly describing non-housing general plan elements), *with* CAL. GOV'T CODE § 65583 (prescribing components of the housing element and the process for state review). The state initially rejected the City of Orange's housing element before signing off on a revised version. *See* Noah Biesiada & Hosam Elattar, *Sacramento Warns Orange for Trying to Quietly Sidestep Housing Law*, VOICE OF OC (Apr. 20, 2023), https://voiceofoc.org/2023/04/sacramento-warns-orange-for-trying-to-quietly-sidestep-housing-law [https://perma.cc/QFY6-XNW6].

4. *See* Verified Petition for Writ of Mandate at 6–7, Californians for Homeownership, Inc. v. City of Orange, No. 30-2024-01382115 (Cal. App. Dep't Super. Ct. Feb. 28, 2024) (on file with the *Iowa Law Review*).

These two anecdotes point to an emerging phenomenon of great importance. In the past decade, states and local governments facing a historic housing crisis have been swept up in a movement to reform local zoning regulations that block the production of new housing.[5] Although it has long been thought that local governments would never willingly loosen land use restrictions, given the influence in local politics of "Not in My Backyard" homeowners who strongly oppose change,[6] the depth of the housing crisis and the emergence of powerful "Yes in My Backyard" housing advocacy groups has changed that calculus.[7] To date, more than one hundred local governments have taken steps to change their land use regulations and permit more housing, sometimes on their own initiative and sometimes with state prodding.[8] But it appears their efforts may be thwarted by private deed restrictions (technically known as "covenants" or "servitudes") that are often duplicative of or even more restrictive than the now-repealed public land use regulations. In many parts of the country, deed restrictions vigorously enforced by homeowners associations ("HOAs") are a ubiquitous and dreaded component of home ownership.[9] Indeed, a number of scholars in recent years have expressed skepticism about "upzoning" efforts underway in many places for exactly that reason—they worry that neighbors opposed to upzoning will respond by weaponizing deed restrictions, which are typically more onerous and harder to change than zoning regulations.[10] In a previous article, I argued that this concern was overstated because state legislatures have the power to "override" deed restrictions that interfere with state housing goals, and several states have

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5. *See, e.g.*, Brian J. Connolly, *Putting the "Why" in YIMBY*, 57 ARIZ. ST. L.J. 443, 458–65 (2025) (discussing state and local reforms).

6. *See* WILLIAM A. FISCHEL, THE HOMEVOTER HYPOTHESIS 15–16 (2001) (arguing that homeowners are the dominant faction in local politics and developers are mere "supplicants").

7. *See* Kenneth A. Stahl, *"Yes in My Backyard": Can a New Pro-Housing Movement Overcome the Power of NIMBYs?*, ZONING & PLAN. L. REP., Mar. 2018, at 1, 1–2, https://papers.ssrn.com/sol3/papers.cfm?abstract_id=3087508 [https://perma.cc/K4HX-JCYZ]; Connolly, *supra* note 5, at 465–78 (discussing different hypotheses for why local governments have adopted zoning reform).

8. *See* Ipso Cantong, Stephen Menendian & Samir Gambhir, *Zoning Reform Tracker*, OTHERING & BELONGING INST. at n.1 (Apr. 18, 2025), https://belonging.berkeley.edu/zoningreform-tracker [https://perma.cc/Q3XG-JQ95] (recording 109 local jurisdictions that have undertaken zoning reform up to April 2025).

9. *See* Paula A. Franzese & Steven Siegel, *Trust and Community: The Common Interest Community as Metaphor and Paradox*, 72 MO. L. REV. 1111, 1125 (2007) ("[N]early all new residential development in many quick growth regions is within the province of a homeowners association." (emphasis omitted)).

10. *See* Maureen E. Brady, *Turning Neighbors into Nuisances*, 134 HARV. L. REV. 1609, 1682 (2021) (speculating that if zoning reform succeeds and zoning restrictions are rolled back, "covenants like those banning apartments may ultimately reemerge in cities and suburbs to entrench resident control over neighboring uses"); Richard C. Schragger, *The Perils of Land Use Deregulation*, 170 U. PA. L. REV. 125, 159–60, 165 (2021); Christopher Serkin, *A Case for Zoning*, 96 NOTRE DAME L. REV. 749, 754 (2020).

exercised that power in recent years.[11] This Article takes on a related but thornier question—do *local* governments also have the power to override deed restrictions that interfere with local housing goals?

This is apparently a question of first impression. As far as I know, no court has ever ruled on whether local governments can override deed restrictions, no scholar has addressed the issue, and until very recently, there were few recorded instances in which local governments even tried to override deed restrictions.[12] Historically, zoning and deed restrictions functioned as complementary systems of land use control to maintain community character and prevent unwanted change, particularly in the suburban planned communities that are mainstays of our metropolitan regions.[13] But the urgency of the current housing crisis has finally pushed many local governments to change their land use regulations, creating tension between evolving zoning rules and staid deed restrictions.

So, do local governments have the power to override deed restrictions? As discussed herein, the scope of local power to address deed restrictions is a bit murky because local governments do not necessarily enjoy the full complement of police powers that states do. In most states, local governments have "home rule," which means they can act in ways that are not in conflict with state law, but the scope of home rule is often subject to a variety of limitations.[14] For example, many states prohibit local governments from regulating "private law," a strange exception of uncertain provenance.[15] Overriding deed restrictions could be seen as an instance of local governments regulating private law insofar as it changes the contours of liability for a private cause

11. *See* Ken Stahl, *The Power of State Legislatures to Invalidate Private Deed Restrictions: Is It an Unconstitutional Taking?*, 50 PEPP. L. REV. 579, 583 (2022) [hereinafter Stahl, *The Power of State Legislatures*]; *see also* Gerald Korngold, *Repealing Single-Family Zoning Is Not Enough: A Proposal for Removing Existing Parallel Private Covenants for Violating Public Policy*, 89 MO. L. REV. 1, 7 (2024) (making a similar argument). In the time since I wrote this Article, the State of California has taken an even larger step in overriding covenants that block housing. Under Assembly Bill ("AB") 1050, which came into effect on January 1, 2026, landowners desiring to convert commercial property to residential use could obtain the removal of any deed restriction limiting a property's ability to be used for residential purposes, with some exceptions. Assemb. B. 1050, 2025–2026 Reg. Sess. (Cal. 2025). AB 1050 follows on the heels of AB 721, which contains a similar mechanism but only for one hundred percent affordable housing. *See* Stahl, *The Power of State Legislatures*, *supra*, at 594–605 (discussing AB 721); *infra* note 199 (same).

12. In one case from Ohio, private deed restrictions on residential use contained a provision that they could be waived by the mayors of three Ohio towns, but when the mayors' appointees attempted to exercise the power, the court construed it extremely narrowly to prevent the exercise. *See* Berger v. Van Sweringen Co., 216 N.E.2d 54, 56, 59–60 (Ohio 1966). The story of this case is told in 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. RSRV. L. REV. 617, 634–35 (2001).

13. *See infra* Sections I.A–.B.

14. *See infra* text accompanying notes 91–111.

15. *See infra* text accompanying notes 113–39.

of action.[16] Though the private law exception these days appears to be inconsistently applied, perhaps even moribund, it does point to an important normative critique of local regulatory power that may bear on the legitimacy of local covenant overrides. Specifically, the exception reflects concerns about the unique vulnerability of local governments to interference from private economic interests, and inefficiencies created by "patchwork" non-uniform regulations.[17]

However, I conclude that the legal and normative objections to local covenant overrides are inapt. The private law exception is inconsistently enforced today, and makes little sense in a modern context where local governments routinely implement land use regulations that shape private property rights, with little resistance from the courts.[18] What's more, although it is clear that state governments and state courts have the power to alter or terminate covenants based on public policy or changed conditions,[19] local governments are actually much better positioned than either of these institutions to exercise this power. Local governments have strong incentives to ensure that landowners' wealth is protected, which means they are less likely than state governments to trample on private property rights by overriding covenants unless they have a compelling rationale.[20] And local governments are more likely than state governments—and certainly the courts—to have particularized knowledge of local conditions that enable them to answer fact-specific questions relevant to the continued enforcement of covenants, such as whether a covenant has or has not been consistently enforced, whether there has been a relevant change in conditions that may render the covenant obsolete, or whether the continued enforcement of a covenant is inconsistent with public policy.[21] Therefore, I conclude that local governments have the power to override deed restrictions, subject to certain limitations.[22]

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16. *See infra* text accompanying notes 122–26, 134–36.

17. *See infra* text accompanying note 137.

18. *See infra* text accompanying notes 113–14.

19. *See* Stahl, *The Power of State Legislatures*, *supra* note 11, at 584 (establishing that state governments have the authority to override covenants); RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 3.1, 3.4–.7 (AM. L. INST. 2000) (servitudes are invalid if they violate public policy); *id.* §§ 7.4, 7.6, 7.10–.11 (servitudes can be judicially modified or terminated based on abandonment, estoppel, or changed conditions, among other grounds).

20. *See infra* text accompanying notes 191–92.

21. *Cf.* David J. Barron, *The Promise of Cooley's City: Traces of Local Constitutionalism*, 147 U. PA. L. REV. 487, 522 (1999) (arguing that our Constitution empowers local governments to enforce constitutional rights that "lie beyond judicial competence to enforce," even over the objection of the state).

22. As addressed *infra* Section II.D, local governments are subject to the constraints of the Constitution's Takings Clause. In substance, as long as local governments are overriding covenants for the purpose of effectuating an important public policy such as addressing a serious housing shortage, or to address changed conditions within a community, the Takings Clause should be satisfied. *See* Stahl, *The Power of State Legislatures*, *supra* note 11, at 605–28 (addressing a takings question in the context of state legislative overrides of covenants). In a previous article, I also

This Article proceeds in three parts. Part I describes the historical relationship between private deed restrictions and public land use regulations, and explores how that traditionally complementary relationship is beginning to come apart. Part II articulates the main argument: Local governments do have the power to override covenants, subject to certain caveats. Part III then explores some implications of that conclusion. If local governments have the power to override covenants, do they also have the duty to do so? I argue that in states where local governments are required by state law to demonstrate that their land use regulations accommodate their fair share of the regional need for housing—such as California and New Jersey—local governments may indeed be required to override covenants in order to be in compliance with state law. Another question raised by my conclusion is whether local covenant overrides may be preempted by state legislation. This is a close call. Although state legislatures typically prevail in preemption disputes based on the strong statewide interest in preventing extralocal impacts of land use regulation and the need for certainty in real estate transactions, local covenant overrides are unlikely to present either of these problems. Covenant overrides are more likely to *reduce* extralocal impacts by absorbing regional demand for housing rather than externalizing it onto neighboring communities, and given the widely documented lack of sophisticated consumer knowledge regarding the content of deed restrictions, it is unlikely local covenant overrides would have any significant effect on real estate markets.

Aside from its practical relevance for cities and states looking to address outdated land use regulations, this Article also stakes out a middle ground in a brewing debate about the virtues and vices of local land use control. As states have become more aggressive in preempting local land use control, local government scholars have been torn between those, like Richard Schragger and Christopher Serkin, who argue that local control is a way of securing the benefits of local knowledge and enabling local experimentation,[23] and those like David Schleicher, who argues that local control is simply a license for unvarnished "Not in My Backyard" ("NIMBY") sentiment.[24] I myself have mostly echoed Schleicher's criticism and strongly advocated that state governments have the power to preempt local land use control in light of the parochialism and spillover impacts of local land use regulation.[25] I have also expressed skepticism that local governments really bring any local knowledge

discussed possible legal challenges under the Contract Clause, and I argued that a Contract Clause claim was even less viable than a takings claim. *Id.* at 628–30. For that reason, the Contract Clause is not addressed further in this Article.

23. *See* Schragger, *supra* note 10, at 199; Serkin, *supra* note 10, at 792.

24. David Schleicher, *Exclusionary Zoning's Confused Defenders*, 2021 WIS. L. REV. 1315, 1323–25 [hereinafter Schleicher, *Exclusionary Zoning*]; David Schleicher, *Constitutional Law for NIMBYs: A Review of "Principles of Home Rule for the 21st Century" by The National League of Cities*, 81 OHIO ST. L.J. 884, 899 (2020) [hereinafter Schleicher, *Constitutional Law for NIMBYs*].

25. *See* Kenneth Stahl, *Home Rule and State Preemption of Local Land Use Control*, 50 URB. LAW. 179, 186–87 (2020) [hereinafter Stahl, *Home Rule*]; *infra* text accompanying notes 219–22.

to land use regulation when local governments pretty much uniformly use their local knowledge to say "no" to everything.[26]

This Article, however, demonstrates that local control can be more than just a euphemism for saying no. By overriding deed restrictions that block housing production, local governments can leverage their knowledge of local conditions to actually say yes to new housing. Likewise, covenant overrides buck the long-standing tradition of local governments using their land use powers to dump their housing needs on neighboring communities; in this case, they would instead be absorbing the regional demand for housing.[27] Exercising the land use power in this way would effectively rebut some of the best arguments for state displacement, or "preemption," of local land use control. For example, it is often said that preemption substitutes a "one size fits all" solution for local knowledge.[28] I have argued, however, that since local governments mostly use their land use powers uniformly to block needed housing and ensure that almost all housing takes the form of detached single-family homes on large lots, it is in fact local governments that are creating a one size fits all regulatory scenario. State preemption would thus actually have the paradoxical effect of disrupting uniformity and introducing some diversity of housing types.[29] If local governments were to use their land use power to override covenants that impede local housing needs, however, they would necessarily be using real, differentiated local knowledge tailored to local contexts, in the process making a solid case against a uniform statewide rule. On the other hand, if local governments fail to use the power to override, and persist in old patterns of blocking housing, that will reinforce the case for state preemption.

I. THE RELATIONSHIP BETWEEN COVENANTS AND ZONING

This Part discusses the long-standing relationship between public and private land use control. Historically, public land use restrictions and private deed restrictions served similar purposes and acted as complementary systems of land use control. But that historical relationship is now coming under strain. As local governments increasingly recognize the role of restrictive land use regulations in blocking housing supply, they are acting to remove or lessen those regulations. But private deed restrictions are much harder to change, so they remain in place. One way to resolve this conflict, now coming into view, is for local governments to affirmatively invalidate deed restrictions that obstruct local housing needs. Though there are some constitutional limitations to doing so, local governments still retain ample power to terminate or alter deed restrictions to advance local housing goals.

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26. *See* Stahl, *Home Rule*, *supra* note 25, at 201–02.

27. *See infra* Section II.B.

28. Stahl, *Home Rule*, *supra* note 25, at 201.

29. *See id.*

A. The Rise and Maybe Fall of the Two Parallel Systems

The emerging conflict between zoning regulations and deed restrictions is the latest development in a long relationship between public and private land use regulations. For the last century, zoning and deed restrictions have generally operated in a complementary fashion as parallel systems of land use control. The conflict we are now witnessing represents, as I describe below, a break from that tradition.

First, let's define terms. Deed restrictions, which are formally known as covenants, servitudes, or easements, are conditions attached to a real property deed that affect the purchaser's use of the property.[30] As many of the fine distinctions between these different instruments have eroded over time, I will for the sake of simplicity use either the term "covenant" or "deed restriction" throughout this Article. Traditionally, deed restrictions limited a landowner's property use, such as by imposing a lot size minimum or height limit, but modern deed restrictions are often part of comprehensive development schemes that, in addition to such negative restrictions, also impose an affirmative obligation to pay dues to an HOA, which then enforces the covenant regime.[31] Deed restrictions are sometimes created by agreement among neighboring landowners, but more often by a developer in the course of subdividing land and selling off the individual parcels as part of creating a planned residential community.[32] In order to ensure that the community has a uniform look and character, the developer will place terms in each purchaser's deed, or in a document recorded with the subdivision map called a "declaration," that includes standardized restrictions on the use of the property and an affirmative obligation to pay dues to the HOA.[33] If the restrictions are referenced in a deed conveyed to a subsequent purchaser, or "recorded" against the property with a county official called a recorder, and if certain other conditions are met, the restrictions "run with the land," meaning that they can bind the purchaser regardless of whether the purchaser was one of the original contracting parties to the restriction or explicitly consented to the restriction.[34] An HOA or

30. Deed restrictions are comprehensively discussed, and somewhat helpfully modernized, in RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.1. The Third Restatement was enormously influenced by its reporter, UCLA Law Professor Susan French. French's approach to servitudes is laid out in Susan F. French, *Toward a Modern Law of Servitudes: Reweaving the Ancient Strands*, 55 S. CAL. L. REV. 1261 (1982).

31. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 6.2, 6.9 (AM. L. INST. 2000).

32. As explained *supra* in footnote 2, it is less common for restrictions to be created among neighbors in existing developments because common schemes only work if all or a very significant majority of homeowners agree to be bound by the restrictions. Inevitably, there will be a handful of "holdouts" who scuttle the entire scheme, unless a developer creates the scheme a priori and then binds each purchaser to the scheme as a condition of purchase. *See supra* note 2.

33. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 6.2 cmt. a.

34. *See* French, *supra* note 30, at 1271–81 (discussing traditional requirements for a servitude to run with the land).

neighboring homeowner benefitted by the restriction can sue to enforce it if a violation occurs or is threatened.[35]

Zoning, on the other hand, is the formal government regulation of private property use, normally exercised by municipalities. Local zoning regulations are adopted by a municipal ordinance and stipulate, for each property within the municipality's jurisdiction, permitted uses, densities, heights, and other development standards, as well as processes for amending those standards.[36] Unlike private restrictions, there is no need for these development standards to be set out in a landowner's deed or other recorded document prior to the landowner's purchase to be binding on the landowner. Subject to constitutional limitations, a duly enacted ordinance is sufficient to bind any property within the municipality's jurisdiction, even if enacted after the landowner's purchase.[37] Violations are enforced through code enforcement proceedings, which can result in fines or jail time.[38]

On the surface, zoning and deed restrictions do many of the same things, such as regulating the use, density, heights, and other development standards for private properties. Indeed, as Maureen Brady points out, private deed restrictions became a key justification for public land use regulation in the early twentieth century, with the language of deed restrictions often being imported directly into zoning regulations.[39] Nevertheless, there are some

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35. Though I focus here primarily on residential deed restrictions, the analysis and conclusions in this Article apply equally to *commercial* deed restrictions, such as Reciprocal Easement Agreements ("REAs") among retail establishments to provide common access to parking and other facilities. REAs may pose barriers to housing production in the increasingly common scenario where a developer proposes to develop housing on a formerly commercial site. *See* Assemb. B. 1050, 2025–2026 Reg. Sess. (Cal. 2025) (reciting arguments in support of state bill to limit enforcement of REAs, describing REAs as barriers to housing). This is indeed what happened in the City of Orange when the city proposed to accommodate a portion of its housing need on commercial sites where REAs would preclude housing development. *See* Biesiada & Elattar, *supra* note 3. Outside the housing context, commercial deed restrictions may raise other public policy issues such as suppressing competition or underserving specific neighborhoods.

36. *See, e.g.*, GRAY, *supra* note 1, at 31–47; SONIA A. HIRT, ZONED IN THE U.S.A.: THE ORIGINS AND IMPLICATIONS OF AMERICAN LAND-USE REGULATION 31–32 (2014).

37. *See* Murr v. Wisconsin, 582 U.S. 383, 392–94 (2017) (holding that timing of enactment of land use regulation is relevant but not dispositive to question of whether a regulatory taking has occurred).

38. *See* Martin Jaffe, *A Practical Look at Zoning Enforcement*, LAND USE L. & ZONING DIG., Nov. 1984, at 3, 5–8 (discussing code enforcement procedures and alternatives); *see also* Jennifer Aronsohn, *Weaponizing Code Enforcement*, 108 CORNELL L. REV. ONLINE 16, 19–26 (2022) (discussing how enforcement of zoning codes can perpetuate segregation by maintaining exclusion in affluent areas and focusing enforcement on areas of lower socioeconomic status).

39. *See* Brady, *supra* note 10, at 1617 (observing that private law developments such as the evolution of deed restrictions "affect perceptions of what is reasonable and harmful in property law and what counts as a legitimate exercise of government power"); *see also* MARC A. WEISS, THE RISE OF THE COMMUNITY BUILDERS: THE AMERICAN REAL ESTATE INDUSTRY AND URBAN LAND PLANNING 69 (1987) ("Deed restrictions legitimized the idea that private owners should surrender some of their individual property rights for the common good, including their own."); Korngold, *supra* note 12, at 641–42.

significant differences between zoning and deed restrictions. Conceptually, the most important difference is that deed restrictions are considered *private* property rights, consensually accepted by landowners by virtue of their having purchased the property with presumptive notice of the deed restriction, whereas zoning is considered an exercise of coercive and therefore *public* regulatory power.[40]

This conceptual distinction has a few important practical consequences. First, where zoning regulations can be amended by local elected or appointed officials with few formal constraints, deed restrictions are difficult to alter without consent of a significant majority of the affected homeowners because homeowners can generally be bound only by private restrictions to which they impliedly agreed by purchasing the property with notice of the restrictions.[41] Though, as discussed below, the courts have long had the equitable power to alter or invalidate covenants on a variety of grounds, they have historically been

40. In the context of HOAs specifically, Robert C. Ellickson's classic article *Cities and Homeowners Associations*, 130 U. PA. L. REV. 1519, 1522 (1982) [hereinafter Ellickson, *Cities*], articulated the foundational view that HOAs are distinguished from cities primarily on the grounds that the former are somewhat more voluntarily entered into, and therefore should not be subjected to the same constitutional constraints. He writes: "[B]ecause original membership in an association is more voluntary than original membership in a city, an association's constitution should be allowed to contain substantive restrictions not permissible in a city charter." *Id.* at 1528. In the years since Ellickson wrote, there have been reams of scholarly work criticizing the categorization of HOAs as "private," and arguing that they should be considered governmental or quasi-governmental entities subject to the same kinds of constitutional constraints binding public bodies. *See, e.g.*, Gregory S. Alexander, *Dilemmas of Group Autonomy: Residential Associations and Community*, 75 CORNELL L. REV. 1, 6–7 (1989). Ellickson himself has recently taken a much more jaundiced view of the role of HOAs, though he does not entirely back away from his categorization of them as "private." *See* ROBERT C. ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS: THE ABUSE OF ZONING 168 (2022) [hereinafter ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS]. In any event, the public–private distinction continues to play a significant role in how courts treat HOAs and other deed restrictions compared to how they treat local governments. *See, e.g.*, Comm. for a Better Twin Rivers v. Twin Rivers Homeowners' Ass'n, 929 A.2d 1060, 1074 (N.J. 2007) (observing that most courts have not found HOAs to be state actors in the context of regulations of signs, newsletters, and other forms of expression). For purposes of this Article, it is not necessary to resolve this philosophical question. As I argue, cities can override private covenants regardless of whether we label them "public" or "private."

41. The declaration of a common-interest community can often be amended with the consent of a supermajority of landowners rather than unanimous consent. *See* Andrea J. Boyack, *Common Interest Community Covenants and the Freedom of Contract Myth*, 22 J.L. & POL'Y 767, 800 n.122 (2014). Given the enormous difficulty in obtaining unanimous consent, the supermajority provision makes it somewhat easier to amend the declaration, although it is still exceedingly difficult. In principle, the supermajority provision does not necessarily contravene the idea that homeowners cannot be bound by covenants to which they did not consent since the supermajority provision is contained in the original declaration and thus every homeowner presumptively consents to it when purchasing with constructive notice of the declaration. *See id.* at 810 ("Judges reason that by buying into a community, owners in a [common-interest community] have manifested their assent to the terms of the declaration, including the procedures for amending its terms.").

reluctant to use that power.[42] Second, deed restrictions can often operate in much finer-grained detail than zoning regulations and skirt difficult constitutional issues because they are considered freely negotiated agreements among private parties rather than coercive government regulations.[43] Third, because zoning regulations can be applied coercively and do not require the consent or presumptive consent of those affected, they can sweep more widely across a community as a whole, as opposed to merely binding a single subdivision or neighborhood, and therefore facilitate more comprehensive citywide planning.[44]

Historically, covenants and zoning regulations operated in concert as parallel and complementary systems of land use control. Since the early twentieth century, real estate developers and urban planners relied on a combination of both tools to create new planned residential communities.[45] As described above, deed restrictions provided purchasers with the assurance of permanence

42. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 3.1, 3.4–.7 (AM. L. INST. 2000) (servitudes are invalid if they violate public policy); *id.* §§ 7.4, 7.6, 7.10–.11 (servitudes can be judicially modified or terminated based on abandonment, estoppel, or changed conditions, among other grounds). On the courts' traditional reluctance to use these equitable powers, see ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS, *supra* note 40, at 175–77 & nn.104–14 (observing that it is rare for challenges to a covenant on equitable grounds to succeed).

43. *See* Ellickson, *Cities*, *supra* note 40, at 1528 (citing examples of HOA restrictions that would be of doubtful validity if enacted by local governments). In the years since Ellickson wrote, however, local governments have adapted new regulatory instruments that now allow them to regulate in nearly as fine-grained detail as HOAs. *See* Noah M. Kazis, Note, *Public Actors, Private Law: Local Governments' Use of Covenants to Regulate Land Use*, 124 YALE L.J. 1790, 1792 (2015); Hannah Wiseman, *Public Communities, Private Rules*, 98 GEO. L.J. 697, 714 (2010) (observing that zoning has recently "embraced the specificity that is typical of covenants").

44. There are some other legally significant differences between covenants and zoning regulations as well. First, local zoning regulations may be subject to a more generous judicial standard of review in practice. Most zoning decisions are reviewed under a highly deferential standard of review that presumes the correctness of the municipal decision. *See* Village of Euclid v. Ambler Realty, 272 U.S. 365, 388 (1926) ("If the validity of the legislative classification for zoning purposes be fairly debatable, the legislative judgment must be allowed to control."). Covenants are subject to a similar standard in principle—covenants are presumed to be reasonable unless they are proven to be irrational. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5. But courts will often read the language of covenants narrowly to favor the free use of land. *See* Hill v. Community of Damien of Molokai, 911 P.2d 861, 865–66 (N.M. 1996). Given that deed restrictions are so hard to change without the consent of affected landowners, it can be difficult for homeowners to respond to such a judicial ruling by broadening the language of the restriction. Second, state legislatures can arguably interfere more easily in local zoning practices because state constitutions provide only weak protections for local governments against preemption, whereas deed restrictions enjoy somewhat more robust protection under the Takings Clause. In practice this may not be much of a difference, however, because I have argued that state governments have pretty expansive powers to override covenants as well. *See* Stahl, *The Power of State Legislatures*, *supra* note 11, at 582–87.

45. *See* Brady, *supra* note 10, at 1673 (noting that covenants and zoning were perceived as "mutually reinforcing"); Korngold, *supra* note 12, at 641 ("[L]arge-scale subdividers sought public zoning to supplement private covenants and regulate matters not covered by the deeds."); Kazis, *supra* note 43, at 1792 (observing that zoning and covenants are "parallel" systems of land use regulation).

and allowed fine-grained design control at the neighborhood level; zoning regulations provided flexibility, greater certainty of enforcement, predictable judicial interpretation, and control of the environment beyond the restricted community.[46] Though some of these distinctions have eroded over time, the parallel system has endured. Today, local governments often impose private covenants on projects as part of the public land use approval process because they find that it enables them to circumvent constitutional limitations on bargaining with developers,[47] off-load municipal fiscal responsibilities onto developers and new residents (primarily through HOA assessments),[48] and limit public participation in land use decisions.[49] There are also numerous examples of cities that are either coterminous with HOAs or where most of the privately owned land is tied up with deed restrictions. These cities originated as private communities governed almost exclusively through private deed restrictions, then incorporated and adopted overlapping zoning regulations as a fiscal measure to lower taxes or avoid annexation to a neighboring town.[50]

46. *See* Brady, *supra* note 10, at 1672; Kazis, *supra* note 43, at 1800. According to the visionary residential developer J.C. Nichols, there were seven reasons why public zoning regulations were needed to supplement private deed restrictions: (1) deed restrictions could not be retrofitted to established neighborhoods; (2) it was uncertain how courts would interpret deed restrictions; (3) deed restrictions were thought to be temporary; (4) deed restrictions were very inflexible; (5) deed restrictions could not control the community outside the subdivision; (6) covenants did not provide uniformity; and (7) there needed to be coordination between public and private land use regulation. *See* WEISS, *supra* note 39, at 71–72. As discussed in text below, Nichols appears to have been wrong about several of these items, but in modern times the combination of zoning and deed restrictions has provided other benefits.

47. *See* Daniel P. Selmi, *The Contract Transformation in Land Use Regulation*, 63 STAN. L. REV. 591, 610–11 (2011) (explaining how municipalities became more attracted to the idea of bargaining with developers as imposing conditions of approval outright became curtailed by Supreme Court precedent).

48. *See* Steven Siegel, *The Public Role in Establishing Private Residential Communities: Towards a New Formulation of Local Government Land Use Policies that Eliminates the Legal Requirements to Privatize New Communities in the United States*, 38 URB. LAW. 859, 896 (2006) (documenting an increasing trend for local governments to require creation of HOAs as a condition of land use approval).

49. In an important law review note, Noah Kazis argues that this third goal is the major reason local governments today regulate through the use of private covenants. *See* Kazis, *supra* note 43, at 1806–24.

50. The story of how this occurred in Los Angeles County is well told in GARY J. MILLER, CITIES BY CONTRACT (1981). Small communities like Rolling Hills and Rolling Hills Estates began as little neighborhood-sized HOAs before incorporating as independent cities to lower their tax burdens. A slightly different model took hold in neighboring Orange County, where there were very large undeveloped parcels of land owned by individual landowners. *See* CARL ABBOTT, THE METROPOLITAN FRONTIER: CITIES IN THE MODERN AMERICAN WEST 140 (1993). Developers master-planned these huge parcels into privately owned cities, or "New Towns," which were divided into a variety of smaller "villages" governed by HOAs. *Id.* Many new towns later incorporated as cities, such as Irvine and Rancho Santa Margarita, to evade annexation to neighboring towns. *Id.* (discussing Irvine and other "New Towns").

B. *When Zoning and Deed Restrictions Collide*

Traditionally, as just explained, zoning and covenants operated in lockstep. Given that zoning regulations are easier to change than covenants, zoning regulations do sometimes change in such a way that they become more or less restrictive than the overlapping covenants, but this does not necessarily create an inconsistency between the zoning and the covenant. Normally, it is possible for a landowner to comply with both sets of regulations even if one is more restrictive than the other.[51] Sometimes, however, a zoning change may indicate that a neighborhood is undergoing a change in character—say, from predominantly residential to commercial. In that case, there could be an argument that an overlapping covenant should be terminated due to changed conditions (an equitable defense to enforcement of a covenant).[52] Courts will typically consider a zoning change as evidence of changed conditions, but it is not dispositive of whether conditions have changed sufficiently to warrant termination or nonenforcement.[53]

What we are seeing today in many cities across the country is something different. Cities are not simply changing zoning rules in a piecemeal way in response to changing neighborhood conditions. They are fundamentally rethinking the wisdom of longstanding land-use regulations, liberalizing formerly strict rules on single-use zoning, parking mandates, and large minimum lot size requirements for the express purpose of juicing housing production.[54] These zoning reforms run directly contrary to one of the central functions of deed restrictions, which is to maintain a uniform, low-density suburban lifestyle.[55] In some cases, like Madison, Wisconsin, new deed restrictions are being adopted explicitly to counteract liberalized zoning rules.[56] Unlike the historical pattern, therefore, it seems clear that there is a fundamental contradiction between the newly enacted zoning regulations and overlapping private deed restrictions.

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51. I say "normally" because this is not always possible. For example, a zoning regulation could include a *minimum* density for a site of, say, ten units per acre but the overlapping deed restriction contains a density *maximum* of five units per acre. As discussed *infra* notes 60–62 and accompanying text, however, even this inconsistency does not necessarily signal an intent by the municipality to override the covenant. It is possible that the municipality intends the density minimum to cover sites within the zoning classification that are not otherwise governed by contrary deed restrictions.

52. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 7.4, 7.6, 7.10–.11 (AM. L. INST. 2000) (servitudes can be judicially modified or terminated based on abandonment, estoppel, or changed conditions, among other grounds).

53. *See* Brady, *supra* note 10, at 1651–53; RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (collecting cases).

54. *See* Cantong et al., *supra* note 8; Connolly, *supra* note 5, at 445–46.

55. *See* EVAN MCKENZIE, PRIVATOPIA: HOMEOWNER ASSOCIATIONS AND THE RISE OF RESIDENTIAL PRIVATE GOVERNMENT 56–78 (1994) (discussing HOAs' legacy of inscribing class and racial discrimination into suburban communities).

56. *See supra* notes 1–2 and accompanying text.

This contradiction is emerging because public opinion surrounding land use regulation has undergone a massive reevaluation in the last several years. Until recently, it was widely seen as good public policy to encourage restrictions on the use of land such as large lot size minimums, setbacks, and so forth in order to encourage investment in real property and neighborhood stability.[57] Zoning and deed restrictions accordingly worked in concert to restrain new housing development. That conventional view has come under withering scrutiny in the last few years, however, as it has become clear that these restrictions have created a severe supply crunch that is locking future generations out of housing opportunities.[58] The result has been a bifurcated, almost feudal housing market in which consumers who purchased homes years ago have secure housing in stable, unchanging neighborhoods of single-family homes while everyone else struggles to obtain what little housing is available.[59] In this changing policy environment, zoning's flexibility enables it to adapt to change (albeit slowly), whereas traditional covenant law doctrines make it very difficult for covenants to adapt. That dynamic has created the emerging tension between zoning and covenants.

What has been said so far does not mean courts should assume that differences between zoning and deed restrictions necessarily present a conflict. As indicated above, a discrepancy between a zoning regulation and a deed restriction does not automatically make them inconsistent.[60] For example, a zoning regulation may permit both commercial and residential uses, whereas an overlapping covenant permits only residential uses. In this case, there is no inconsistency because a homeowner can comply with both restrictions. Nor can it be presumed that a zoning change always indicates either a change in conditions within the covenanted neighborhood, or a legislative intent to undermine the covenant. In such a case, the zoning change may be designed to govern areas outside the covenanted neighborhood while leaving the covenanted neighborhood untouched. This would make sense considering

57. *See, e.g.*, RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 3.5 reporter's note (arguing that indirect restraints on alienation like covenants do not "interfere with free functioning of the market in land" but help stabilize those markets by creating certainty).

58. *See generally* Chang-Tai Hsieh & Enrico Moretti, *Housing Constraints and Spatial Misallocation*, AM. ECON. J.: MACROECONOMICS, Apr. 2019, at 1 (describing the effects of stringent restrictions on the new housing supply); Vicki Been, Ingrid Gould Ellen & Katherine O'Regan, *Supply Skepticism: Housing Supply and Affordability*, 29 HOUS. POL'Y DEBATE 25, 31–33 (2019) (describing broad effects of restrictive local land-use regulations, including increased home costs).

59. *See, e.g.*, Jeanna Smialek, Jim Tankersley & Conor Dougherty, *American Dream Deferred: Why Housing Prices May Pose a Problem for Biden*, N.Y. TIMES (Dec. 15, 2023), https://www.nytimes.com/2023/12/15/us/politics/housing-prices-biden.html (on file with the *Iowa Law Review*); Anna Kodé, *The American Dream Without a House? Believe It*, N.Y. TIMES (Sept. 8, 2024), https://www.nytimes.com/2024/09/07/realestate/american-dream-homeowner-young-people.html (on file with the *Iowa Law Review*).

60. *See supra* text accompanying notes 51–53.

that one goal of zoning is to provide land use regulations for places that do not have private restrictions.

Absent a specific statement of legislative intent to override a covenant, it cannot be readily discerned whether a zoning regulation is inconsistent with a deed restriction or not.[61] As a result, any rule that would automatically invalidate a covenant that a court deems inconsistent with a zoning regulation could create massive uncertainty regarding the enforceability of covenants. Purchasers of property would never know for sure if deed restrictions on the property were enforceable, as there would normally be some overlapping zoning restriction that could arguably be considered inconsistent with them. This is not mere speculation. The state of Vermont actually enacted a statute that invalidated all covenants inconsistent with local zoning, then quickly repealed the statute before it even went into effect because of concerns about the uncertainty this would cause in real estate transactions.[62]

In the case where a local government expressly declares an intent to override, however, these concerns are absent. The municipality can tailor its override to specific covenants or covenants with specific characteristics to avoid creating broader uncertainty. And even if uncertainty is created by an express covenant override, presumably this outcome reflects a legislative judgment that the cost of some uncertainty is outweighed by the benefits to be derived from removing the offending restrictions. As discussed further below, local governments can also alleviate some of the uncertainty involved in covenant overrides by requiring that for an override to take effect, a covenant modification document referencing the override must be recorded against the property.[63]

C. The Constitutionality of Covenant Overrides

As described above, zoning and deed restrictions have long existed in a delicate kind of ecosystem, with each having corresponding advantages and disadvantages that counterbalance the other. Covenants are intentionally inflexible to ensure stability for investors and protect the property rights of landowners, whereas zoning rules are flexible to permit comprehensive

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61. An exception to this general principle would be a "piecemeal" rezoning where a zoning or other land use change occurs in the process of approving a specific project, as opposed to a more general zoning change affecting a larger area. *See* Sara C. Bronin, *Comprehensive Rezonings*, 2019 BYU L. REV. 725, 732–35. In the former case, there is a good argument that the local government has impliedly preempted any deed restrictions in conflict with it. For example, if a city approves a project at a density of five units per acre, but a covenant on the property permits only two units per acre, that could be interpreted as an implied override of the covenant.

62. *Compare* 2020 Vt. Acts & Resolves No. 179, at 5 ("Deed restrictions, covenants, or similar binding agreements added after January 1, 2021 that prohibit or have the effect of prohibiting land development allowed under a municipality's bylaws shall not be valid."), *with* 2021 Vt. Acts & Resolves No. 4, at 1 ("Deed restrictions . . . that prohibit or have the effect of prohibiting land development allowed under 24 V.S.A. § 4412(1)(E) and (2)(A) shall not be valid.") (codified as 27 Vt. Stat. Ann. § 545).

63. *See infra* text accompanying notes 200–01.

planning. This raises an important question: If covenants could be easily overridden by state or local governments, would it destroy that delicate ecosystem and devalue deed restrictions? If so, covenant overrides could potentially be unconstitutional "takings" under the Constitution's Takings Clause.[64]

Without addressing this question directly, many scholars have indicated that the benefits of deed restrictions could be significantly diminished by excessive government interference. Gerald Korngold, for example, argues that covenants have the advantage of representing the undiluted will of the covenanted community, whereas the political process of making zoning rules allows people living outside that community to "exert undue power" over it.[65] In a similar vein, Robert Ellickson perceives covenants as presumptively more legitimate than zoning regulations because the former are consensual whereas the latter are coercive.[66] Susan French argues that the inflexibility of covenants protects covenanted communities against the uncertainty of zoning regulations, which can change due to political pressures.[67] One can infer from all these arguments that a governmental power to override covenants could significantly

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64. I addressed the taking question as it relates to covenant overrides by state legislatures in Stahl, *The Power of State Legislatures*, *supra* note 11, at 606–28. *See also infra* text accompanying notes 69–71 (summarizing this analysis).

65. Korngold, *supra* note 12, at 642 ("Citizens and interested parties from outside the affected area may exert undue power over the zoning process."). Ellickson also sees the HOA as representing the "unanimous wishes" of the community members. Ellickson, *Cities*, *supra* note 40, at 1528; *see also* Clayton P. Gillette, *Courts, Covenants, and Communities*, 61 U. CHI. L. REV. 1375, 1395 (1994) ("[C]ovenants . . . permit individuals whose preferences to encourage or discourage discrete activities are sufficiently common to serve as a coordination point, but not so robust as to warrant supervision by a governmental body . . . ."). Korngold also articulates a "moral obligation" argument in favor of the enforceability of covenants. Korngold, *supra* note 12, at 627–28. He summarizes the argument: "It would be unfair for *A* to purchase property at a reduced price because the land is subject to a covenant benefiting *B* and then resell it free and clear of the covenant. *B* would lose the value of a bargained and paid-for right in *A*'s land and *A* would be receiving a windfall by selling the land at its full, unrestricted price." *Id.* at 627. To the extent this situation is "unfair" to B, that unfairness is addressed through the Takings Clause. As I have discussed previously and summarize further in *infra* text accompanying notes 75–78, as long as the state or local government is acting to address a matter of public policy such as a housing shortage, or responding to a change in conditions, there is no constitutional problem under the Takings Clause with the covenant override because B has no reasonable expectation that the covenant would be enforced in that situation. *See* Stahl, *The Power of State Legislatures*, *supra* note 11, at 606–28. Though overriding the covenant is arguably unfair in that it makes A a winner and B a loser, policy decisions frequently create winners and losers and "[t]akings law is full of these 'all-or-nothing' situations." Lucas v. S.C. Coastal Council, 505 U.S. 1003, 1020 n.8 (1992). If it chooses, the state or local government adopting the override can address any apparent unfairness through appropriate measures, such as imposing an exaction on developers in exchange for taking advantage of the override, to capture the developer's windfall. *See* Koontz v. St. Johns River Water Mgmt. Dist., 570 U.S. 595, 614–15 (2013) (describing scope and boundaries of municipalities' power to impose exactions).

66. *See* Ellickson, *Cities*, *supra* note 40, at 1520–21, 1523, 1527–29 (observing that courts review HOA regulations more strictly than land use regulations adopted by cities, but "[c]onsidering the 'private' nature of the association, one might have expected exactly the opposite judicial treatment").

67. French, *supra* note 30, at 1263 n.6.

diminish the value that covenants hold for landowners—possibly resulting in an unconstitutional taking. (Though these scholars tend to contrast private deed restrictions with local zoning regulations, this objection could just as easily extend to efforts by *state* governments to override covenants.)

None of these are very convincing arguments against a governmental power to override covenants, however. As an initial matter, private deed restrictions have always been subject to certain judicially enforceable limitations. Most significantly, deed restrictions are invalid if they violate public policy, and they may be terminated if there is a change in conditions that significantly reduces the benefit of the covenant within the restricted community, or results in the harm caused by the restriction to outweigh the benefit.[68] In a previous article, I argued that state legislatures have the power to override deed restrictions, notwithstanding constitutional limitations imposed by the Takings Clause, *provided that* the legislature is acting either to effectuate some important public policy objective or responding to a significant change in conditions.[69] As I argued, whether one's property has been "taken" is generally determined by whether the treatment of the property is consistent with background principles of state law, particularly whether a reasonable landowner would expect their property to be treated a certain way.[70] I argued that, in the case of covenants, longstanding common-law principles create the reasonable expectation that a landowner's right to enforce a covenant would be limited where the covenant is contrary to an important public policy goal or where there has been a significant change in conditions.[71]

These constitutional parameters undercut any normative argument against covenant overrides. First, consider Ellickson's argument that covenants are consensual rather than coercive, and Korngold's related argument that covenants reflect the will of the consensual community unpolluted by the larger polity. In the case where the state or local government is acting to address a matter of fundamental public policy such as a severe housing shortage, this argument simply has no merit. The problem here is not that the broader public will pollute the integrity of the more intimate, private community, but that that parochial interests of the private community will harm the interests of the public at large. "Consent" is not a meaningful argument when deed restrictions agreed upon by a small community have impacts on a larger public that has not consented in any way to those deed restrictions. For example, suppose a covenant contains a (quite typical) condition that all lots must be a minimum of twenty thousand square feet in size, and each lot must contain

68. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 3.1, 3.4–.7 (AM. L. INST. 2000) (servitudes are invalid if they violate public policy); *id.* §§ 7.4. 7.6, 7.10–.11 (servitudes can be judicially modified or terminated based on abandonment, estoppel, or changed conditions, among other grounds).

69. *See* Stahl, *The Power of State Legislatures*, *supra* note 11, at 606–28.

70. *See id.* at 615–16.

71. *See id.* at 614–28.

no more than one single-family residence. Undoubtedly, these conditions represent the will of the residents within the covenanted community, who all purchased with knowledge of the restrictions, and will likely benefit, at least in the short term, from having a uniformly restricted low-density suburban neighborhood. But it is now well documented that large minimum lot sizes are one of the main culprits in our housing supply shortage, by artificially constraining the supply of housing.[72] In other words, the restricted community benefits by imposing the externality of higher housing costs on everyone outside the community. Again, although the "insiders" may have consented to this state of affairs, the "outsiders" have not. This is the very reason why covenants are subject to the qualification that they can be judicially invalidated due to inconsistency with public policy.[73] Needless to say, if courts can invalidate covenants on this basis, then elected state and local government officials who are actually charged with making public policy in our democratic system should have the power to do the same.[74]

72. *See supra* notes 1–2 and accompanying text (collecting sources on effects of minimum lot size requirements).

73. The idea that covenants are invalid if they violate public policy appears to originate in the famous case of *Shelley v. Kraemer*, 334 U.S. 1, 20–21 (1948), in which the Supreme Court found covenants restricting ownership or occupancy of homes on the basis of race to be unconstitutional. *See also* Hurd v. Hodge, 334 U.S. 24, 35–36 (1948) (same). As the constitutional foundation for the ruling was somewhat dubious, covenants expressing any kind of racial preference or dis-preference were subsequently prohibited by the Fair Housing Act of 1968. 42 U.S.C. § 3604(c) (1968). Courts have since made clear that racially restrictive covenants are invalid as a matter of common law for violating public policy. *See, e.g.*, Hawthorne v. Realty Syndicate, Inc., 259 S.E.2d 591, 594 (N.C. Ct. App. 1979) ("Racial restrictive covenants prohibiting the sale or use of real property by a particular racial group are unenforceable today either in equity, or at law in an action for damages." (citations omitted)). The ban on racially restrictive covenants clearly cuts against the "consent" theory of covenants. Despite the fact that all the homeowners in the community have constructively agreed to be bound by the racial restriction, the covenant is considered unenforceable because the benefit to the community is outweighed by the burden it places on outsiders.

74. Aside from the argument in the text, the contention that covenants are somehow more consensual than zoning regulations has largely been discredited for two principal reasons. On one hand, covenants are frequently not consensual because in many places, it is extremely difficult to find housing that is not tied down with covenants, conditions, and restrictions ("CC&Rs"), and consumers don't have much free choice since the CC&Rs tend to be quite uniform. *See* Franzese & Siegel, *supra* note 9, at 1113 ("As a practical matter, housing consumers in high-growth parts of the United States simply cannot 'vote with their feet' with respect to CIC [("common interest community")] organization and governance because, at present, there exists no meaningful consumer choice amongst CIC organizational structures."). The principal reason for both of these phenomena is that, as alluded to above, municipal governments often require that new housing be bound by CC&Rs as a condition of receiving land use approvals, to offload financial responsibilities of municipal governments onto private HOAs. *See* Ana Teresa Solá, *Here's What the Rise of Homeowners Associations Means for Buyers*, CNBC (Dec. 2, 2024, 2:26 PM), https://www.cnbc.com/2024/12/02/heres-what-the-rise-of-homeowners-associations-means-for-buyers.html [https://perma.cc/SWY8-AXNN] (reporting that most consumers desire homes without HOAs, but they are difficult to find because local governments insist on creating them as a condition of approval).

Next, consider Susan French's argument that the permanence of covenants makes them superior to government regulation. She says: "Because zoning ordinances and other governmental controls are usually much more susceptible to change as the result of political and economic pressures than are real covenants and equitable servitudes, one function served by private land use arrangements is to protect against uncertainty of governmental land use regulation."[75] This is not a very persuasive argument against covenant overrides. For one thing, zoning rules related to housing very *infrequently* change because the same homeowners who enjoy the benefits of covenants restricting the residential use of property also wield disproportionate influence in local government, and use it to make sure zoning rules are not liberalized to permit more housing outside the covenanted community.[76] That aside, the resistance to change that French lauds in covenants is precisely their biggest flaw—covenants are very poorly adapted to dealing with changing neighborhood conditions because they are so hard to revise. For example, if a neighborhood bound with deed restrictions is rapidly undergoing change from residential to commercial uses, the restrictions may no longer provide much benefit to the homeowners and may in fact be impeding their ability to devote their property to other uses. But covenants are intentionally very difficult to change, often requiring supermajority consent or even unanimity. For that reason, courts have long had the power to terminate covenants due to changed conditions (though historically they have rarely used this power).[77] As addressed further below, if it is appropriate for the courts to have this power, then undoubtedly state and local governments should have it as well, because they are much better situated to identify changed conditions than is the judiciary. Therefore, legislative overrides of deed restrictions do not interfere with the underlying goals of covenant law, but actually help effectuate them.

In other words, if a state or local government were to override a covenant in order to effectuate an important public policy or to address a significant change in conditions, it would be entirely consistent with longstanding limitations on the enforceability of covenants and thus, would not in any way disrupt

Many commentators have compared HOAs to governmental entities and urged that they should be treated as "public" entities subject to constitutional constraints rather than "private" entities exercising property rights. *See, e.g.*, Alexander, *supra* note 40, at 6–7. The second reason why the distinction between HOAs and local government land use control is largely discredited is that, to the extent homeowners "choose" to be bound by CC&Rs by virtue of moving into a community, they similarly choose to be bound by land use regulations by moving to a town. And considering that metropolitan regions today feature numerous, even dozens of municipalities exercising independent land use powers, homeowners have just as much variety in their ability to choose a municipality in which to settle as they have variety in choosing HOAs. *See infra* notes 87–89, 150–55 and accompanying text.

75. French, *supra* note 30, at 1263 n.6.

76. *See* ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS, *supra* note 40, at 33, 111–28 (marshaling evidence that restrictive zoning rules are rarely loosened in most places).

77. Maureen Brady identifies the first "changed conditions" case as occurring in 1881. *See* Brady, *supra* note 10, at 1651 (citing Trs. of Columbia Coll. v. Thacher, 87 N.Y. 311, 321 (1881)).

the goals of covenant law or the relationship between zoning and covenants. Furthermore, any such override would not be a taking of property because it would be fully consistent with a landowner's reasonable expectations regarding their property.[78] Of course, if an override did not serve the purpose of furthering public policy or addressing a change in conditions, it would likely be invalid as a taking or a violation of substantive due process. These constitutional limitations on the power to override are sufficient to safeguard whatever values we associate with covenants while ensuring state and local governments have the power to adapt land use policy to modern purposes.

II. THE LOCAL POWER TO OVERRIDE COVENANTS

The previous Part dispelled the idea that covenant overrides generally should be invalid or otherwise disfavored on the grounds that they will undermine the goals of covenant law or disturb landowners' reasonable expectations related to the use of their property. These points apply regardless of whether the override is enacted by state or local governments. But, as this Part explores, it may be that unique limitations apply to the power of *local* governments specifically to enact such overrides. In particular, the doctrine of home rule and the private law exception may pose obstacles to local covenant overrides. However, I conclude that these are not actually significant obstacles to the power, and local governments are in fact well-positioned legally and practically to adopt covenant overrides.

A. THE STATE OF LOCAL CONTROL

As a threshold question, why would the power of local governments to enact covenant overrides be any different than the power of the state? The doctrinal issue is that, as a matter of local government law in the United States, municipalities do not have the inherent police power that states enjoy but are instead "creatures of the state."[79] As such, whatever regulatory authority local governments possess is derived either from legislative grants or from state constitutional provisions. These grants of authority may also contain explicit or implicit limitations on local power. For example, and as discussed below, many state constitutions grant local governments a general power to regulate absent a specific state delegation, a power known as "home rule," but limit

78. It could be argued that a landowner would only reasonably expect the relatively rare occurrence of a judicial override. As I have argued before, however, it makes very little sense to think that *only* the judiciary can articulate a public policy basis for overriding covenants when, of course, elected legislative bodies such as state and local governments are a far more credible source of public policy. *See* Stahl, *The Power of State Legislatures*, *supra* note 11, at 620–24. Furthermore, covenant overrides by local governments are, for reasons I discuss below, likely to be fairly rare and limited in nature. *See* discussion *infra* Sections II.D–.E, III.A.

79. Stahl, *Home Rule*, *supra* note 25, at 185. Much of the discussion that follows in this and the following Section is drawn from Stahl, *Home Rule*, *supra* note 25; and Kenneth Stahl, *Home Rule Immunity from State Preemption of Local Land Use Regulation*, ZONING & PLAN. L. REP., Feb. 2023, at 1.

that power to matters that are "local" in nature, or exclude matters that are considered "private law," such as employment law, torts, wills and trusts, and the like.[80]

Before going any further, I should step back a moment to review why our law treats local governments differently from state governments. Most of the extant limits on local power are vestiges of a Gilded-Age skepticism about regulatory power in general. With the advent of industrialization and urbanization, government became more active in regulating economic life. Elite reformers and the conservative judiciary saw the new regulatory state as a threat to economic freedom, and they took steps to rein it in.[81] Courts asserted expansive new powers to review regulations for constitutionality, and legislators passed numerous "reforms" to professionalize government (which, incidentally, also made it less democratically accountable).[82] Local governments were perceived as especially likely to overreach into private economic affairs, given their close relationship with private interests such as the railroads, and were subjected to numerous restrictions on their power.[83]

Although many of the Gilded-Age constraints on the federal and state governments weakened considerably after the New Deal, as the regulatory state became ascendant, restrictions on local power have largely remained in place. To this day, local governments are much more closely intertwined with the private economy than other levels of government, though they rarely deal with the railroads anymore. Local governments' relatively smaller size as compared to states and the federal government means the functions of local government often overlap with those of private enterprise.[84] The close historical relationship between covenants and zoning described above is one such example. Local governments' relatively smaller size also arguably makes them more vulnerable to capture by private economic interests, more likely to act parochially and dump the costs of local activity on unpopular outsiders, and less likely to be staffed by qualified professionals with expertise in regulatory affairs.[85] Likewise, the smaller scale of local regulatory activity often leads to concerns that different local governments will adopt contradictory or duplicative regulations that cause confusion and uncertainty, as people struggle to sort out how to comply with regulations in numerous different jurisdictions.[86]

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80. *See* Stahl, *Home Rule*, *supra* note 25, at 185–88; *infra* text accompanying notes 113–38.

81. *See* KENNETH A. STAHL, LOCAL CITIZENSHIP IN A GLOBAL AGE 76–79 (2020).

82. *See* David J. Barron, *Reclaiming Home Rule*, 116 HARV. L. REV. 2255, 2281–89, 2332–34 (2003).

83. *See id.* at 2285–88, 2297–98.

84. *See id.* at 2310–18.

85. These dynamics are complex. For discussion of determinants and degree of capture, see generally, for example, Pranab Bardhan & Dilip Mookherjee, *Capture and Governance at Local and National Levels*, 90 AM. ECON. REV. 135 (2000); SARAH F. ANZIA, LOCAL INTERESTS: POLITICS, POLICY, AND INTEREST GROUPS IN US CITY GOVERNMENTS (2022).

86. *See* Paul A. Diller, *The City and the Private Right of Action*, 64 STAN. L. REV. 1109, 1119–26, 1153 (2012).

Nevertheless, as we will see, there are weighty counterarguments in favor of local control. To the extent local governments operate at a different scale or are otherwise qualitatively distinct from state governments, this entails some reasons for skepticism of local power as discussed above, but also reason to believe that local governments are *more* capable of exercising power than state governments. The small scale of local governments gives people the ability to "vote with [their] feet," self-sorting into communities of choice.[87] Arguably, this means that local government is more consensual than government at a broader scale. Likewise, the "closeness" of local governments to the people suggests that local governments may be more representative of local needs and desires.[88] For these reasons and others I discuss below, some scholars have suggested that certain constitutional constraints should not apply to local governments as forcefully as they do at the state level—and indeed, sometimes courts do not treat local governments as constitutional actors to the same degree.[89]

Given all of the above, the doctrinal limitations on local power discussed further below are at best inconsistently applied, and local governments in fact appear to have a fairly wide berth to engage in regulatory activity. Courts do not always, or even usually, treat local governments as "creatures of the state."[90] But we cannot simply assume that local power on any particular issue is coextensive with the power of the state. In short, absent any case law dealing with the specific issue of covenant overrides and with an unclear doctrinal framework governing the parameters of local control, we must undertake a more fine-grained analysis to determine whether local governments may appropriately exercise the power to override covenants. As we shall see, covenant overrides fit neatly into the scope of local governments' long recognized powers.

B. Dillon's Rule and Home Rule

Among the states, there are three basic frameworks of municipal power: Dillon's Rule, constitutional or "imperio" home rule, and legislative home rule. This Section argues that, setting aside the possible applicability of the "private law exception" discussed in the following Section III.C, local governments

87. *See* STAHL, *supra* note 81, at 43–46 (arguing that residents' ability to "vote[] with his or her feet" renders local citizenship more consensual than national citizenship).

88. *See* Stahl, *Home Rule*, *supra* note 25, at 180 (quoting former Beverly Hills Mayor John Mirisch as stating: "Local government, when done right, is the best and most democratic form of government because it is closest to the people. . . . [P]eople deserve to have decisions affecting their daily lives made as close to home as possible").

89. *See infra* text accompanying notes 202–09.

90. *See, e.g.*, Stahl, *Home Rule*, *supra* note 25, at 185–91; Romer v. Evans, 517 U.S. 620, 635–36 (1996) (holding that state ballot measure could not constitutionally preempt local civil rights laws prohibiting discrimination on the basis of sexual orientation).

likely have the power to override covenants under all three frameworks, in the absence of any conflict with state legislation.[91]

Under the doctrine known as "Dillon's Rule," local governments are creatures of the state and have no inherent power of self-rule or immunity against preemption by state legislatures.[92] Today, only a handful of states still follow Dillon's Rule.[93] Many state constitutions have been amended to give local governments a modicum of independent authority to initiate legislation and some immunity against state preemption.[94] This type of home rule, called "constitutional" or "imperio" home rule, generally gives local governments the power to regulate and some immunity from state preemption in areas that are considered purely "local," but they are subject to state control with regard to "general" or "statewide" matters.[95] Eventually, reformers grew frustrated with the imperio home rule system because it gave a considerable amount of power to the courts to define the meaning of "local" and "statewide" affairs, which they often used to narrowly construe the scope of municipal power.[96] Several states adopted what is now called "legislative" home rule, which is designed to permit legislatures to delegate to local governments whatever legislative power the legislature itself possesses, regardless of whether the matter is "local" or "general."[97] Legislative home rule is more expansive than Dillon's Rule, which requires courts to narrowly construe the scope of any delegated power strictly against the municipality.[98] But unlike imperio home rule, legislative home rule provides no protection for local governments against state preemption.[99]

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91. In Section III.A.3, *infra*, I address the question of whether, in the event of such a conflict, the state law would preempt local covenant overrides.

92. For a comprehensive discussion of the different extant models of local control, see Stahl, *Home Rule*, *supra* note 25, at 185–91.

93. *See* Paul Diller, *Intrastate Preemption*, 87 B.U. L. REV. 1113, 1126–27 nn.64–65 (2007) (counting and comparing states' use of different frameworks for local power); DALE KRANE, PLATON N. RIGOS & MELVIN B. HILL, JR., HOME RULE IN AMERICA: A FIFTY-STATE HANDBOOK 14 (2001) (identifying forty-five home rule states).

94. Stahl, *Home Rule*, *supra* note 25, at 185–86.

95. Diller, *supra* note 93, at 1124–27.

96. *Id.* at 1125–26.

97. Stahl, *Home Rule*, *supra* note 25, at 186–88.

98. In the last several years, the National League of Cities released a new framework for home rule and a new set of model home-rule constitutional provisions that differ dramatically from both the imperio and legislative frameworks. *See* NAT'L LEAGUE OF CITIES, PRINCIPLES OF HOME RULE FOR THE 21ST CENTURY 9–13 (2020), https://www.nlc.org/wp-content/uploads/2020/02/Home-Rule-Principles-ReportWEB-2-1.pdf [https://perma.cc/6ER4-YYYA]. If adopted, the new model home-rule principles would significantly change the balance of power between cities and states. *Id.* at 24–27. To date, no state has adopted the new framework. For a critical analysis of the new model home-rule principles, see generally Schleicher, *Constitutional Law for NIMBYs*, *supra* note 24 (critiquing the model home rule principles).

99. At least some cases appear to infer a sphere of home-rule immunity from a legislative home-rule grant, however. *See, e.g.*, City of Tucson v. State, 273 P.3d 624, 625–26 (Ariz. 2012) (finding that apparent legislative home-rule language subjecting city charters to "the laws of the

In states following Dillon's Rule or the legislative model of home rule, local governments can only act pursuant to a delegation from the state legislature. The difference between the two is that under Dillon's Rule, the delegation would need to be quite specific and unambiguous, with any doubts resolved against the exercise of power, whereas under legislative home rule, the grant would be read broadly in favor of the power of the municipality to regulate.[100] As it relates to covenant overrides, this distinction is probably immaterial. Every state in the Union has in fact delegated to local governments the power to enact zoning regulations using some variation of the Standard State Zoning Enabling Act ("SZEA"), originally issued by the Commerce Department in 1922.[101] The SZEA gives local governments the power to regulate land use, height, density and so forth for the purpose of reducing congestion, coordinating land use with municipal infrastructure, and generally serving the public health and general welfare.[102] Though the SZEA expressly contemplated that land use regulation would take the form of creating districts for different classes of uses, within which all uses would be treated uniformly (commonly known as "zoning"), courts have nevertheless been fairly liberal in recent decades about permitting local governments to do a wide range of things beyond those traditional zoning practices, such as creating individualized discretionary permitting processes that are disconnected from districting, making the issuance of permits contingent on developers providing public benefits, and enacting design and other aesthetic regulations.[103]

Compared to many of these modern innovations, covenant overrides are much more in line with the original intent of the SZEA. For example, where discretionary land use controls enable municipalities to craft site-specific standards that may permit land uses within an area to vary widely, covenant overrides to conform covenants to the overlapping zoning ensure that uses within a zoning district are in fact treated uniformly.[104] What's more, many

state" only permitted preemption in matters of statewide concern; form of local elections was not a statewide concern and thus immune from preemption).

100. *See* Olesen v. Town (City) of Hurley, 691 N.W.2d 324, 329 (S.D. 2004) (holding, in a Dillon's Rule state, that legislative delegation of power to operate a bar serving alcoholic beverages did not imply the power to serve bar food).

101. *See* ADVISORY COMM. ON ZONING, DEP'T OF COM., A STANDARD STATE ZONING ENABLING ACT 3 (rev. ed. 1926), https://planning-org-uploaded-media.s3.amazonaws.com/legacy_resources/growingsmart/pdf/SZEnablingAct1926.pdf [https://perma.cc/6C8G-DCWG].

102. *Id.* at 4–6.

103. *See, e.g.*, Campion v. Board of Aldermen, 899 A.2d 542, 561 (Conn. 2006) (holding that under state enabling legislation, municipalities are not limited to traditional single-use districting because "[z]oning must be sufficiently flexible to meet the demands of increased population and evolutionary changes in such fields as architecture, transportation, and redevelopment" (alteration in original) (quoting Harris v. Zoning Comm'n, 788 A.2d 1239, 1251 (Conn. 2002))).

104. A local covenant override could take a different form than that described in the text. For example, hypothetically a local government could attempt to lower or eliminate HOA dues in a bid to raise property taxes. Such an override would probably not be considered "land use"

jurisdictions today use their zoning power to *impose* covenants on new developments as a condition of approval,[105] and courts have never doubted that this falls within the scope of their land use power. If jurisdictions have the power to impose covenants under the SZEA, it stands to reason they have the power to remove them as well.

In states following the imperio home rule model, the question is whether overriding covenants is properly considered a local as opposed to a statewide concern. I have argued elsewhere that where conflict arises between the state and local government about the land use power, the state should ordinarily prevail because the statewide dimension of land use control is paramount over the local dimension.[106] However, I was also careful to state that land use has both statewide and local facets, and the only question raised there was what to do in the case of a conflict.[107] Absent any conflict, local governments may legislate in the land use area because it does indeed implicate local concerns about managing community character, coordinating land use with transportation and school infrastructure, and generating jobs and tax revenue. Even in the case of conflicts, most states today follow a "dialectical" approach to the home rule power, which recognizes that most matters are mixed matters of local and statewide concern, and that the state and local interests must be balanced.[108] I address the question of conflict, and whether state legislation can "preempt" local covenant overrides, in Part III.

Furthermore, my skepticism about local control of land use in the earlier article centered on local *opposition* to new development, especially housing. I argued that "local control" is too often a euphemism for "no new housing," and that municipalities rarely bring any uniquely local knowledge or expertise to the land use process because they are all basically regulating land use the same way—overzoning for single-family homes, failing to adapt old zoning rules to demographic changes, and subjecting multi-family housing to onerous discretionary review processes.[109] The argument for local control and local knowledge is, as I discuss further below, much stronger where local governments are acting to *facilitate* or *approve* new housing rather than blocking it, such as where they are overriding private covenants restricting housing develop-

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regulation at all, and thus would not be encompassed within the SZEA's delegated power. It is possible, however, that a local government could have home-rule authority to adopt such an override. This is an interesting question, but for purposes of this Article I am focusing only on overrides of covenants restricting the provision of housing, which clearly fall under the umbrella of land use regulation.

105. *See* Siegel, *supra* note 48, at 899.

106. *See* Stahl, *Home Rule*, *supra* note 25, at 191–97.

107. *See id.* at 191–92.

108. *Id.* at 191.

109. *Id.* at 201.

ment.[110] Local governments would necessarily act in a more particularized manner in deciding when and whether specific covenants should be overridden than when they enact a blanket prohibition on multi-family housing. Furthermore, where local opposition to new housing generally creates externalities in the form of raising regional housing costs that neighboring cities then have to bear, when localities act to approve new housing they are absorbing that regional demand and preventing extralocal externalities.[111] For these reasons, the power to override covenants is clearly a "local" matter. Indeed, as I describe in Part III, in some circumstances it may be so overwhelmingly local that the state may not prohibit local governments from exercising the power.[112]

C. The Private Law Exception

There is still one potential legal obstacle to local covenant overrides. In many states, home rule is subject to what's called the private law exception—local governments may not make "private law."[113] As described below, it is not clear how significant or viable this principle really is, but the private law exception nevertheless speaks to a significant normative concern about local governments interfering in private legal and economic relationships, which could include deed restrictions agreed upon among neighbors. The somewhat amorphous contours of the private law exception give courts ample leeway to put a thumb on the scale depending on how they feel about local power in a particular case. For that reason, it is important to explore how the private law exception may apply in the specific context of covenant overrides.

According to Paul Diller's comprehensive account, the private law exception has two distinct forms.[114] What he calls the "the subject-based"

110. *See infra* Section II.E. Covenant overrides would virtually always be in the direction of permitting something that covenants prohibit, rather than the reverse. If a zoning regulation were more restrictive than a covenant, there would be no need for an override because landowners would already be required to comply with the stricter of the two standards. *See* Brady, *supra* note 10, at 1673 n.445 (collecting cases standing for the principle that stricter control always prevails).

111. *See infra* text accompanying notes 157–59.

112. *See infra* Section III.A.

113. This exception appears to apply to both models of home rule, the imperio and legislative. *See* Diller, *supra* note 86, at 1118–21. One possible difference between the imperio and legislative models, as Diller observes, is that in jurisdictions following the legislative model, local governments may act in private law areas if they are doing so "incident to an exercise of an independent municipal power." *Id.* at 1119 (citation omitted). In this case, as discussed below, overriding covenants is clearly "incident" to the "independent municipal power" of regulating land use, to the extent that local governments perceive covenants as obstacles to effectuating the goals of a municipal zoning ordinance or other land use regulation.

114. *See id.* at 1116–17 (discussing "the *subject-* and *complainant*-based meanings" of the private law exception). Diller's article is one of very few analyzing the private law exception, which has largely been neglected by scholars. *See also* Gary T. Schwartz, *The Logic of Home Rule and the Private Law Exception*, 20 UCLA L. REV. 671, 687–747 (1973) (discussing the private law exception). Its neglect may reflect what Diller describes as the obsolescence of the doctrine. *See infra* text accompanying notes 119–27 (discussing Diller's argument that the private law exception is moribund and obsolete).

private law exception places certain specific common-law subject matters, such as torts, contracts, wills, and property, off limits to local governments.[115] The "complainant-based" version, on the other hand, focuses more on the ability of local governments to create or modify the scope of private causes of action such as negligence, employment discrimination, and so forth.[116] Both forms are potentially relevant in the case of covenant overrides. Overriding a private deed restriction could be seen as legislating in the private law area of property. It also alters the ability of a private landowner to bring suit to challenge the violation of a covenant.

There is little historical background on the origins or meaning of the exception, but scholars have deduced that the exception stems from the same Progressive-era libertarian concerns that animated the move to place limits on local power generally—a worry that local governments would become too entangled in private economic relations, engaging in redistribution and harming economic productivity.[117] It also appears to reflect a concern about nonuniformity and information costs that may arise from scores of local governments enacting duplicative or inconsistent regulations.[118] For example, if every local government had its own law of contracts, businesses with ties in many cities would have to familiarize themselves with potentially dozens of different contract law regimes.

Nevertheless, as Diller observes, the private law exception is not, in practice, a significant limitation on local power today. The subject-based exception is largely moribund, for good reason.[119] Today, unlike when Dillon's Rule was adopted, state legislatures extensively regulate in many common-law areas,[120] so if local regulation in those same areas present questions of uniformity, those questions can effectively be addressed through the power of the state to preempt local regulatory action, without the need for additional judicial intervention. Diller also notes that local ordinances are so easy to discover today that costs of compliance with different local rules are much lower than at the time the private law exception originated.[121]

115. *See* Diller, *supra* note 86, at 1116–17.

116. *See id.* at 1117–18.

117. *See id.* at 1114–16 (describing ideological underpinnings of the private law exception).

118. *See id.* at 1119–26, 1153.

119. *See id.* at 1121–29 (surveying the subject-based exception and concluding that "a *subject-based* private law exception does not significantly limit local autonomy, at least in most home-rule states").

120. *See, e.g.*, Halle B. Kissell, Note, *Extending Protections for CAFOs Is the Wrong Move for Iowa Courts and the Legislature to Make*, 109 IOWA L. REV. 2267, 2270–79 (2024) (discussing common-law nuisance claims related to Iowa concentrated animal feeding operations ("CAFOs") and state statutes protecting CAFOs from nuisance suits); N. William Hines, *Here We Go Again: A Third Legislative Attempt to Protect Polluting Iowa CAFOs from Neighbors' Nuisance Actions*, 103 IOWA L. REV. ONLINE 41, 54–62 (2018) (discussing the most recent statute doing so).

121. Diller, *supra* note 86, at 1125–26.

The subject-based exception makes especially little sense in the context of covenant overrides, which fall broadly into the common-law area of property law.[122] Property is unique among the common-law subjects in that it has a close public law analogue—land-use law—that actually functions to shape and delimit the contours of property rights.[123] At the time the private law exception was created, land use and related fields with a profound effect on shaping property rights, such as environmental law, landlord–tenant law, and consumer law did not even exist.[124] Today, state and local governments routinely regulate in these areas, and the courts have upheld their power to do so.[125]

The complainant-based exception is somewhat more cogent than the subject-based exception, but still relatively weak. As Diller writes, most states are somewhat ambivalent about the ability of local governments to alter the rights and liabilities of private litigants, with a handful of states being generally skeptical or hostile to that notion.[126] Nevertheless, Diller observes that even among those states, enforcement of the private law exception is inconsistent at best. Local governments routinely create private law causes of action despite their uncertain authority to do so.[127] Furthermore, Diller notes that even in those generally skeptical states, municipal ordinances such as housing codes are typically permitted to set a standard of care for private causes of action such as negligence or breach of an implied warranty of habitability.[128]

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122. According to Diller, at least one state, Massachusetts, still applies the subject-based private law exception to property law. *Id.* at 1127, 1127 n.90. The cases Diller cites for this proposition are specifically about landlord–tenant law, so arguably Massachusetts's subject-based exception covers only landlord–tenant law, not all of property law. *See id.* (citing Bannerman v. City of Fall River, 461 N.E.2d 793, 795 (Mass. 1984) (converting apartments to condominiums); CHR Gen., Inc. v. City of Newton, 439 N.E.2d 788, 790 (Mass. 1982) (same); and Marshal House, Inc. v. Rent Rev. & Grievance Bd. of Brookline, 260 N.E.2d 200, 208 (Mass. 1970) (rent control ordinance)).

123. *See, e.g.*, Mark W. Cordes, *Property Rights and Land Use Controls: Balancing Private and Public Interests*, 19 N. ILL. U. L. REV. 629, 638–49 (1999) (discussing divergence and overlap between land-use law's public purposes and property law's private purposes).

124. *See* Diller, *supra* note 86, at 1121.

125. *See* Nestor M. Davidson & Timothy M. Mulvaney, *Takings Localism*, 121 COLUM. L. REV. 215, 222 (2021) ("[S]tates in our legal system define the boundaries of many important property interests."). As Davidson and Mulvaney observe, a leading Supreme Court case affirming the power of states to define property rights, *Murr v. Wisconsin*, 582 U.S. 383 (2017), actually involved a *local* property regulation. Davidson & Mulvaney, *supra*, at 227, 231–34. The Court made no distinction between the power of states and the power of local governments to affect property rights through regulation. I discuss *Murr* and Davidson & Mulvaney's analysis further below in the text accompanying notes 140–49.

126. Diller, *supra* note 86, at 1129.

127. *Id.* at 1145–53 ("Despite the doctrinal ambiguity created by the private law exception, cities and counties have nonetheless forged an impressive body of complainant-based private law, vividly demonstrating home rule's value as an incubator of policy experimentation.").

128. *Id.* at 1121 n.55, 1131–32. In a recent case, the California Court of Appeal recognized that the violation of a municipal ordinance can establish elements of private causes of action such as negligence or nuisance. *See* Cohen v. Superior Court, 322 Cal. Rptr. 3d 62, 80 (Ct. App. 2024) (review granted).

In the relevant context here, that of covenant overrides, an even more apt example of local private lawmaking is the power local governments possess to define an activity as a nuisance. Local governments can establish by ordinance or resolution that a use of land constitutes a nuisance per se.[129] Doing so empowers the municipality to abate the nuisance,[130] but it also enables private litigants to bring suit against the land use under the common law of nuisance.[131] Indeed, the violation of a zoning ordinance standing alone is sufficient to create private liability for nuisance per se.[132] Thus, like negligence per se or the implied warranty of habitability, nuisance per se is an example in which local public-facing regulation alters a private common-law duty that can be enforced by a private litigant. More practically for the current purposes, nuisance per se actually reshapes a party's property rights by changing the scope of their common-law liability. Covenant overrides operate exactly the same way: They bar a landowner from enforcing a private covenant against their neighbor. In both cases, a landowner who used to have the right to do something with their property now does not have that right, and the change is effectuated by the government altering the contours of a landowner's common-law legal liability. I have found no case in which a court has ever held that local governments lack the power to declare a use of land to be a nuisance because it alters common-law property rights.[133]

The policy rationales underlying the private law exception also seem largely inapplicable in the case of local covenant overrides. Diller thinks that perhaps the most persuasive justification for the complainant-based exception is that it permits local governments to place an added administrative burden on state courts by creating new causes of action, although, to be clear, he does not find this justification very persuasive.[134] Regardless, this rationale only makes sense in regard to local ordinances that *expand* private liability—the focus of Diller's

129. Nuisance per se refers to activities that are absolutely prohibited regardless of any balancing of the harm and utility or the magnitude of the harm. Where the legislature prohibits the activity by statute or ordinance, this is one type of a nuisance per se. *See, e.g.*, 58 AM. JUR. 2D *Nuisances* § 13 (2025). Municipalities sometimes themselves bring causes of action under common-law nuisance theories as well. *See, e.g.*, *In re* Nat'l Prescription Opiate Litig., 589 F. Supp. 3d 790, 817 (N.D. Ohio 2022).

130. *See, e.g.*, Golden Gate Water Ski Club v. County of Contra Costa, 80 Cal. Rptr. 3d 876, 883 (Ct. App. 2008); Flahive v. City of Dana Point, 85 Cal. Rptr. 2d 51, 53–54 (Ct. App. 1999).

131. *See* Soupal v. Shady View, Inc., 672 N.W.2d 171, 173–74 (Mich. 2003) (private plaintiff could bring cause of action to enjoin nuisance per se where defendant's activity violated local zoning ordinance).

132. *See id.*

133. This makes sense in part because common-law property rights in fact protect landowners, and thus community members, against nuisances; a more protective approach, particularly in context with the delegation of the SZEA, appears consistent with local power in all contexts. *See generally* N. William Hines, *CAFOs and U.S. Law*, 107 IOWA L. REV. ONLINE 19 (2022) (discussing nuisance at common law and various state and local efforts to alter such liability).

134. *See* Diller, *supra* note 86, at 1154–62.

article.[135] Covenant overrides are different because they actually *reduce* the scope of private liability, and would therefore only relieve the courts of additional administrative burdens.[136]

The other major argument for the private law exception, as Diller observes, has to do with uniformity—the proverbial "patchwork" of local regulations that could drastically increase information and compliance costs by requiring people to familiarize themselves and come into compliance with lots of potentially conflicting local requirements on different matters.[137] Admittedly, as I address further on, uniformity and information costs are potential concerns with local covenant overrides. A prospective purchaser of a parcel of land burdened with a covenant would not necessarily have knowledge or any way of readily learning that a covenant has been overridden by local authorities. Zoning resolutions are not always searchable online, and zoning codes are long and prolix. Although state legislation overriding covenants may present a similar issue, the problem is somewhat minimized because purchasers will only need to familiarize themselves with one set of state codes, generally available online, not with the zoning codes and enactments of every local jurisdiction in which they may be shopping for a property.

I address some of these concerns further below, but as Diller observes, although uniformity is often a persuasive reason for local governments to refrain from legislating in private law matters, it is not a persuasive justification for the private law exception because state preemption is a far better mechanism for accomplishing the same goal.[138] At the time the private law exception was adopted, it was *arguably* necessary for courts to ensure statewide uniformity through the private law exception because the state did not legislate much in areas traditionally considered private law. Today, however, states routinely do legislate in such areas, including in the area of covenant overrides.[139] This means that the uniformity problem can be effectively addressed by the state legislature through preemption, rather than by courts through the clunky mechanism of the private law exception. Hence, to the extent local covenant overrides create questions about non-uniformity and information costs, state preemption is a ready solution. Below I will suggest some ways in which states could act to address the information costs involved in local covenant overrides without extinguishing the power entirely, as well as ways local governments

135. *Id.* at 1135–53.

136. On this theory, local governments would presumably have expansive powers to reduce or eliminate private liability in many other contexts as well. For example, local governments could enact "right to farm" laws that would reduce nuisance liability for farmers. On the right to farm, see Stahl, *The Power of State Legislatures*, *supra* note 11, at 607 n.164.

137. *See* Diller, *supra* note 86, at 1119–26, 1153.

138. *Id.* at 1157–58 (noting that state legislation preempting local actions may be better both for its democratic legitimacy and its more precise nature than the private law exception).

139. *See generally* Stahl, *The Power of State Legislatures*, *supra* note 11 (discussing state legislative overrides).

themselves can act to address the uniformity issue and therefore possibly head off state preemption.

D. The Takings Clause and Local Government

In short, there does not appear to be any doctrinal or normative argument against local governments overriding covenants. This conclusion is perhaps especially evident when we consider the Takings Clause, the principal constitutional vehicle through which property rights—such as the right to enforce a covenant—are protected.[140] Indeed, a review of takings doctrine as applied to local governments will demonstrate that local governments are perhaps even more capable of overriding covenants than the state is.

Initially, many of the most significant takings cases involve local governments, which is not at all surprising considering the widespread effects of local land use regulations on private property rights. In these cases, the courts have typically upheld the challenged local action without ever distinguishing local governments from the state or implying that local governments are entitled to any less deference. Importantly, many of the challenged local regulations had the effect of altering private property rights, yet the courts have never viewed that as a barrier to local regulatory power.[141] For example, in the case of *Murr v. Wisconsin*, the Supreme Court found that a local regulation requiring the "merger" of adjacent small parcels into a single parcel, thereby preventing individual parcels from being sold separately, was not a taking.[142] The Court held that the landowner did not have a reasonable expectation of being able to sell smaller parcels individually, in light of the preexisting merger provision and other factors.[143] What's notable about the Court's reasoning is that *Murr* reflects and recodifies a "positivist" understanding of property rights, in which the state (and in this case, the local government) can shape a landowner's expectations, and hence their property rights, through regulation.[144] Here, the merger provision had the direct effect of preventing property owners from buying and selling their property in the private marketplace. Yet, there was not a hint in *Murr* that the private law exception would be a barrier to this regulation. Indeed, the Court never even commented on the fact that the merger provision was a local rather than a state regulation.[145]

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140. U.S. CONST. amend. V.

141. *See* Davidson & Mulvaney, *supra* note 125, at 231–34 (discussing cases).

142. Murr v. Wisconsin, 582 U.S. 383, 403–06 (2017).

143. *See id.* at 402–06.

144. *See* Davidson & Mulvaney, *supra* note 125, at 227 (noting how the court called the state's definitional role in property interests and the Takings Clause an "unavoidable" "positivist puzzle"); Stahl, *The Power of State Legislatures*, *supra* note 11, at 614–16.

145. *See Murr*, 582 U.S. at 401–03 ("The merger provision here is likewise a legitimate exercise of government power, as reflected by its consistency with a long history of state and local merger regulations that originated nearly a century ago. . . . As the Wisconsin courts held, the state and local regulations merged Lots E and F.").

If *Murr* suggests that local property regulations should be treated no less favorably than state property regulation, there are, in fact, convincing reasons for takings analysis to be *more* deferential to local property regulations than to state regulations. In short, if the private law exception reflects a structural concern with local governments resulting from their scale and character, those same structural factors may actually give us reason to think local governments are *better* suited than state governments to regulate property rights, including overriding covenants. A central concern of the Takings Clause is to prevent government from exploiting private property rights for politically expedient ends; specifically, the concern is that government agencies will impose burdens on individual property owners to confer a benefit on the public as a whole.[146] At the *local* level, however, this concern is much more likely to be reversed—local governments are all too willing to sacrifice the public good for the benefit of small groups of property owners.[147] It has long been observed that local governments tend to be beholden to property owners, specifically homeowners. Recent empirical studies confirm that homeowners have disproportionate influence in local government, which they use to block the provision of needed land uses, especially housing.[148] The point is that the concern animating the Takings Clause—government exploiting property owners—is much less likely to occur at the local level than the state level because property owners are *overrepresented* in the local political process. Hence, when local governments act in a way that harms property owners, courts should not be concerned that this results from a political process that is unfair to landowners.[149]

146. *See, e.g.*, Armstrong v. United States, 364 U.S. 40, 49 (1960) ("The Fifth Amendment's guarantee that private property shall not be taken for a public use without just compensation was designed to bar Government from forcing some people alone to bear public burdens which, in all fairness and justice, should be borne by the public as a whole.").

147. *See* Davidson & Mulvaney, *supra* note 125, at 269 ("Whatever risks the tyranny of the local majority holds as a general matter, in other words, property holders seem more likely to be the subjects than the objects of political power in most local contexts.").

148. *See* Katherine Levine Einstein, Maxwell Palmer & David M. Glick, *Who Participates in Local Government? Evidence from Meeting Minutes*, 17 PERSPS. ON POL. 28, 34, 39 (2019) (finding that homeowners are significantly more likely to participate in local land use meetings and overwhelmingly oppose new housing construction).

149. It could be argued that property developers would exert undue influence on local governments to obtain covenant overrides through campaign contributions and promises of extravagant public benefits. It has long been argued that developers and the associated "growth machine" have disproportionate power in local government. JOHN R. LOGAN & HARVEY L. MOLOTCH, URBAN FORTUNES: THE POLITICAL ECONOMY OF PLACE 50–98, 154–62 (1987). As observed in *supra* note 148, however, it is well established empirically that anti-growth homeowners rather than developers are the main power center in most municipalities. *See* Einstein et al., *supra* note 148, at 34; *see also* FISCHEL, *supra* note 6, at 15–16 (arguing that homeowners are the dominant faction in local politics and developers are mere "supplicants"). In any event, if developer influence in local politics is a problem, it has nothing to do with covenant overrides per se but with the overall incentive structure of local governments and the Supreme Court's decision permitting unlimited money in politics. *See* Citizens United v. Fed. Election Comm'n, 558 U.S. 310, 371–72 (2010).

On a related note, Nestor Davidson and Tim Mulvaney argue that local governments are less likely to overreach in regulating property rights than state governments are because local governments are susceptible to the discipline of mobility.[150] Most metropolitan regions today contain many, sometimes dozens, of municipalities, giving property investors numerous choices of where to reside and invest within reasonable proximity to jobs, schools, and so forth. If one municipality enacts regulations that impose excessive burdens on property owners, those property owners may withdraw their investments and relocate elsewhere, costing cities precious revenue during an era when most municipalities are experiencing declining fiscal health.[151] This discipline of mobility may explain why, as a matter of fact, local governments are often exceptionally solicitous of property owners, and rarely act to deliberately harm long-standing property interests.[152]

In the present context, this line of argument underscores why local covenant overrides should be treated at least as deferentially as overrides by the state. Local governments contemplating such an override will likely have to do so in the face of significant opposition from homeowners, who abhor the thought of new development in their neighborhoods. Homeowner opposition to new development is usually successful, as witnessed by the fact that zoning of single-family neighborhoods historically almost never changes.[153] Moreover, many covenant overrides will have to occur over the opposition of HOAs, who are often highly organized and motivated to prevent any changes to their neighborhood, and have the resources to fight city hall by virtue of mandatory assessments that all homeowners must pay.[154] Thus, to the extent local governments are willing to override such covenants, it is reasonable to presume that the affected landowners were adequately represented in the local political process and do not require judicial intervention to protect their rights. At the state level, by contrast, these groups are much weaker, as they must contend

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150. *See* Davidson & Mulvaney, *supra* note 125, at 273–74 ("To the extent that local governments respond to mobility-related incentives in areas of policy most related to takings, centralizing through broad-scale state preemption undermines that avenue of preference satisfaction.").

151. *See* FARHAD OMEYR & HARSHITA UMESH TANKSALI, NAT'L LEAGUE OF CITIES, CITY FISCAL CONDITIONS 2025, at 5 (2025), https://www.nlc.org/wp-content/uploads/2025/11/2025-City-Fiscal-Conditions-ReportwebA.pdf [https://perma.cc/KDT6-7P7M] (noting that National League of Cities' "data show signs of tightening budgets and growing concern over external pressures that could reshape local fiscal landscapes").

152. *See, e.g.*, FISCHEL, *supra* note 6, at 47–57 (discussing the hypothesis that homeowners influence municipal decision-making because they are sensitive to home values, which are influenced by local policy, and therefore vote politically and with their mobility to preserve that capital).

153. *See* ELLICKSON, AMERICA'S FROZEN NEIGHBORHOODS, *supra* note 40, at 33, 111–28 (marshaling evidence that restrictive zoning rules are rarely loosened in most places).

154. *See* William A. Fischel, *Revolution or Evolution?*, REGULATION, Summer 2004, at 50 (describing HOAs' active role in enforcing zoning regulations that affect their community).

with a wider array of competing interest groups and a legislative body with less direct accountability to homeowners in a particular community.[155]

This entire discussion demonstrates that local overrides of private deed restrictions turn most of the traditional arguments against local control on their head. One long-standing critique of local governments, echoing James Madison's *Federalist 10*, is that their small scale will allow them to exploit unpopular minorities.[156] But as just described, this is unlikely to be a concern in the case of local covenant overrides because local governments would actually be working against political interests that are disproportionately *powerful* at the local level, not interests that are powerless or unpopular. A second major argument, particularly as it relates to local control of land use, is that local land use regulation is likely to cause extralocal externalities.[157] At the behest of powerful homeowners, local governments block new housing and thus shift the cost of accommodating regional housing needs to neighboring communities. But local covenant overrides do the exact opposite: They actually *prevent* sub-local groups of self-interested homeowners from imposing externalities on other parts of the community, by forcing them to absorb rather than block needed housing. I have argued previously that state governments have broad powers to preempt local land use control in order to prevent local governments from imposing externalities on neighboring towns by blocking new housing.[158] When local governments override private covenants restricting housing growth, they are doing the same thing at a smaller scale. Insofar as the state's power to preempt local land use control rests on the need to prevent the extralocal externalities of local control, local governments should have the power to preempt private deed restrictions for exactly the same reason.[159]

155. *See* Connor Halloran Phillips, Interest Groups and State Legislative Polarization 44–57 (Apr. 21, 2023) (Ph.D. dissertation, Harvard University), https://dash.harvard.edu/server/api/core/bitstreams/a31421d7-7e56-4c2c-88bf-672df691128a/content [https://perma.cc/PBK5-DUXE] (discussing the link between interest groups and polarization); Jeffrey R. Lax & Justin H. Phillips, *The Democratic Deficit in the States*, 56 AM. J. POL. SCI. 148, 153–54 (2012) (finding significant incongruence in state policy between surveyed public opinion and policy as implemented).

156. *See* THE FEDERALIST NO. 10, at 63–64 (James Madison) (Jacob E. Cooke ed., 1961).

157. *See* Stahl, *Home Rule*, *supra* note 25, at 194–97 (articulating the argument for state preemption of local land use control based on extraterritorial impacts of local land use regulation).

158. *See id.*

159. The Supreme Court has embraced a version of this logic in *City of Eastlake v. Forest City Enterprises, Inc.*, 426 U.S. 668 (1976). *Eastlake* upheld the validity of a local ballot initiative (sparked by a controversial affordable housing project) that subjected future zoning changes to a voter referendum. *Id.* at 679. Previous cases had held that such referenda at the *neighborhood* level were unconstitutional standardless delegations of the police power. Washington *ex rel.* Seattle Title Tr. Co. v. Roberge, 278 U.S. 116, 122–23 (1928); Eubank v. City of Richmond, 226 U.S. 137, 143–44 (1912). But the Court held that delegation to the "people at large" was fine. *Eastlake*, 426 U.S. at 677–78. Thus, a citywide referendum would be "far more than an expression of ambiguously founded neighborhood preference. It is the city itself legislating through its voters—an exercise by the voters of their traditional right [to decide] what serves the public interest." *Id.* at 678 (quoting S. Alameda Spanish Speaking Org. v. City of Union City, 424 F.2d 291, 294 (9th

E. LOCAL KNOWLEDGE IN COVENANT OVERRIDES

What has been said so far points to a perhaps even greater advantage local governments possess over state governments when it comes to covenant overrides: local knowledge. A common argument in favor of local control generally is that local governments often have unique knowledge about local conditions and local needs that the state does not possess.[160] However, the "local knowledge" argument is often severely overstated when it comes to local land use control.[161] There is an enormous amount of uniformity in local zoning practices across the nation. Although there are procedural variations, it is common for municipalities to oppose most new housing development, to maintain the vast majority of residential areas in restrictive zoning classifications that do not permit apartments, and to subject any modestly dense housing proposal to a gauntlet of unpredictable discretionary procedures, permitting delays, and high fees.[162] Likewise, the local political process is broadly similar in these municipalities, with residents mouthing identical concerns about density and traffic in response to new housing development, resulting predictably in very little new housing being constructed, and what housing is constructed taking the form of very car-oriented, unwalkable development.[163] A casual observer driving through several towns in a region rarely has a sense that they have crossed some meaningful border; it all rather has the appearance of undifferentiated suburban sprawl.

By contrast, when local governments override covenants blocking housing development, they are cutting against the grain of typical zoning practices by facilitating rather than restricting the production of housing, and in the process applying real local knowledge, not the same tired NIMBY complaints about traffic and density.[164] Recall that in order for a covenant override to survive a takings challenge, the government must generally have some significant public policy basis for doing so, or there must be some substantial

Cir. 1970)). In a prior article, I criticized *Eastlake*'s distinction of *Roberge* and *Eubank*. I argued that a small city changing its zoning process for the obvious purpose of blocking an affordable housing project was not exactly "the city" effectuating the "public interest" in a more meaningful way than the blockfront consents in the earlier cases. *See* Kenneth A. Stahl, *Neighborhood Empowerment and the Future of the City*, 161 U. PA. L. REV. 939, 1004–08 (2013). By contrast, when a city overrides covenants for the purpose of permitting new housing, it is in fact rising above the parochialism of neighborhood groups and effectuating the broader public interest in approving housing. *Id.* at 1007–08.

160. *See, e.g.*, Nestor M. Davidson, *Localist Administrative Law*, 126 YALE L.J. 564, 618 (2017) (calling for increased deference to local administrative lawmaking due to "local conditions and the local implications of policy").

161. *See* Stahl, *Home Rule*, *supra* note 25, at 201.

162. *See id.*

163. *See id.* at 201–02; Kristina M. Currans & Kenneth A. Stahl, *Are Traffic Studies "Junk Science" that Don't Belong in Court?*, 90 J. AM. PLAN. ASS'N 77, 79–81 (2024) (discussing ubiquitous traffic concerns).

164. *See supra* text accompanying notes 23–26.

change in conditions.[165] This is because under the "positivist" takings inquiry described above, a taking is measured by the reasonable expectations of landowners as established by background legal principles, and the operative background legal principle here is that covenants have always been subject to alteration or termination on the equitable grounds that they violate some fundamental public policy or there has been a significant change in conditions.[166] Though courts have long had the equitable power to terminate covenants on these grounds, and state legislatures likely have the power to terminate covenants on the same grounds, local governments are better positioned than either of these other institutions to terminate or alter covenants based on public policy or changed conditions because both necessarily involve the application of local knowledge that only municipalities possess.[167]

Start with the idea that covenants can be terminated if they conflict with some fundamental public policy.[168] A local government that chooses to override a covenant with, say, a minimum lot size requirement of twenty thousand square feet would likely do so on the grounds that such covenants restrict housing supply and thus conflict with a local policy determination to increase housing affordability by expanding the local housing supply. In that case, the local policy would be supported by local knowledge as to the operation of local and regional housing markets that state legislatures—and certainly courts—are unlikely to have. Local governments are well suited to discover what covenants are active in their communities and what role those covenants are playing in distorting the local housing market. HOAs tend to be quite active in local politics, so local governments could be expected to have some sense of the role of HOAs and their underlying covenant regimes in affecting local housing policies and housing markets.[169]

State legislatures and courts, by contrast, have no access to this local knowledge. There is no central database of deed restrictions, nor are they easily accessible online as zoning regulations typically are. State housing agencies may be completely unaware of where deed restrictions are operative, and therefore unable to enforce housing laws effectively. This is, indeed, exactly what happened in the City of Orange, where the state certified the city's housing plan as compliant with state law apparently in complete ignorance of the fact that the properties the city chose as suitable for housing were covered with deed restrictions barring new housing.[170] For their part, courts have no knowledge of local conditions and very limited ability to grasp public policy in the way that elected local officials can. For this reason, courts are typically

165. *See supra* text accompanying notes 67–68.

166. *See supra* text accompanying notes 141–45.

167. *See* Stahl, *Home Rule*, *supra* note 25, at 194–97.

168. *See* RESTATEMENT (THIRD) OF PROP.: SERVITUDES §§ 3.1, 3.4–.7 (AM. L. INST. 2000) (servitudes are invalid if they violate public policy).

169. *See* FISCHEL, *supra* note 6, at 50 (describing the role of HOAs in local land use politics).

170. *See supra* notes 3–4 and accompanying text.

extremely deferential to "legislative" or policy-making decisions by local governments, upholding them unless they are clearly arbitrary or irrational.[171] Courts recognize the institutional superiority of local governments when it comes to making land use policy for the municipality, and act accordingly.[172] There is no reason for them to act differently in the case of covenant overrides. In short, local governments are far better suited institutionally by virtue of their local knowledge than either the state legislature or the judiciary to appropriately craft covenant overrides based on a conflict with public policy.

Now consider the other traditional equitable ground for invalidating covenants—changed conditions. Here, the case for local knowledge is even stronger. Changed conditions is a highly fact-specific question about the extent to which the neighborhood restricted by a covenant has sufficiently changed that the covenant is no longer of significant value.[173] Typically, a court must consider a number of factors, including the types of change the neighborhood has experienced and its location (within or outside the restricted community), the nature and magnitude of the change, the extent to which the change may diminish the value of the covenant, the current zoning and zoning history, the degree to which the covenant has or has not been enforced over time, and the balance between the benefit neighbors receive from the covenant and the harm the burdened landowner and the community at-large would suffer from its continued enforcement.[174] These are all matters far more likely to be within the knowledge of local governments than within the knowledge of the state legislature or the courts. Indeed, one reason why local zoning ordinances are often consulted by the courts as a factor to determine if there has been a change in conditions is because it reflects the superior knowledge local governments have regarding existing conditions in the locality. Though, as discussed above, courts have traditionally been reluctant to infer a change in conditions from a zoning change standing alone, as such a zoning change

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171. *See* Adam J. MacLeod, *Identifying Values in Land Use Regulation*, 101 KY. L.J. 55, 64–65 (2013) (describing that under the standard of review applicable to legislative decisions, "[t]he land use decision is presumed to be both legally legitimate and factually supported by the evidence, and the reviewing court defers to both the local government's statement of purpose and the means chosen to protect that state interest, unless some irrationality, which is inexplicable on the record, unambiguously presents itself").

172. *See id.*; *see also* MICHAEL ASIMOW, MICHAEL J. LEVY, LAURINE E. TULEJA & PIPPIN C. BREHLER, CALIFORNIA PRACTICE GUIDE: ADMINISTRATIVE LAW § 17:678, Westlaw (database updated Nov. 2025) (legislative decisions fall in an arena "in which the demarcation between facts, reasoning, policy and discretion is quite vague" (quoting Am. Coatings Ass'n v. S. Coast Air Quality Mgmt. Dist., 278 P.3d 838, 848 (Cal. 2012))).

173. RESTATEMENT (THIRD) OF PROP.: SERVITUDES § 7.10 (AM. L. INST. 2000).

174. *See id.* §§ 7.4, 7.6, 7.10–.11 (AM. L. INST. 2000) (servitudes can be judicially modified or terminated based on abandonment, estoppel, or changed conditions, among other grounds). Balancing of the hardships, non-enforcement/waiver, abandonment, estoppel, and changed conditions are sometimes treated as distinct equitable defenses to the enforceability of a covenant, but in my view they are all variations of the basic changed conditions defense.

does not necessarily signal a change of conditions in the neighborhood,[175] where a local government makes explicit findings that a change in conditions has in fact occurred, courts should have confidence in that determination.

It is well-established that local governments not only have the capacity to make broad "legislative" judgments about public policy, but also the power to make highly individualized determinations about the use of particular parcels of land, sometimes referred to as "quasi-judicial" determinations.[176] Courts have long treated such individualized determinations fairly deferentially, while imposing some heightened procedural protections to safeguard property rights, because courts recognize that local governments are better situated than courts to make these kinds of individualized decisions.[177] And because quasi-judicial proceedings do offer heightened protections for property rights, the additional safeguards of the Takings Clause and private law exception would seem to be unnecessary. Local governments affect landowners' property rights every day in the course of making individualized decisions such as granting or approving variances, use permits, design review, and so on. Of course, as discussed above, local governments can also dramatically affect property rights by declaring a land use to be a nuisance per se.[178] The heightened procedural protections of the quasi-judicial process have long been considered sufficient to protect the property interests involved, absent an egregious interference with a landowner's established expectations.[179] There's no reason to treat a covenant override based on changed conditions any differently than a landowner requesting a variance or use permit.[180]

To summarize a bit, local governments have long had the power to act in both a broad legislative capacity (setting public policy) and in a particularized adjudicative capacity (making individualized determinations), and courts have long deferred to both capacities, recognizing the limits of their own ability to make land use decisions. The two traditional bases for invalidating covenants—inconsistency with public policy and changed conditions—correspond almost

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175. *See supra* note 53 and accompanying text.

176. Edward J. Sullivan & Carrie Richter, *Out of the Chaos: Towards a National System of Land-Use Procedures*, 34 URB. LAW. 449, 461–62 (2002) (quasi-judicial determination is where a "previously determined policy is applied to a particular person, place, or circumstance and looks retrospectively upon the same to determine a future outcome").

177. *See* Biestek v. Berryhill, 587 U.S. 97, 102 (2019) (burden to produce "substantial evidence," commonly required in quasi-judicial proceedings, is "not high").

178. *See supra* text accompanying notes 129–33.

179. *See id.*

180. Considering that local governments have rarely—maybe never—invalidated covenants, whereas variances and use permits are denied all the time, it could certainly be argued that for purposes of the Takings Clause landowners have more of an "investment-backed expectation" in the enforceability of covenants than in having a variance granted. As I have argued previously, however, landowners should have no such expectations regarding the enforceability of covenants since it is a long-standing common-law doctrine that covenants may be terminated due to changed conditions. *See supra* notes 77–78 and accompanying text.

precisely to these two different types of local land use decisions. In the nuisance context, for example, local governments have the power to declare a whole class of uses to be a nuisance as a policy matter, as well as to declare a particular use of property to be a nuisance in an adjudicative setting. Either type of decision affects the property rights of landowners, and their ability to sue and be sued in private litigation. For the same reason, local governments have the power to "legislatively" invalidate whole classes of covenants that interfere with housing production (say, any covenant with a minimum lot size that exceeds city zoning standards), or they can "adjudicatively" invalidate specific covenants where they determine that conditions have changed such that these covenants no longer have significant value or the benefits of the covenant are outweighed by its harms. Either type of decision would be entitled to significant judicial deference in the same manner as any other legislative or quasi-judicial land use action.

III. IMPLICATIONS OF A LOCAL POWER TO OVERRIDE COVENANTS

If local governments do have the power to override covenants, this raises a number of interesting questions that I address in this Part. First, can state legislatures preempt local covenant overrides? Second, does a local power to override covenants also imply in some circumstances a *duty* to do so? Third, what does this discussion contribute to the ongoing debate regarding local control of land use? Does a local power to override covenants give reason for optimism that local land use control can be more than just a euphemism for saying no?

A. STATE PREEMPTION OF LOCAL OVERRIDES

A major issue in local government policy over the past decade has been aggressive state preemption of local regulation in a variety of areas, including land use regulation.[181] I myself have argued that state legislatures do have the power to preempt local land use regulation in most cases.[182]

Up to this point, I have only addressed the question of whether local governments have the power to initiate covenant overrides in the absence of any conflict with state policy. But suppose state legislatures were to preempt

181. *See, e.g.*, Nestor M. Davidson, *The Dilemma of Localism in an Era of Polarization*, 128 YALE L.J. 954, 963 (2019); Richard Briffault, *The Challenge of the New Preemption*, 70 STAN. L. REV. 1995, 2011 (2018); Erin Adele Scharff, *Hyper Preemption: A Reordering of the State-Local Relationship?*, 106 GEO. L.J. 1469, 1476–79 (2018); Richard C. Schragger, *The Attack on American Cities*, 96 TEX. L. REV. 1163, 1179–81 (2018); Kenneth A. Stahl, *Preemption, Federalism and Local Democracy*, 44 FORDHAM URB. L.J. 133, 136 (2017). These and other sources are collected in RICHARD BRIFFAULT, NESTOR M. DAVIDSON & LAURIE REYNOLDS, THE NEW PREEMPTION READER (2019).

182. *See generally* Stahl, *supra* note 181 (arguing that externalities of local land use regulation and statewide interest in housing production and uniform land use rules generally justify state preemption).

local covenant overrides.[183] Do they have the power to do so? The analysis here largely depends on which model of local authority the particular state follows: constitutional home rule, legislative home rule, or Dillon's Rule.[184]

1. Constitutional Home Rule States

In states following the constitutional home rule model, the state is prohibited from preempting local regulation in matters that are "local" in nature.[185] This is often a difficult question because there is no clear line between local and statewide matters. I conclude that covenant overrides are more towards the "local" side of that line, and therefore the state cannot preempt local covenant overrides.

In order to discern whether a local regulation is local or statewide, courts most often look to two factors: (1) the extent to which the local regulation has extralocal impacts; and (2) the effect of the local regulation on a statewide interest in uniformity.[186] On the first of these two factors, the balance clearly tips towards local control. As discussed previously, local covenant overrides are unlikely to impose extralocal impacts, and are far more likely to *reduce* interlocal externalities by absorbing the local housing demand rather than shifting it to neighboring localities.[187] This is contrary to the usual case where local zoning regulations restrict housing production, thus imposing externalities on neighboring cities. Therefore, state preemption would appear to be less justified in the case of covenant overrides than in the standard "exclusionary zoning" context.

The "uniformity" factor, however, seemingly presents a strong argument in favor of the state's power to preempt. Local covenant overrides raise legitimate concerns that diverse local approaches towards covenants would reduce consumers' confidence in real estate markets by creating uncertainty about the enforceability of recorded restrictions. Courts have often recognized that the significant statewide interest in ensuring certainty in consumer transactions justifies state preemption of, for example, local banking regul-

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183. Arguably, as discussed *infra* in text accompanying notes 202–04, many states have already impliedly preempted local covenant overrides through uniform common interest ownership laws.

184. For a discussion of the three models, see *infra* Sections III.A.1–.3.

185. Stahl, *Home Rule*, *supra* note 25, at 188.

186. *See id.* at 188–89, 194. Courts often also look to whether a matter has "traditionally been regulated at the state or [local] level." *Id.* at 189. As discussed *infra* at text accompanying notes 205–08, courts have historically afforded a wide berth to local land use regulation because it is a traditional area of local control.

187. *But see* Town of Telluride v. Lot Thirty-Four Venture, L.L.C., 3 P.3d 30, 39 (Colo. 2000) (holding that a municipal law designed to absorb its share of regional housing demand imposed an extraterritorial impact on regional housing markets and could be preempted by state law). As the dissent in *Telluride* pointed out, however, the *Telluride* majority was mistaken on this point because the municipality's actions would actually reduce any extraterritorial impacts. *See id.* at 46–47 (Mullarkey, C.J., dissenting).

ations.[188] And one reason why the private law exception is obsolete as a mechanism for correcting local disuniformity is the ready availability of state preemption in cases where lack of uniformity is a significant problem.[189]

On the other hand, given the foregoing discussion, it is unlikely that local covenant overrides would seriously affect any statewide interest in uniformity or certainty in real estate transactions. Local governments have strong incentives *not* to override covenants, so it is doubtful they would use the power to override covenants liberally enough to cause considerable uncertainty.[190] Local governments will surely be loath to incur the wrath of powerful homeowners by cavalierly exercising the override power. They will also be wary of losing future property investments if they create too much uncertainty. Finally, given that most covenant regimes today are created at the behest of local governments themselves so they can outsource municipal functions and financing to the private sector,[191] it is far-fetched to think that local governments would kill the golden goose they have so often sought to create, absent a compelling local policy basis such as an extreme housing crisis.

Another reason why the local power to override covenants is unlikely to rattle real estate markets is because there is not much evidence that covenants today play a significant role in enhancing or stabilizing the marketability of real estate the way they perhaps once did. A substantial majority of consumers today report that they prefer homes *not* restricted by covenants.[192] One recent survey reported that seventy percent of homeowners would prefer a home without an HOA;[193] another reported that number as eighty-four percent.[194] The ubiquity of HOAs today is, as just mentioned, mostly a result of local governments requiring their creation as a condition of approving new development, rather than the expression of any underlying consumer demand.[195] What's more, studies consistently show that most homeowners are either completely ignorant of or entirely misinformed about the scope and nature of covenants

188. *See* Am. Fin. Servs. Ass'n v. City of Oakland, 104 P.3d 813, 823–24 (Cal. 2005) (holding local lending regulation was impliedly preempted because "[c]ommercial reality today would confound any effective regulation of mortgage lending based on potentially hundreds of competing and inconsistent measures at the local level"); California Fed. Sav. & Loan Ass'n. v. City of Los Angeles, 812 P.2d 916, 929 (Cal. 1991) (finding local bank tax was preempted due to need for "[c]entralized command over the intrastate tax burden on savings banks").

189. *See supra* text accompanying notes 119–21.

190. *See supra* text accompanying notes 161–75.

191. *See generally* Wiseman, *supra* note 43 (explaining why municipalities are increasingly demanding creation of covenanted communities as a condition of approving new housing development).

192. *See id.* at 728; Solá, *supra* note 74 (reporting that most consumers desire homes without HOAs, but they are difficult to find because local governments insist on creating them as a condition of approval).

193. *See* Solá, *supra* note 74.

194. *See* Franzese & Siegel, *supra* note 9, at 1134 (reporting survey results regarding preference of HOAs).

195. *See* Siegel, *supra* note 48, at 899.

binding their properties, which strongly suggests that consumers are not carefully considering the applicability of specific covenants before undertaking to purchase residential real property.[196] As Andrea Boyack writes, "it is highly unlikely that a buyer reads or understands CC&Rs prior to closing."[197] And recent empirical studies show that covenants lose virtually all their financial benefits after a period of about forty years, yet largely remain in place anyway because they are so difficult to change.[198] Given all of that, the state interest in certainty and uniformity seems fairly weak by comparison with the local interest in addressing a severe housing shortage, or in updating its land use regulations to reflect a change in local conditions.

Local governments may, and perhaps should, take additional steps to provide prospective purchasers with certainty (and, incidentally, weaken the case for state preemption). It would be advisable for local governments, when overriding a covenant, to include a mechanism for ensuring that the override is appropriately recorded against the applicable title so that prospective purchasers within the affected subdivision are aware of the override. In the case of a resolution narrowly targeted at a specific covenant or HOA, the resolution should include a direction for local staff to record the resolution against the property or tract affected. Where the local government enacts an ordinance that broadly targets a class of covenants (for example, any lot size minimum above ten thousand square feet), the ordinance should require that any landowner looking to subdivide or otherwise construct housing on a lot smaller than ten thousand square feet that is covered by such a covenant record a restrictive covenant modification document against the parcel, attaching the relevant ordinance.[199] A recording mechanism such as this would resolve many questions about certainty and the integrity of chains of title.

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196. Wiseman, *supra* note 43, at 732–34, 746–47 (reporting that many homeowners are not informed about covenants when in the process of buying a home); Franzese & Siegel, *supra* note 9, at 1126 ("[E]mpirical research suggests that even rudimentary informed consent is lacking.").

197. Boyack, *supra* note 41, at 798.

198. *See, e.g.*, Wyatt Clarke & Matthew Freedman, *The Rise and Effects of Homeowners Associations*, 112 J. URB. ECON. 1, 11, 14 (2019) (explaining that HOA property value premium fades as homes age, and disappears after about forty years).

199. A model for such a covenant modification document is provided by two recently enacted California bills, AB 721 and AB 1050. Assemb. B. 1050, 2025–2026 Reg. Sess. (Cal. 2025); Assemb. B. 721, 2021–2022 Reg. Sess. (Cal. 2021) (now codified at 2025 Cal. Stat. ch. 504 (amending Cal. Civ. Code § 714.6)). These bills permit landowners who desire to construct housing to, in certain circumstances, remove any restrictive covenant impeding such construction by filing a restrictive covenant modification document with the county recorder. AB 721 and AB 1050 are themselves modeled on legislation authorizing the removal of racially restrictive covenants through the use of restrictive covenant modification documents. I discuss AB 721 and the increasing national movement to remove racially restrictive covenants in Stahl, *The Power of State Legislatures*, *supra* note 11, at 594–605. *See also supra* note 11 (discussing AB 1050). There is now a Uniform Unlawful Restrictions in Land Records Act that provides for the removal of racially restrictive covenants through restrictive covenant modifications. Four states plus the District of Columbia adopted the

Local governments might also consider avoiding overrides of any covenants less than twenty years old. This would ensure that those covenants being overridden are likely to be obsolete, and fairly unlikely to confer any significant benefits on the covenanted community.[200]

2. Legislative Home Rule States

In states following the legislative home rule model, local governments theoretically have no protection against preemption, although occasionally courts have inferred a sphere of home rule immunity from a legislative home rule grant.[201] On the assumption that local governments have no immunity from preemption in these states, they would have little recourse in the event states expressly preempted the power to override covenants. What about *implied* preemption, however? Most states today have some kind of uniform law regulating HOAs and other common interest communities.[202] Given their comprehensive character, it could plausibly be argued that these laws impliedly preempt the field of regulating common interest communities.[203] However, courts should exercise care before presuming an intent to preempt the field. As discussed above, states have long delegated to local governments the power to regulate land use through uniform zoning enabling legislation, and local covenant overrides fit squarely within that delegated power.[204] John Nolon observes that courts have traditionally been very reluctant to infer implied preemption of local land use controls, given the presumption of validity long given to municipal land use regulation.[205] To the extent covenant overrides present some tension between the delegated land use power and uniform common interest community statutes, courts ordinarily attempt to harmonize statutes to avoid conflict whenever possible.[206] The drafters of the Uniform Common Interest Community Act do the same, writing in commentary on the text that, although the law preempts local regulations regarding forms of ownership, the "field" of preemption does not include local regulations

uniform law in its first year. *See* UNLAWFUL RESTRICTIONS IN LAND RECORDS ACT (UNIF. L. COMM'N 2023), https://www.uniformlaws.org/committees/community-home?CommunityKey=b1ed931f-d4c2-4078-867d-018a850ef303 [https://perma.cc/48UP-MHZD]. Thanks to Thomas Mitchell for pointing this out.

200. *See* Clarke & Freedman, *supra* note 198, at 11, 14.

201. *See, e.g.*, City of Tucson v. State, 273 P.3d 624, 629–30 (Ariz. 2012) (finding that apparent legislative home-rule language subjecting city charters to "the laws of the state" only permitted preemption in matters of statewide concern; form of local elections was not a statewide concern and thus immune from preemption).

202. Eight states have adopted the Uniform Condominium Act, and most others have some kind of uniform common interest community statute. *See* Boyack, *supra* note 41, at 778–79.

203. My thanks to Brian Connolly for suggesting this line of argument.

204. *See supra* text accompanying notes 182–201.

205. *See* John R. Nolon, *Death of Dillon's Rule: Local Autonomy to Control Land Use*, 36 J. LAND USE & ENV'T L. 7, 27 (2020) ("In the unique area of land use control, the judiciary seems reluctant to imply preemption, given the presumption of validity afforded land use law.").

206. *See, e.g.*, 73 AM. JUR. 2D *Statutes* § 151 (2025).

regarding land use.[207] For all these reasons, courts should be hesitant to infer a legislative intent to preempt local covenant regulations based on uniform condominium legislation.

2. Dillon's Rule States

In those few states following Dillon's Rule, any delegation of state power to local governments is strictly construed against the municipality. In land use matters, however, the rule of strict construction seems to be mostly honored in the breach as courts even in Dillon's Rule states have interpreted zoning enabling statutes to give municipalities ample authority to regulate land use.[208] Thus, in practice there may be little difference in how the preemption question turns out in a Dillon's Rule state versus a legislative home rule state.

B. Do Local Governments Have the Duty to Remove Covenants?

In some states, most notably New Jersey and California, the state government affirmatively requires local governments to ensure that their land use regulations accommodate the municipality's fair share of the regional need for affordable housing, even if that means changing or reducing land use regulations.[209] Traditionally, however, local governments have not been required to account for the role of covenants in blocking housing need. Under California's Housing Element Law, for example, cities are required to analyze and, "where appropriate and legally possible, remove governmental and nongovernmental constraints to . . . housing."[210] But the state's guidance on constraints does not mention covenants as either a governmental or non-governmental constraint that requires analysis.[211] In practice, cities in which covenants clearly operate as constraints, such as smaller cities that are coterminous with HOAs, either ignore covenants in their housing plans or

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207. *See* NAT'L CONF. OF COMM'RS ON UNIF. STATE L., UNIFORM COMMON INTEREST OWNERSHIP ACT 32 cmt. 1 (as amended in 2014) ("With respect to forms of ownership . . . this Act, as a state enactment, preempts the field and accordingly, except as provided in the Act, the municipality may not regulate the form of ownership, as opposed to the use of that real estate.").

208. *See* Nolon, *supra* note 205, at 19 ("[I]n all but a handful of states, Dillon's Rule of strict construction does not apply to municipal regulation of matters related to land use."). Indeed, based on Nolon's analysis, it appears that only the state of Virginia clearly applies Dillon's Rule of strict construction to land use matters. *See id.* at 13–22.

209. For a very erudite discussion of different "models" of state housing legislation, see Christopher S. Elmendorf, *Beyond the Double Veto: Housing Plans as Preemptive Intergovernmental Compacts*, 71 HASTINGS L.J. 79, 94–113 (2019).

210. *See* CAL. GOV'T CODE § 65583(a)(5)–(7), (c)(3) (West 2026).

211. *Non-Governmental Constraints*, CAL. DEP'T HOUS. & CMTY. DEV., https://www.hcd.ca.gov/planning-and-community-development/housing-elements/building-blocks/non-governmental-constraints [https://perma.cc/9LKC-Y27F]; *Address and Remove (or Mitigate) Constraints*, CAL. DEP'T HOUS. & CMTY. DEV., https://www.hcd.ca.gov/planning-and-community-development/housing-elements/building-blocks/address-and-remove-or-mitigate-constraints [https://perma.cc/L6BC-WZ8F].

treat them as if they are not constraints.[212] And the state Department of Housing and Community Development ("HCD"), which is responsible for certifying each jurisdiction's compliance with state housing law, does not appear to consider covenants as a barrier to achieving compliance. The City of Orange, for example, identified several sites for housing despite covenants in place that would prevent housing from being developed there, and the state certified its housing element anyway.[213] The city is now facing a lawsuit to decertify the housing element based on its choice of unrealistic sites for housing, but this is only happening because of one attorney's diligent efforts to uncover covenants restricting the sites the city chose for housing.[214] It is fair to speculate that many other cities did the same thing and simply have not been caught.

It may be that HCD simply assumed local governments did not have the power to remove covenants, and therefore that it was not "legally possible" to remove them as constraints. As this Article has taken pains to establish, however, local governments do have the legal power to override covenants. Thus, under the plain language of the housing element law, they have the duty to do so as well. It is also possible that HCD was reluctant to expend resources investigating the presence of covenants on identified housing sites, which would be extremely time intensive. Or HCD may have been deliberately cautious in how far it chose to push cities toward achieving their housing goals.

Whatever the case may be, covenants restricting housing likely constrain housing production in many cities and should be treated as such. Cities could all too easily circumvent state housing law by theoretically zoning enough land to meet their regional housing goals despite the presence of deed restrictions that make housing development on that land infeasible. Hence, if HCD is hesitant to require cities to analyze covenants as constraints on housing production, the state legislature should force the issue by expressly requiring

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212. For example, the housing element for Rolling Hills, a city in Los Angeles County that is coterminous with the Rolling Hills Community Association HOA, discusses CC&Rs in its section on non-governmental constraints, acknowledging that the CC&Rs limit housing development in the city to single family, one story homes with a minimum 1,300 square foot floor area, but does not apparently consider the CC&Rs to be a constraint that needs addressing by the city because state law bars CC&Rs from prohibiting accessory dwelling units ("ADUs"). *See* ROLLING HILLS GENERAL PLAN 2021-2029 HOUSING ELEMENT, CITY OF ROLLING HILLS 5-25 to -26 (Sept. 26, 2022), https://cms5.revize.com/revize/rollinghillsca/Goverment/Planning%20And%20Community%20Services/General%20Plan/HousingElement/RollingHills6thCycleHousingElement-AllChapters.pdf [https://perma.cc/Y857-WUK4]. Villa Park, another such city in Orange County, does not mention CC&Rs in its housing element at all. *See generally* CITY OF VILLA PARK, CITY OF VILLA PARK 2021-2029 HOUSING ELEMENT (May 10, 2023), https://villapark.org/Portals/0/Documents/Departments/Planning/Housing%20Element/City%20of%20Villa%20Park%20Draft%206th%20Cycle%20Housing%20Element_June%202023.pdf [https://perma.cc/JEX6-FS3L].

213. *See supra* notes 3–4 and accompanying text.

214. *See* Biesiada & Elattar, *supra* note 3; Verified Petition for Writ of Mandate, *supra* note 4, at 29–34.

cities to analyze the effects of covenants in their housing plans and remove them where necessary.

C. The Local Control Debate

In an important article, Richard Schragger makes a strong case against the recent trend of state preemption of local land use control.[215] Among other things, he argues that state preemption will prevent local governments from engaging in needed experimentation and protecting important local interests.[216] While acknowledging that local control is a license for the kind of exclusionary land use regulation for which local governments have been notorious over the past hundred years, Schragger argues that local control "need not be" a cover for local defensiveness and parochialism.[217]

Although it's true that local land use control could theoretically be deployed in some way that is not defensive and parochial, in practice the last century of local control has been a basically unbroken legacy of selfish parochialism. As David Schleicher points out in a critique of Schragger's article, the great majority of municipalities use their land use powers to prevent unwanted change, not to experiment in forward-looking ways or include historically excluded populations.[218] What's more, all the actual examples Schragger provides of things local governments are doing and could do with their land use powers are themselves examples of local parochialism and defensiveness. Schragger mentions three specific examples of how local control could flourish in the absence of state preemption—community benefits agreements, rent control, and inclusionary zoning.[219] The virtues of these policies can be and have been debated, but they are all undoubtedly examples of "defensive" strategies for communities to protect themselves against change.[220] Perhaps more importantly, all of these policies have tended to result in increased housing costs, for new residents at least, and making mobility extremely difficult

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215. *See* Schragger, *supra* note 10, at 156–62.

216. *See id.*

217. *Id.* at 202.

218. *See* Schleicher, *Exclusionary Zoning*, *supra* note 24, at 1359–61 (observing that while Schragger is focused on the power of cities, the vast majority of local governments who benefit from local control are suburban jurisdictions with severe zoning restrictions).

219. *See* Schragger, *supra* note 10, at 191–92 (defining community benefit agreements ("CBAs")); *id.* at 156–64 (explaining that states have preempted local rent control, inclusionary zoning, and affordable housing impact fees); *id.* at 193–94, 193 n.333 (appearing to endorse vacancy tax and short-term rental restrictions).

220. William H. Simon, The Community Economic Development Movement: Law, Business, & the New Social Policy 62–67, 93–95, 113–41 (2001) (discussing these and other community economic development strategies as defensive strategies for community protection against capital-driven change).

for everyone.[221] In short, Schragger's argument for local control is a de facto case for local parochialism.

Nevertheless, I agree with Schragger that local control "need not be" defensive and parochial. Local governments can and should use their land use powers to include rather than exclude and address their share of the regional need for housing at all income levels. More than one hundred municipalities have already begun to do that by reforming their zoning regulations to permit more housing.[222] But this is only a start. As these zoning reforms advance, municipalities will undoubtedly confront the ubiquitous and pernicious effects of deed restrictions. If and when local governments respond by overriding covenants that restrict housing, they would be undercutting the culture of defensive parochialism that pervades our localism today and articulating a vision of the public good that transcends insular covenanted communities.

I recognize the irony in arguing that local governments are capable of transcending parochialism by citing an example of something local governments have very rarely actually done. Arguably, the fact that local governments have hardly ever attempted to override covenants reinforces the claim that they are hopelessly parochial, and state preemption is our only salvation. But that's also the whole reason for this Article. Local control is today justly under attack, and if local governments want to preserve it, they need to prove that they stand for something other than hoarding opportunity for the people who are already securely housed there.

CONCLUSION

Fortunately, many local governments are already rising to the occasion and reforming zoning regulations to accommodate their fair share of the regional housing need. If these reforms are to be truly meaningful, however, local governments may need to take the next step and override covenants that impede the progress of zoning reform. This Article has provided the legal roadmap for local governments to confidently take that step.

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221. *See, e.g.*, Rebecca Diamond, Tim McQuade & Franklin Qian, *The Effects of Rent Control Expansion on Tenants, Landlords, and Inequality: Evidence from San Francisco*, 109 AM. ECON. REV. 3365, 3368 (2019) (finding that rent control in San Francisco had long-term effect of increasing rents).

222. *See* Cantong et al., *supra* note 8; Connolly, *supra* note 5, at 445.